Clerk's Stamp:

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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
APPLICANT	COMPEER FINANCIAL, PCA
RESPONDENT	**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**
DOCUMENT	**BRIEF OF THE RESPONDENTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Blue Rock Law LLP 700-215 9 Avenue SW Calgary AB T2P 1K3 Attention: David W. Mann KC/Scott Chimuk Phone: (403) 605-3992/(587) 390-7041 Fax: (825) 414-0831 Email Address: david.mann@bluerocklaw.com scott.chimuk@bluerocklaw.com File No. 1375-00001

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5.	*Brideau v. Boucher*, [1994] N.B.J. No. 544
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46. *Swift v Tomecek Roney Little & Associates Ltd., 2014 ABCA 49*

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55. *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187

56. *Ryan v Moore* 2005 SCC 38

57. *Agrium v Orbis Engineering Field Services*, 2022 ABCA 266

58. CED 4TH (online) *Guarantees, Indemnity and Standby Letters of Credit,* “Indemnities: Miscellaneous” (XIII.D) at § 134

59. Halsbury's Laws of Canada - Misrepresentation and Fraud (2023 Reissue) “ Fraudulent Misrepresentation Founded in Tort: The Tort of Fraudulent Misrepresentation,: Requisite Elements of the Tort” (IV.1(2)), HMF-28 “Requisite elements of the tort of fraudulent misrepresentation”

60. Halsbury's Laws of Canada - Guarantee and Indemnity (2022 Reissue) Assessing the Liability of the Surety, Non-Guarantee Indemnities: Contractual Indemnities Distinguished by Similar Objections” (III.3(1)) at HGI-113 “Meaning and Scope of Contractual Indemnities”

61. Halsbury's Laws of Canada - Guarantee and Indemnity (2022 Reissue) ,“Assessing the Liability of the Surety, Non-Guarantee Indemnities: Contractual Indemnities Distinguished by Similar Objections” (III.3(1)) at HGI-114 “Circumstances under which the right to indemnity may exist.”

62. Halsbury's Laws of Canada - *Business Corporations (2022 Reissue)* Shareholder Remedies, The Oppression Remedy, Procedural Considerations, Bars to Action, at HBC 306 Specific exclusions.

63. CED Contracts 4th (online)*Duty of Good Faith in Performance of Contracts*, “Express Terms; Performance of Contract: Performance” (XII.B) at § 189

64. *Paterson v. Hamilton*, 1996 ABCA 143

65. *Opron Constr. Co. v. Alta* 151 AR 241

66. *Color Your World, Inc. v. Robert F. Avery Holdings Ltd.,* 1987 ABCA 216

67. *Klewchuk v. Switzer,* 2001 ABQB 316

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.

2014 SCC 8 (CanLII)

BOA COMPEER000006

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.

Statutes and Regulations Cited

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 20.

Authors Cited

Osborne, Philip H. *The Law of Torts*, 4th ed. Toronto: Irwin Law, 2011.

APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O. and Laskin, Sharpe, Armstrong and Rouleau JJ.A.), 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, setting aside a decision of Grace J., 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Appeal dismissed.

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.

Lois et règlements cités

Règles de procédure civile, R.R.O. 1990, Règl. 194, règle 20.

Doctrine et autres documents cités

Osborne, Philip H. *The Law of Torts*, 4th ed. Toronto : Irwin Law, 2011.

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.

2014 SCC 8 (CanLII)

August Parna and

Reta Parna (*Plaintiffs*) *Appellants*;

and

G. & S. Properties Limited, and Frank Albert and William Harvie (*Defendants*) *Respondents.*

1970: May 22, 25; 1970: October 6.

Present: Martland, Judson, Hall, Spence and Pigeon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Fraud—Deceit—Purchase of apartment house—Vendors' representations as to income and expenses—Alleged misrepresentations as to certain disbursements—Failure to prove necessary ingredients in action for deceit.

The personal respondents, who owned and controlled the respondent company, offered to sell to the appellants (AP and his wife) an apartment house, which the company had built in 1965. The asking price was $255,000. The respondents furnished to AP a document which purported to be a statement as to receipts and disbursements for the year 1966. Subsequently, the appellants made an offer in writing to purchase the building for $251,000. Attached to the offer and forming part thereof was a Schedule "A" setting out the details of income and expenses as shown in the statement given to AP. The offer contained a provision that it was subject to satisfactory evidence being provided as to the accuracy of the representations as regards income and expenses.

AP's solicitor requisitioned an auditor's report supporting the amounts set forth in Schedule "A". He received a reply that such a report was not available but that he could satisfy himself as to the income and expenses. On the day set for closing the personal respondents made a statutory declaration that Schedule "A" was a financial statement setting out to the best of their knowledge and ability an accurate and fair estimate of the yearly revenue and yearly expenditure of the corporate respondent. The appellants accepted the statutory declaration "as a substitute" and closed the transaction.

August Parna et

Reta Parna (*Demandeurs*) *Appelants*;

et

G. & S. Properties Limited, et Frank Albert et William Harvie (*Défendeurs*) *Intimés.*

1970: les 22 et 25 mai; 1970: le 6 octobre.

Présents: Les Juges Martland, Judson, Hall, Spence et Pigeon.

EN APPEL DE LA COUR D'APPEL D'ONTARIO

Fraude—Tromperie—Achat d'un immeuble résidentiel—Présentation par vendeur des faits relatifs aux recettes et dépenses—Allégation de fausse représentation à l'égard de certaines dépenses—On n'a pas prouvé les éléments essentiels d'une action pour tromperie.

Les intimés personnels, qui sont propriétaires et maîtres de la compagnie intimée, offrirent de vendre aux appelants (AP et son épouse) un immeuble résidentiel, qui avait été construit par la compagnie en 1965. Les intimés en demandaient $255,000 et remirent à AP un document qui était présenté comme étant un état des recettes et dépenses pour l'année 1966. Subséquemment, les appelants ont offert $251,000. Une annexe «A», reproduisant les chiffres figurant dans l'état des recettes et des dépenses remis à AP, a été jointe à l'offre pour en faire partie intégrante. L'offre était en outre subordonnée à la production d'une preuve satisfaisante de l'exactitude des mentions relatives aux recettes et dépenses.

L'avocat de AP a demandé un rapport du vérificateur à l'appui des chiffres indiqués dans l'annexe «A». On lui a répondu qu'on n'avait pas de rapport de vérificateur mais qu'il pouvait s'assurer lui-même ce qu'étaient le revenu et les dépenses. Le jour fixé pour la conclusion du contrat, les intimés personnels ont fait une déclaration statutaire à l'effet que l'annexe «A» était un état financier qui indiquait autant qu'ils le savaient et du mieux qu'ils le pouvaient faire, une estimation précise et équitable du revenu annuel et des dépenses annuelles de la société intimée. Les appelants ont accepté la déclaration statutaire «en remplacement» et ont conclu le marché.

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Two weeks later AP attended his solicitor to illustrate that the representations made in the first statement, repeated in Schedule "A", and confirmed in the statutory declaration were false. Shortly thereafter the appellants brought an action claiming damages in the amount of $35,000 because of false and fraudulent representations as to three disbursements, *i.e.*, the cost of fuel, light and water.

The trial judge found in favour of the appellants and awarded damages in the amount of $24,790. On appeal, the Court of Appal varied the trial judgment by reducing the damages to $4,000. The appellants then appealed and the respondents cross-appealed to this Court.

Held: The appeal should be dismissed and the cross-appeal allowed dismissing the action.

In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Fraud is "a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it." Here the appellants failed to prove false representation of fact made with a knowledge of its falsehood or recklessly, without belief in its truth, and that they actually were induced by any such representation.

AP failed to prove, and the burden of proof was upon him, that the statement was not to the best of the knowledge and ability of the personal respondents an accurate and fair estimate. AP was not misled in any way by the representations even if they had been false to the knowledge of the respondents. As a shrewd and intelligent apartment house operator, he figured he could pay $251,000 for the property in question and obtain a satisfactory percentage of net profit.

Derry v. Peek (1889), 14 App. Cas. 337, applied.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing in part an appeal by the defendants (respondents) from the judg-

[1] [1969] 2 O.R. 346, 5 D.L.R. (3d) 315.

Deux semaines plus tard, AP se présentait chez son avocat pour lui montrer que ce qui était exposé dans le premier état, et qui était repris à l'annexe «A» et confirmé dans la déclaration statutaire, était faux. Les appelants ont alors introduit une action réclamant $35,000 en dommages-intérêts pour cause de présentation fausse et frauduleuse des faits à l'égard de trois postes de dépenses, à savoir le coût du combustible, de l'éclairage et de l'eau.

Le juge de première instance a statué en faveur des appelants et leur a adjugé un montant de $24,790 en dommages-intérêts. La Cour d'appel a modifié le jugement de première instance en réduisant à $4,000 le montant des dommages-intérêts. Les demandeurs en appelèrent à cette Cour et les défendeurs ont interjeté un appel incident.

Arrêt: L'appel doit être rejeté et l'appel incident accueilli, rejetant l'action.

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. La fraude est «une fausse présentation de faits, que l'on sait être fausse ou qui est commise avec insouciance, sans la croire vraie, et avec l'intention que la partie qui se dit lésée y donne suite et qui la porte effectivement à y donner suite». Les demandeurs n'ont pas prouvé qu'il y a eu fausse présentation de faits, que l'on savait être fausse, ou commise avec insouciance, sans la croire vraie, et que pareille présentation ait effectivement incité les demandeurs à y donner suite.

AP n'a pas prouvé,—comme il lui appartenait de le faire—que l'état financier ne constituait pas une estimation équitable et précise autant que les intimés l'aient su ou aient pu le savoir. AP n'a été d'aucune façon induit en erreur par la présentation des faits, même si elle avait été fausse à la connaissance des intimés. Comme exploitant entendu et intelligent d'immeubles résidentiels, il a estimé qu'il pouvait payer $251,000 pour la propriété en question et obtenir de la sorte un pourcentage satisfaisant de bénéfice net.

Arrêt suivi: *Derry v. Peek* (1889), 14 App. Cas. 337.

APPEL d'un jugement de la Cour d'appel d'Ontario[1], accueillant en partie un appel des défendeurs (intimés) d'un jugement du Juge

[1] [1969] 2 O.R. 346, 5 D.L.R. (3d) 315.

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ment of Ferguson J. in favour of the plaintiffs (appellants) in an action for deceit. Appeal dismissed; cross-appeal allowed dismissing the action.

August Parna and Reta Parna, in person, plaintiffs, appellants.

D. F. O'Leary, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.—This appeal concerns an action for damages for fraud instituted under the following circumstances.

The plaintiff August Parna was an Estonian by birth who came to Canada in 1948. The plaintiff Reta Parna is the wife of the plaintiff August Parna but took no active part in any of the negotiations in reference to this transaction. I shall use the word "plaintiff" hereafter to refer to August Parna.

August Parna was by no means an uneducated man. He had a university education in Estonia; in addition, he had attended a law course in Heidelberg, Germany, but because of the intervention of the war he had not a university degree nor was he a graduate lawyer. However, only four years after he arrived in Canada he purchased his first apartment house and up to the date of the offer to purchase the apartment house with which this action is concerned he had purchased four other apartment houses and later sold some of them and he had been for the year previous operating a 29-suite apartment house.

It would appear from these facts as well as from the manner in which Mr. Parna carried on his appeal in this Court, appearing in person, that he was a shrewd and intelligent business man.

The apartment house in question consisted of 24 suites and was built by the defendant G. & S. Properties Limited in the year 1965. G. & S. Properties Limited, a respondent, is a company owned and controlled by the other respondents, Frank Albert and William Harvie, who were, respectively, its president and secretary. Before the apartment house was completed, the plaintiff

Ferguson en faveur des demandeurs (appelants) dans une action pour tromperie. Appel rejeté; appel incident accueilli, rejetant l'action.

August Parna et Reta Parna, à titre personnel, demandeurs, appelants.

D. F. O'Leary, c.r., pour les défendeurs, intimés.

Le jugement de la Cour a été rendu par

LE JUGE SPENCE—Le pourvoi se rattache à une action en dommages-intérêts pour fraude instituée dans les circonstances suivantes.

Le demandeur, August Parna, Estonien de naissance, est arrivé au Canada en 1948. La demanderesse, Reta Parna, est l'épouse du demandeur August Parna mais n'a participé activement à aucune des négociations relatives à cette affaire. J'emploierai ci-après le mot «demandeur» pour désigner August Parna.

August Parna n'était nullement un homme sans instruction. Il avait reçu en Estonie une formation universitaire; de plus, il avait suivi un cours de droit à Heidelberg (Allemagne) mais, à cause de la guerre, n'avait pu obtenir un grade universitaire ni un diplôme d'avocat. Toutefois, quatre ans seulement après son arrivée au Canada, il achetait son premier immeuble résidentiel. Jusqu'à la date de l'offre d'achat de l'immeuble résidentiel dont il est question dans la présente action, il avait acheté quatre autres immeubles résidentiels et, plus tard, il en vendit quelques-uns; durant l'année précédente, il avait exploité un immeuble résidentiel de 29 appartements.

Il ressort de ces faits, aussi bien que de la manière dont M. Parna a présenté son pourvoi en cette Cour, où il a comparu personnellement, qu'il est un homme d'affaires intelligent et très entendu.

L'immeuble résidentiel en question comprenait 24 appartements et avait été construit par la défenderesse, G. & S. Properties Limited, en 1965. G. & S. Properties Limited, intimée, est une compagnie dont les autres intimés, Frank Albert et William Harvie sont propriétaires et maîtres, et respectivement président et secrétaire. Avant que soit achevée la construction de l'immeuble résí-

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approached the latter respondents and attempted to buy the property but these respondents informed the plaintiff that it was their intention to retain ownership and operate the apartment as a business, although they had not previously owned or operated apartment buildings. The two respondents, Frank Albert and William Harvie, who conducted a plumbing business, during the course of the next year determined that too much of their capital was tied up in the apartment building and therefore they decided to sell it.

The respondents first offered the apartment through a realtor for the sum of $262,500. The only offer which materialized was one for the sum of $262,000 which, however, provided for a small amount of cash to be paid on closing. The respondents desired to have the whole balance between the two mortgages of $180,000 and $19,000 respectively, and the purchase price paid in cash upon closing and they, therefore, approached the appellant Parna and offered to sell the property to him. The respondents then were asking the price of $255,000. The respondents at this time furnished to the appellant Parna a document produced at trial as ex. 6 which purported to be a statement as to receipts and disbursements for the year 1966. The appellant examined the figures set out in this statement and took the position that some of the disbursements were at an amount too low to reflect the true operating costs. The respondents Albert and Harvie offered to produce for the appellant Parna's inspection any of the vouchers he desired to see but Parna asked only for the voucher for the cost of fuel for the month of January 1967, and he was shown an invoice for the amount of $345.53. The appellant Parna still insisted that the operating costs as set out in the statement (ex. 6) were too low, and he took the position that the property could not justify a price of more than $241,000.

Very shortly after the appellant Parna was given ex. 6, he was given also another statement (ex. 7) purporting to be applicable to the year

dentiel, le demandeur a pressenti ces derniers et a tenté d'acheter l'immeuble mais ces intimés ont informé le demandeur qu'ils voulaient en conserver la propriété et comptaient l'exploiter comme immeuble de rapport, même si jamais jusque-là ils n'avaient été propriétaires ou administrateurs d'immeubles résidentiels. Les deux intimés, Frank Albert et William Harvie, qui exploitaient une entreprise de plomberie, constatèrent au cours de l'année suivante qu'une trop forte proportion de leurs capitaux était engagée dans l'immeuble résidentiel et, par conséquent, décidèrent de le vendre.

Les intimés ont d'abord mis l'immeuble en vente par l'entremise d'un agent immobilier pour la somme de $262,500. La seule offre qui se soit présentée était pour la somme de $262,000, mais ne prévoyait le versement que d'un faible montant en espèces à la conclusion du contrat. Les intimés désiraient que le solde entier entre les deux hypothèques de $180,000 et $19,000, respectivement, et le prix d'achat fût payé comptant à la conclusion du contrat; c'est pourquoi ils firent une démarche auprès de l'appelant Parna, offrant de lui vendre l'immeuble. A ce moment-là les intimés en demandaient $255,000 et remirent à l'appelant Parna un document (produit au procès comme Pièce nº 6) qui était présenté comme étant un état de recettes et de dépenses pour l'année 1966. L'appelant examina les chiffres qui figuraient dans cet état et exprima l'avis que le montant de quelques-unes des dépenses était trop bas pour refléter les véritables frais d'exploitation. Sur quoi les intimés Albert et Harvie offrirent à l'appelant Parna de lui mettre entre les mains toute pièce comptable justificative qu'il lui plairait d'examiner, mais Parna se contenta de réclamer la pièce justificative indiquant ce qu'avait coûté le combustible pour le mois de janvier 1967. On lui fit voir une facture de $345.53. L'appelant Parna persista à déclarer que les frais d'exploitation indiqués dans l'état (Pièce nº 6) étaient trop bas et exprima l'avis que l'immeuble ne pouvait justifier un prix supérieur à $241,000.

Très peu de temps après qu'on lui eut confié la Pièce nº 6, on remit à l'appelant Parna un autre état (Pièce nº 7) qui était censé s'appliquer à

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1967. This statement, although it did not vary the amounts as to the expenses for fuel, light and water, did have significant changes from its predecessor. The rental revenue was increased from $36,564 to $39,444, an increase of $2,880, representing $10 per apartment per month. The respondents Albert and Harvie informed the appellant Parna that notice of an intention to increase the rental of each apartment by $10 per month had already been sent to tenants and that these increases would take effect as soon as the lease dates permitted. The taxes shown in ex. 6 at $8,250 were shown in ex. 7 at $8,450.

The appellant Parna attended his solicitor, Mr. John S. Miller, and gave to him ex. 6. Mr. Miller, who testified on behalf of the appellant Parna at the trial, did not remember having seen ex. 7 prior to the closing of the transaction although the appellant Parna testified that he had received it very shortly after he received ex. 6.

The appellant Parna testified that although the respondents were asking a price of $255,000 and although it was his opinion that the property, in order to obtain a net income prior to mortgage payments of 10 per cent, could only be worth $241,000, he surmised that the vendors would sell for $252,000 and he therefore instructed his solicitor to draw an offer for an amount slightly less, *i.e.*, $251,000.

Throughout his testimony, the appellant Parna insisted that his sole gauge as to the price he would pay for an apartment building was that the property had to return about 10 per cent, prior to payment of mortgages, upon the purchase price. The testimony which I have outlined above would seem to indicate that the appellant Parna did not engage in any such accurate calculations at all but simply entered into the usual buyer and seller bargaining. The proposed vendors asked $255,000. The proposed purchaser thought he should offer up to $241,000 but that the proposed vendors would sell for $252,000 and so he instructed his solicitor to offer $251,000. The procedure is one which occurs on practically every occasion when real property is sold.

l'année 1967. Dans cet état, les dépenses pour le combustible, l'éclairage et l'eau étaient les mêmes que dans l'état précédent, mais à d'autres égards l'état comportait d'appréciables différences. De $36,564 qu'il avait été, le revenu provenant des loyers était passé à $39,444, ce qui représentait une augmentation de $2,880, ou de $10 par mois et par appartement. Les intimés Albert et Harvie ont alors informé l'appelant Parna qu'ils avaient déjà averti les locataires que le loyer de chaque appartement allait être augmenté de $10 par mois dès que les dates des baux le permettraient. Là où la Pièce nº 6 indiquait un montant de $8,250 pour les taxes, la Pièce nº 7 indiquait un montant de $8,450.

L'appelant Parna s'aboucha avec son avocat, M. John S. Miller, et lui remit la Pièce nº 6. M. Miller, qui a témoigné au procès au nom de l'appelant Parna ne se rappelait pas avoir vu la Pièce nº 7 avant la conclusion du contrat bien que, selon le témoignage de l'appelant Parna, il l'avait reçue très peu de temps après qu'il eut reçu la Pièce nº 6.

L'appelant Parna a témoigné que, même si les intimés demandaient $255,000, et bien qu'à son propre avis l'immeuble ne pouvait valoir plus de $241,000 afin de rapporter un revenu net de 10 pour cent avant le paiement des hypothèques, il présuma que les vendeurs céderaient la propriété pour $252,000 et c'est pourquoi il chargea son avocat de dresser une offre pour un montant un peu moindre, soit $251,000.

Tout le long de son témoignage, l'appelant Parna a maintenu que son seul critère du prix qu'il paierait pour un immeuble résidentiel c'était que la propriété rapporte environ 10 pour cent du prix d'achat, avant de satisfaire aux hypothèques. Les témoignages que je viens de relater paraîtraient indiquer que l'appelant Parna n'a pas du tout fait de tels calculs précis mais s'est tout simplement livré au marchandage habituel entre acheteur et vendeur. Les vendeurs éventuels demandaient $255,000. L'acheteur éventuel a cru devoir offrir jusqu'à $241,000 mais estimait que les vendeurs éventuels accepteraient $252,000, et c'est pourquoi il chargea son avocat d'offrir $251,000. C'est un procédé qui se renouvelle dans presque toutes ventes de propriétés immobilières.

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The solicitor drafted the offer to purchase, which was produced at trial as ex. 1. One provision in that offer was as follows:

> . . . and it is further subject to satisfactory evidence being provided as to the accuracy of representations as regards income and expenses as contained in Schedule "A" attached hereto. Upon the non-fulfilment or non-performance of any or all of the conditions aforementioned, this offer shall be null and void and the deposit moneys returned to the purchasers. Schedule "A" attached hereto is to be part of this contract of purchase and sale.

Schedule "A" was attached. I set it out in full:

SCHEDULE "A"
FINANCIAL STATEMENT

101 King Street East Dundas, Ontario
24-Suite Apartment Building

Monthly Rentals	2,947.00	
8 monthly garage rentals	40.00	
Monthly coin machine receipts	60.00	
Total monthly revenue:	3,047.00	
Yearly revenue		$ 36,564.00
Expenditures		
Taxes	8,250.00	
Fuel	1,500.00	
Light	500.00	
Water	200.00	
Janitor	900.00	
Insurance	217.00	
Maintenance	300.00	
Elevator service	504.00	
Total expenditures		$ 12,371.00

All tenants are on one-year leases that mature from May 1st on during 1967.

WITNESS:
"AP"

G. & S. PROPERTIES LIMITED
Per:
(Signed) William A. Harvie
" Frank Albert

L'avocat rédigea l'offre d'achat qui a été produite au procès comme Pièce nº 1. Une des clauses de l'offre était celle-ci:

> [TRADUCTION] . . . elle est en outre subordonnée à la production d'une preuve satisfaisante de l'exactitude des mentions relatives aux recettes et aux dépenses figurant à l'annexe A ci-jointe. Advenant inaccomplissement ou inexécution pour partie ou pour le tout des conditions susmentionnées, cette offre sera nulle et l'acompte versé sera remboursé aux acheteurs. L'Annexe A ci-jointe fera partie intégrante de ce contrat d'achat et de vente.

L'Annexe A y a été jointe. La voici en entier:

[TRADUCTION]

ANNEXE «A»
ÉTAT FINANCIER

101 est, rue King, Dundas, Ontario
Immeuble résidentiel de 24 appartements

Loyers mensuels	2,947.00	
8 locations mensuelles du garage	40.00	
Recettes mensuelles provenant des appareils automatiques	60.00	
Recettes mensuelles totales	3,047.00	
Revenu annuel		$ 36,564.00
Dépenses		
Taxes	8,250.00	
Combustible	1,500.00	
Éclairage	500.00	
Eau	200.00	
Concierge	900.00	
Assurances	217.00	
Entretien	300.00	
Service d'ascenseur	504.00	
Dépenses totales		$ 12,371.00

Tous les locataires sont assujettis à un bail d'un an qui expire à partir du 1er mai en 1967.

TÉMOIN:
«AP»

Pour G. & S. PROPERTIES LIMITED

(Signé)
William A. Harvie
Frank Albert

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It is to be noted that that schedule used the figures set out in the statement of receipts and disbursements as to 1966 (ex. 6) and did not make or use any reference to the altered situation as shown in ex. 7, although the appellant Parna had ex. 7 in his possession shortly after he received ex. 6 and some time before he instructed his solicitor to prepare and present the offer to purchase (ex. 1). The offer to purchase was presented to the respondents and was accepted by the respondents; the date of acceptance is not completed on ex. 1 but it would appear to have been on February 17, 1967, at which time the offer, by its terms, expired. The date for closing as set out in the offer was April 1, 1967.

The appellant Parna's solicitor, Mr. Miller, testified that about March 15, 1967, he wrote to the vendor's solicitor with the usual requirements on title including a requisition reading as follows:

> 6. REQUIRED auditor's report for the period of ownership of your clients supporting the rental income and operating expenses as set forth in Schedule "A" of the Agreement of Purchase and Sale.

and that he received in reply a letter from the vendor's solicitor dated March 28, 1967, which read in reference to that requisition:

> 6. We do not have an auditor's report but you can satisfy yourself as to income and expenses.

The learned trial judge characterized that answer as "one of those brush-off answers".

In his testimony, Mr. Miller testified that upon receipt of the latter letter he immediately telephoned to his client, the appellant Parna, and told the appellant that he was not prepared to close the transaction on that basis requesting that the appellant attend him. Mr. Miller testified that he then telephoned the vendors' solicitor informing him that many of the answers to the requisitions were unsatisfactory and that he would not be closing the transaction unless very much more material was forthcoming, "particularly as regards the support for Schedule 'A' attached to the offer,

A noter que cette Annexe reproduit les chiffres figurant dans l'état des recettes et des dépenses pour 1966 (Pièce nº 6) sans faire usage ni mention des points de différence ressortant de la Pièce nº 7, quoique l'appelant Parna ait eu la Pièce nº 7 en sa possession peu après avoir reçu la Pièce nº 6 et quelque temps avant d'avoir chargé son avocat de dresser et de présenter l'offre d'achat (Pièce nº 1). L'offre d'achat fut présentée aux intimés et acceptée par eux. La date de l'acceptation ne figure pas dans la Pièce nº 1, mais il semble que ce fût le 17 février 1967, date même où, d'après ses dispositions, l'offre allait expirer. Il était dit dans l'offre que la date de la conclusion du contrat était fixée au 1er avril 1967.

M. Miller, avocat de l'appelant Parna, a témoigné que vers le 15 mars 1967 il avait écrit à l'avocat des vendeurs pour obtenir les renseignements d'usage quant à l'état du titre et pour faire la demande suivante:

> [TRADUCTION] 6. PRIÈRE DE NOUS FAIRE TENIR le rapport du vérificateur pour la période de propriété de vos clients à l'appui des chiffres relatifs au revenu de location et aux dépenses d'exploitation indiqués dans l'Annexe «A» de la convention d'achat et de vente.

et qu'il avait reçu de l'avocat des vendeurs une lettre datée du 28 mars 1967 disant, à propos de la demande susdite:

> [TRADUCTION] 6. Nous n'avons pas de rapport de vérificateur mais vous pouvez vous assurer vous-même ce que sont le revenu et les dépenses.

Le savant juge de première instance a dit de cette réponse que c'est «une de ces réponses de refus sec servant d'échappatoire».

Dans son témoignage, M. Miller a déposé qu'au reçu de cette lettre il avait immédiatement téléphoné à son client, l'appelant Parna, pour l'informer qu'il n'était pas disposé à conclure le marché sur cette base et lui demander de venir le voir. M. Miller a déclaré qu'il avait ensuite téléphoné à l'avocat des vendeurs afin de lui faire observer que plusieurs des réponses données aux demandes qui lui avaient été communiquées n'étaient pas satisfaisantes et qu'il n'allait pas conclure le marché à moins d'obtenir beaucoup plus de précisions, «particulièrement à l'appui de

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that I would not be closing unless some satisfactory evidence were produced to support the schedule".

On the morning of March 31st, which date the solicitors had fixed for closing as April 1st was a Saturday, the vendors' solicitor attended Mr. Miller and presented to him a statutory declaration produced at trial as ex. 4. The declaration is brief and I quote it in full:

I, Frank Albert
of the Town of Dundas in the County of Wentworth

DO SOLEMNLY DECLARE THAT:

1. I am the President of G. & S. Properties Limited and have knowledge of the facts hereinafter declared.
2. Schedule "A" to the Offer to Purchase is a Financial Statement setting out to the best of my knowledge and ability an accurate and fair estimate of the yearly revenue and yearly expenditures of G. & S. Properties bearing in mind the increase in rentals from time to time and the increase in expenditures such as taxes from time to time.
3. No actual sources of revenue and no actual disbursements have been omitted in arriving at the estimates.
4. New one year leases have been given to some of the tenants with the approval of the purchasers.

AND I make this solemn Declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of "The Canada Evidence Act".

DECLARED before me at the City of Hamilton in the County of Wentworth this 31st day of March A.D. 1967

(Signed)
Alec Z. Beasley
A Commissioner, etc.

(Signed) Frank Albert
" William Harvie

l'Annexe «A» jointe à l'offre, et que je n'allais pas conclure l'affaire sans preuve satisfaisante à l'appui de l'annexe».

Durant la matinée du 31 mars, date que les avocats avaient fixée pour la conclusion du contrat puisque le 1er avril était un samedi, l'avocat des vendeurs se présenta chez M. Miller et lui remit une déclaration statutaire qui a été produite au procès comme Pièce nº 4. La déclaration est brève, et je la cite en entier:

[TRADUCTION]

Je, Frank Albert
de la ville de Dundas, dans le comté de Wentworth

DÉCLARE SOLENNELLEMENT QUE:

1. Je suis président de G. & S. Properties Limited et j'ai connaisance des faits ci-après déclarés.
2. L'Annexe «A» à l'offre d'achat est un état financier qui indique autant que je sache et du mieux que je le puisse faire, une estimation précise et équitable du revenu annuel et des dépenses annuelles de G. &. S. Properties, compte tenu de l'augmentation périodique des loyers et de l'augmentation périodique des dépenses telles que les taxes.
3. Dans le calcul de ces estimations, aucunes sources réelles de revenu et aucuns déboursés réels n'ont été omis.
4. De nouveaux baux d'une durée d'un an ont été consentis à quelques-uns des locataires, avec l'approbation des acheteurs.

ET je fais cette déclaration solennelle, la croyant consciencieusement vraie et sachant qu'elle a la même force et le même effet que si elle était faite sous serment, aux termes de la *Loi sur la preuve au Canada.*

DÉCLARÉ devant moi en la ville d'Hamilton dans le comté de Wentworth ce 31e jour de mars 1967

(Signature)
Alec Z. Beasley
Commissaire, etc.

(Signature) Frank Albert
" William Harvie

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Within an hour after receipt of that document, Mr. Miller testified, the appellants August and Reta Parna attended him. He showed them this statutory declaration and they discussed the matter. It must be noted that under the exact terms of the offer for sale if the vendor did not produce

> satisfactory evidence . . . as to the accuracy of the representations as regards income and expenses as contained in Schedule "A" attached hereto the offer should be considered null and void and the deposit returned.

Yet Mr. Miller testified that the appellants August and Reta Parna having inspected the statutory declaration elected to accept it "as a substitute" and closed the transaction. It would appear, in fact, from Mr. Miller's testimony that he stressed the additional values of having a statutory declaration. Mr. Miller was not asked to explain what additional values he found in that form of evidence but it would certainly occur to one that what the appellants were then concerned with was to obtain evidence to support just such an action as they subsequently instituted. The transaction was closed on that same day, March 31, 1967, and within two weeks the appellant Parna attended Mr. Miller to illustrate to Mr. Miller that the representations made in the first statement (ex. 6), repeated in Schedule "A" to the offer to purchase, and confirmed in the statutory declaration given on closing were false.

On May 18, 1967, the appellants issued a writ in this action claiming damages in the amount of $35,000 because of false and fraudulent representations as to three disbursements, *i.e.*, the cost of fuel, light and water. The action proceeded to trial before Ferguson J. The appellant sought to add other alleged misrepresentations both at trial and before this Court but the consideration of this action has always been confined to the representation as to these three items. The learned trial judge found in favour of the plaintiffs (appellants in this Court) and awarded to them damages in the amount of $24,790. He calculated these damages in this fashion: he accepted the evidence of the appellant August

Selon le témoignage de M. Miller, les appelants August et Reta Parna sont venus le voir moins d'une heure après avoir reçu ce document. Il leur a montré cette déclaration statutaire et ils ont discuté l'affaire. Il faut remarquer qu'au sens strict des conditions de l'offre de vente, si le vendeur ne produisait pas

> une preuve satisfaisante . . . de l'exactitude des mentions relatives aux recettes et aux dépenses figurant à l'Annexe «A» ci-jointe, l'offre serait considérée comme étant nulle et l'acompte serait remboursé.

Cependant, M. Miller a déposé que les appelants August et Reta Parna, après avoir examiné la déclaration statutaire, ont décidé de l'accepter «en remplacement» et ont conclu le marché. En fait, selon le témoignage de M. Miller, il a fait ressortir les avantages supplémentaires que conférait le fait d'avoir une déclaration statutaire. Il n'a pas été demandé à M. Miller d'expliquer quels avantages supplémentaires il trouvait dans cette forme de preuve, mais il vient certainement à l'idée que ce qui préoccupait alors les appelants c'était de se munir d'un document qui fût de nature à appuyer une action précisément comme celle qu'ils ont intentée par la suite. Le marché fut conclu le même jour, soit le 31 mars 1967; or, moins de deux semaines plus tard, l'appelant Parna se présentait chez M. Miller pour lui montrer que ce qui était exposé dans le premier état (Pièce n° 6), et qui était repris à l'Annexe "A" de l'offre d'achat et confirmé dans la déclaration statutaire présentée lors de la conclusion du contrat, était faux.

Le 18 mai 1967, les appelants ont introduit cette action réclamant $35,000 en dommages-intérêts pour cause de présentation fausse et frauduleuse des faits à l'égard de trois postes de dépenses, à savoir le coût du combustible, de l'éclairage et de l'eau. En première instance, le juge Ferguson a entendu l'action. Au procès et en cette Cour l'appelant a tenté d'ajouter d'autres prétendues déformations des faits mais la présente action s'est toujours limitée à l'examen de la présentation des faits relative à ces trois postes. Le savant juge de première instance a statué en faveur des demandeurs (les appelants en cette Cour) et leur a adjugé un montant de $24,790 en dommages-intérêts. Il a calculé ces dommages

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Parna that he only made the offer to purchase on the basis that the net annual profits from the property before payment of interest or principal on the mortgages would yield 9.64 per cent on the purchase price. He found that such net profits instead of amounting to $24,193 per annum amounted only to $21,807 and since that amount would represent 9.64 per cent of only $226,910, the learned trial judge found the difference between that sum and the actual purchase price of $251,000, *i.e.*, $24,790, to be the damages suffered by the plaintiffs in the action, the present appellants.

The defendants, here respondents, appealed to the Court of Appeal and the judgment of that Court was given by Evans J.A.[1] at the conclusion of the argument. One paragraph of that judgment reads as follows:

> The learned trial judge found that the defendants knowlingly made a false representation as to the operating expenses with the intention that the plaintiffs should act upon such false representation; he further found that the plaintiffs did in fact act upon the false representation to their detriment. There is ample evidence to support such findings, and the appeal in so far as it affects them must be dismissed.

That paragraph contained the whole of the reasons given in the Court of Appeal on the issue of liability. The Court of Appeal differed from the assessment of damages made by the learned trial judge. That assessment, as would appear from the above, was upon the basis of damages for loss of a bargain. The Court of Appeal was of the opinion that by the award of damages the plaintiffs, here appellants, were entitled to be put in the same position they would have been if the representations had not been made but not in the same position they would have been if the representations had been true. Evans J.A. continued:

> The evidence as to actual value led at trial is rather fragile; proceeding as he did, the learned trial judge made no finding as to the actual value of the property as at 1st April 1967. In my opinion

[1] [1969] 2 O.R. 346, 5 D.L.R. (3d) 315.

de la façon suivante: il a accepté la preuve de l'appelant August Parna qu'il n'avait fait l'offre d'achat qu'à condition que l'immeuble rapporte un bénéfice net annuel de 9.64 pour cent du prix d'achat avant le paiement de l'intérêt ou du principal sur les hypothèques. Or le juge de première instance a constaté qu'au lieu de $24,193 par année, le bénéfice net n'était que de $21,807, et vu que cette somme représente 9.64 pour cent de seulement $226,910, le savant juge a statué que les dommages subis par les demandeurs, les appelants en cette Cour, correspondaient à la différence entre cette dernière somme et le prix d'achat effectif de $251,000, c'est-à-dire, $24,790.

Les défendeurs, intimés en cette Cour, ont interjeté appel à la Cour d'appel et le juge d'appel Evans[1] y a rendu l'arrêt à la fin des débats. Dans un paragraphe de l'arrêt, il est dit:

> [TRADUCTION] Le savant juge de première instance a conclu que les défendeurs avaient sciemment fait une présentation fausse des faits quant aux dépenses d'exploitation avec l'intention que cette présentation fausse incite les demandeurs à agir; il a aussi conclu que, sur la foi de cette présentation fausse les demandeurs avaient effectivement agi à leur détriment. Il y a amplement de preuves pour étayer ces conclusions; et, dans la mesure où il s'y rapporte, l'appel doit être rejeté.

Ce paragraphe renfermait tous les motifs énoncés par la Cour d'appel sur la question de la responsabilité. La Cour d'appel n'a pas été de l'avis du savant juge de première instance quant à l'évaluation des dommages. Il ressort de ce qui précède que l'évaluation a été faite en fonction de dommages subis par suite de la perte d'une bonne affaire. La Cour d'appel a été d'avis qu'en se faisant accorder des dommages, les demandeurs (ici les appelants) avaient le droit de se retrouver dans la même situation où ils auraient été si la présentation des faits en cause n'avait pas été faite mais non dans la situation où ils se seraient trouvés si la présentation avait été faite. Le juge d'appel Evans a ajouté ceci:

> [TRADUCTION] La preuve faite au procès concernant la valeur réelle est plutôt fragile. De la façon dont il a procédé, le savant juge de première instance n'a aucunement déterminé quelle était la valeur réelle

[1] [1969] 2 O.R. 346, 5 D.L.R. (3d) 315.

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the evidence does support an assessment of damages, on the proper basis I have outlined above, at $4,000.

The Court of Appeal, therefore, varied the judgment given at trial by reducing the damages awarded to the plaintiffs to $4,000.

The appellants appealed to this Court and in their factum asked that damages be awarded in the amount of $48,163 and other damages designated as "continuous damages" and interest at the rate of 15 per cent and large amounts for costs. As I have stated, the statement of claim asked only for $35,000 damages.

The respondents cross-appealed asking that the judgment as given by the learned trial judge be vacated and that the action should be dismissed with costs throughout.

Although it would appear that a great deal of the argument in the Court of Appeal, and certainly in this Court, was devoted to the interesting question as to the proper measure for damages, I am of the opinion that the appeal must be disposed of upon the question of liability. The learned trial judge cited two brief passages; the first, from the judgment of Lord Herschell in *Derry v. Peek*[2], at p. 374, reads as follows:

> I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. . .

The second, from *Anson on Contract,* where "fraud" has been defined, reads:

> Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.

I am content to adopt these two short passages as being sufficient to dispose of this appeal. I am of the opinion that, firstly, the plaintiffs failed to prove false representation of fact made with a

[2] (1889), 14 App. Cas. 337.

de l'immeuble le 1er avril 1967. A mon avis, sur la base convenable que j'ai expliquée ci-dessus, il y a preuve à l'appui d'une évaluation des dommages au montant de $4,000.

La Cour d'appel a donc modifié le jugement de première instance en réduisant à $4,000 le montant des dommages-intérêts adjugés aux demandeurs.

Les appelants ont introduit un pourvoi en cette Cour et, dans leur factum, ont demandé que leur soient adjugés des dommages-intérêts de $48,163 de même qu'une indemnité pour ce qu'ils ont appelé des «dommages continus» ainsi que des intérêts au taux de 15 pour cent et une somme importante pour les dépens. Comme je l'ai mentionné, la déclaration des demandeurs ne réclamait que $35,000 en dommages-intérêts.

Les intimés ont interjeté un pourvoi incident demandant infirmation du jugement de première instance et rejet de l'action avec dépens dans toutes les Cours.

Même s'il semble bien qu'une grande partie des débats à la Cour d'appel, et assurément en cette Cour-ci, ait porté sur l'intéressante question de la mesure convenable des dommages subis, je suis d'avis que le pourvoi doit être décidé sur la question de la responsabilité. Le savant juge de première instance a cité deux courts passages; le premier est tiré du jugement de Lord Herchell dans *Derry c. Peek*[2], à la p. 374, et se lit ainsi:

> [TRADUCTION] Les textes me paraissent établir les principes suivants: premièrement, afin de fonder une action pour tromperie (*action of deceit*), il faut prouver qu'il y a eu fraude, et rien de moins que cela ne saurait suffire.

Le second est tiré de l'ouvrage *Anson on Contract* où la «fraude» a été définie comme suit:

> [TRADUCTION] La fraude est une fausse présentation de faits, que l'on sait être fausse ou qui est commise avec insouciance, sans la croire vraie, et avec l'intention que la partie qui se dit lésée y donne suite et qui la porte effectivement à y donner suite.

Je crois que ces deux courts passages suffisent pour décider ce pourvoi. Je suis d'avis que, premièrement, les demandeurs n'ont pas prouvé qu'il y eût fausse présentation de faits, que l'on

[2] (1889), 14 App. Cas. 337.

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knowledge of its falsehood or recklessly, without belief in its truth and, secondly, that the plaintiffs actually were induced by any such representation. It must be remembered that the appellant Parna was, as I have said, a shrewd and experienced apartment house operator, having engaged in the business continuously from 1952 until 1967, and at the time he made the offer to purchase he had been for a full year operating a very similar apartment house in the same Metropolitan Hamilton area. It must also be remembered that the personal respondents Albert and Harvie were not apartment house operators but were plumbers, the property in question here having been the only apartment house which they had built or owned. In my view, the appellant Parna knew much more about the apartment house operating business than did the personal respondents. The appellant Parna, as I have pointed out, had sought to buy the building even before it was completed and knew the exact state of the progress of construction and the progress of the renting. The appellant knew that on February 16, 1967, when he submitted the offer to purchase, the building had not been fully rented for a year and, in fact, that the first tenants had moved in only about eight months before. The appellant, therefore, knew that the amounts set out in ex. 6, and taken from that document into the schedule to the offer to purchase, were mere estimates and that they were not accurate statements as to either receipts or disbursements. As to the disbursements, the appellant had pointed out that those estimates, and he admitted at the trial that he knew they were estimates, had to be low and the appellant very shrewdly picked the month in which the highest amount for heat costs would be incurred, *i.e.*, January 1967, to illustrate that the estimated disbursements were low. Upon inspecting the invoice for $345.50 for that month, the appellant must have known that the annual heating costs would be in excess of the $1,500 set out in ex. 6. If one only allowed for heating during the months of February, March, April and October, November and December, in addition to that month of January, in order to keep within an estimate of $1,500 the average amounts expended in those other months would be $192.50—a graphic illustration that the appellant Parna could not

savait être fausse, ou commise avec insouciance, sans la croire vraie et, deuxièmement, que pareille présentation ait effectivement incité les demandeurs à y donner suite. Il ne faut pas perdre de vue que l'appelant Parna était, comme je l'ai dit, un exploitant entendu et expérimenté d'immeuble résidentiel, ayant exercé ce genre d'affaires continûment de 1952 à 1967, et qu'à l'époque où il fit l'offre d'achat, il exploitait depuis toute une année un immeuble résidentiel à peu près identique dans la même région du Hamilton métropolitain. Il faut aussi se rappeler que les intimés personnels Albert et Harvie n'étaient pas exploitants d'immeubles résidentiels mais plombiers, et que la propriété en question était le seul immeuble de cette nature qu'ils avaient bâti et qui leur avait appartenu. A mon avis, l'appelant Parna en savait beaucoup plus long que les intimés personnels sur la façon d'exploiter un immeuble d'habitation. Comme je l'ai fait observer, l'appelant Parna avait tâché d'acheter l'immeuble même avant qu'il fût achevé et il savait exactement où en étaient les travaux de construction et à quelle allure on trouvait des locataires. L'appelant savait que, le 16 février 1967, lorsqu'il présenta son offre d'achat, l'immeuble n'avait pas été complètement loué pour un an et qu'en fait les premiers locataires avaient emménagé pas plus d'environ huit mois auparavant. En conséquence, l'appelant savait que les montants figurant sur la Pièce nº 6 et reportés de là à l'annexe de l'offre d'achat n'étaient que des estimations et n'étaient pas des relevés précis soit des recettes soit des dépenses. A propos des dépenses, l'appelant avait signalé qu'il fallait bien que ces estimations—il savait, comme il l'a admis au procès, qu'il s'agissait d'estimations,—soient basses, et c'est pourquoi, afin de démontrer que l'estimation des dépenses était basse, l'appelant a très adroitement choisi le mois où le coût du chauffage serait le plus élevé, à savoir, janvier 1967. En examinant la facture de $345.50 pour ce mois-là, l'appelant devait savoir que la note du chauffage pour l'année excéderait la somme de $1,500 figurant à la Pièce nº 6. En ne tenant compte du chauffage que pour février, mars, avril, octobre, novembre et décembre, en plus du mois de janvier, de façon à ce que l'évaluation ne dépasse pas $1,500 la moyenne des dépenses

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have been deceived by the estimate of $1,500. As to revenue, ex. 6 was incorrect, to the knowledge of the appellant Parna, because he knew that notice had already been given of an increase in rentals amounting to $10 per month per apartment and that the revenue had therefore been increased by $2,880.

During the argument of the appeal, counsel for the respondents illustrated that the true excess of the disbursements over the estimates as to the three items only of which the appellant Parna complained in his action, *i.e.*, heat, light and water, was not the $2,386 per year taken by the trial judge but only $1,868.94 per year. It was the appellant Parna's argument that basing his calculations on the estimates given in ex. 6 and repeated in the schedule to the offer to purchase he found that he would get a net return on his investment before payment of interest or principal on mortgage of 9.64 per cent. Taking the disbursements at $1,868.94 in excess of those estimated and making allowance for the increased revenue of $2,880 due to the proposed rental increase, of which the appellant Parna had knowledge, his net return would amount to almost 10 per cent. The appellant, as I have said, admitted in his testimony that he knew the figures as to light, heat and water given in ex. 6 and in the schedule to the offer to purchase were mere estimates.

Under these circumstances, the exact terms of the statutory declaration which the appellant Parna accepted as being a substitute for the proof he was entitled to in the offer to purchase become important. The personal respondents declared that Schedule "A" to the offer to purchase was a financial statement setting out *to the best of their knowledge and ability an accurate and fair estimate* of the yearly revenue and yearly expenditure of the corporate respondent "bearing in mind the increase in rentals from time to time and the increase in expenses such as taxes from time to time" and further that no actual sources of revenue and no actual disbursements had been omitted in arriving at the estimate.

pour les autres mois serait de $192.50—ce qui démontre bien que l'estimation de $1,500 ne pouvait guère induire en erreur l'appelant Parna. Quant aux recettes, la Pièce nº 6 était inexacte, et cela l'appelant Parna ne l'ignorait pas car il savait que les locataires avaient déjà été avertis que leur loyer allait être augmenté de $10 par mois et que, de ce côté-là, les recettes de l'immeuble allaient donc être augmentées de $2,880.

En cette Cour, relativement aux trois seuls postes dont l'appelant Parna s'est plaint dans son action, à savoir, le chauffage, l'éclairage et l'eau, l'avocat des intimés a démontré que le véritable excédent des dépenses sur les estimations n'était pas le montant de $2,386 par année considéré par le juge de première instance mais le montant de $1,868.94 seulement par année. L'appelant Parna a exposé qu'en se fondant sur les évaluations figurant à la Pièce nº 6 et reprises à l'annexe de l'offre d'achat, il a constaté qu'il allait retirer un produit net de 9.64 pour cent de son placement avant le paiement du principal et des intérêts sur l'hypothèque. Si d'une part les dépenses étaient de $1,868.94 supérieures aux estimations et que d'autre part l'augmentation des loyers projetée dont l'appelant Parna était au courant, augmentait les recettes de $2,880, son bénéfice net s'élèverait à presque 10 pour cent. Comme je l'ai dit, l'appelant dans son témoignage a admis qu'il savait que les chiffres se rapportant à l'éclairage, au chauffage et à l'eau et figurant à la Pièce nº 6 ainsi qu'à l'annexe de l'offre d'achat, étaient purement estimatifs.

Dans ces conditions, les termes précis employés dans la déclaration statutaire que l'appelant Parna a acceptée en remplacement de la preuve à laquelle il avait droit dans l'offre d'achat, deviennent importants. Les intimés personnels ont déclaré que l'Annexe «A» de l'offre d'achat constituait un état financier relatant *autant qu'ils le sachent et du mieux qu'ils le puissent faire une estimation précise et équitable* du revenu annuel et des dépenses annuelles de la société intimée «compte tenu de l'augmentation périodique des loyers et de l'augmentation périodique des dépenses telles que les taxes», et aussi, qu'aucunes sources réelles de revenu et aucuns déboursés réels n'avaient été omis dans le calcul de l'estimation.

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I am of the opinion, from the circumstances which I have outlined above, that the appellant failed to prove, and the burden of proof was upon him, that the statement was not to the best of the knowledge and ability of the personal respondents an accurate and fair estimate, and I am further of the opinion that the appellant Parna has failed to prove that any actual disbursements had been omitted. It is true that in ex. 5, the statement produced at trial by the respondents as to the operation of the property, there are disbursements which do not appear in those estimates but those disbursements would appear to have been largely disbursements which were not properly part of the operation of an apartment house, for instance, the purchases which were part of the construction costs, although the purchases were made from the same companies which sold the fuel, and the difference between net and gross bills. It is difficult to understand how the representations could be considered false to the knowledge of the personal respondents when both parties knew that the figures set out were merely estimates and could be nothing else since they purported to be for the operation of an apartment house for a full year when not even one tenant had been in the apartment for more than eight months.

I have come to the conclusion that the evidence given by the appellant Parna himself and by the solicitor who acted for him in the purchase proves that the appellant Parna was not misled in any way by the representations even if they had been false to the knowledge of the respondents, but that a shrewd and intelligent apartment house operator figured that he could pay $251,000 for the property in question and obtain a satisfactory percentage of net profit. A rather graphic confirmation of this conclusion is that even at the trial, which took place in November 1967, the appellant Parna refused to reconvey the property thus confirming the decision which he had made on March 31, 1967, when he had elected to close the transaction without obtaining the proof of the statement to which he was entitled by the very terms of the offer to purchase.

En raison des circonstances que je viens d'évoquer, je suis d'avis que l'appelant n'a pas prouvé, —comme il lui appartenait de le faire—que l'état financier ne constituait pas une estimation équitable et précise autant que les intimés l'aient su ou aient pu le savoir, et j'estime en outre que l'appelant Parna n'a pas prouvé que l'état eût omis de mentionner quelques dépenses effectivement engagées. Il est vrai qu'à la Pièce nº 5, l'état que les intimés ont produit au procès relativement à l'exploitation de l'immeuble, figurent des dépenses que l'on ne retrouve pas dans ces estimations; mais il s'agit surtout de dépenses qui ne font pas normalement partie des frais d'exploitation d'un imeuble résidentiel, par exemple les achats qui entraient dans le coût de la construction, bien que ces achats eussent été faits chez les mêmes compagnies qui fournissaient le combustible, et la différence entre le montant net et le montant brut des factures. Il est difficile de s'expliquer comment la présentation des faits ait pu être considérée comme fausse à la connaissance des intimés personnels alors que les deux parties savaient que les chiffres n'étaient que des estimations et ne pouvaient être autre chose puisqu'ils étaient censés représenter le coût de l'exploitation d'un immeuble résidentiel durant toute une année alors que pas même un seul locataire n'y avait été occupant durant plus de huit mois.

J'en suis venu à la conclusion que les témoignages de l'appelant Parna lui-même et de l'avocat qui l'a représenté aux fins de l'achat prouvent que l'appelant Parna n'a été d'aucune façon induit en erreur par la présentation des faits, même si elle avait été fausse à la connaissance des intimés, mais qu'un exploitant entendu et intelligent d'immeubles résidentiels, a estimé qu'il pouvait payer $251,000 pour la propriété en question et obtenir de la sorte un pourcentage satisfaisant de bénéfice net. Ce qui paraît confirmer bien nettement pareille conclusion, c'est que même au procès, en novembre 1967, l'appelant Parna a refusé de rétrocéder la propriété, ce qui confirmait la décision qu'il avait prise le 31 mars 1967, alors qu'il avait choisi de conclure le marché sans obtenir la preuve de l'état financier, à laquelle il avait droit d'après les termes mêmes de l'offre d'achat.

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I, therefore, have come to the conclusion that the plaintiff has failed to prove the necessary ingredients in an action for deceit and that is the basis upon which the appellant has framed his action.

I would dismiss the appeal and allow the cross-appeal dismissing the action. The respondents are entitled to their costs throughout.

Appeal dismissed and cross-appeal allowed with costs.

August Parna and Reta Parna, plaintiffs, appellants.

Solicitors for the defendants, respondents: O'Leary & Zimmerman, Hamilton.

J'en suis donc venu à la conclusion que le demandeur n'a pas prouvé les éléments essentiels d'une action pour tromperie (*action for deceit*) et c'est sur cette base que l'appelant a fondé son action.

Je suis d'avis de rejeter le pourvoi et d'accueillir le pourvoi incident rejetant l'action. Les intimés ont droit à leur dépens dans toutes les Cours.

Appel rejeté et appel incident accueilli avec dépens.

August Parna et Reta Parna, demandeurs, appelants.

Procureurs des défendeurs, intimés: O'Leary & Zimmerman, Hamilton.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pollock v. Tonca,*
2021 BCSC 1446

Date: 20210723
Docket: S1813682
Registry: Vancouver

Between:

Chris Pollock and 1006085 BC Ltd.

Plaintiffs

And

Theodor Tonca, Graham Young and Graham Theodor & Co. Ltd.

Defendants

Before: The Honourable Madam Justice Choi

Reasons for Judgment

Counsel for the Plaintiffs:	G. Allen
Counsel for the Defendant Graham Young:	A. Schleichkorn
Place and Date of Trial/Hearing:	Vancouver, B.C. April 28–29, May 13–14, and July 2, 2021
Place and Date of Judgment:	Vancouver, B.C. July 23, 2021

2021 BCSC 1446 (CanLII)

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2021 BCSC 1446 (CanLII)

Overview

[1] The defendant Mr. Young applies, pursuant to R. 9-7 of the *Supreme Court Civil Rules*, for summary judgment dismissing the plaintiffs' claims against him.

[2] The plaintiffs, Dr. Pollock and his numbered company, 1006085 BC Ltd. (the "Numbered Company"), seek general damages for civil fraud or conversion, or alternatively, restitution for unjust enrichment. The plaintiffs also seek punitive damages.

[3] Default judgment has been granted against the other two defendants in this action, Mr. Tonca and Graham Theodor & Co. Ltd. ("GTC"). Mr. Tonca and Mr. Young were directors of GTC during the material time.

[4] Dr. Pollock is the sole director, officer, and shareholder of the Numbered Company.

[5] In July and October 2014, the Numbered Company invested a total of $170,000 in GTC in exchange for shares of the company. The entire investment was lost. Dr. Pollock alleges that numerous fraudulent misrepresentations were made to induce him to invest. He argues that the operative question at this point is whether liability flows to Mr. Young as a result of those misrepresentations.

[6] For the reasons that follow, I find that this matter is not suitable for summary disposition because I cannot find the necessary facts on the evidence adduced. Accordingly, Mr. Young's application is dismissed.

The Parties' Positions

[7] This is a case of extremes. Mr. Young argues there is no fraud and the claim ought to be dismissed with special costs payable to him, while the plaintiffs allege fraudulent misrepresentation and conspiracy, and also seek punitive damages.

[8] Mr. Young argues this matter is suitable for summary disposition and the court should dismiss the action.

[9] He argues that there was no fraud at all, and if there was, it was Mr. Tonca who made the fraudulent misrepresentations.

[10] While Mr. Young argues that there is no fraud, it appears that he does so mostly on the basis that he was not aware of any fraud that might have occurred. Mr. Young argues that although he was a director of GTC, his own role was akin to that of a part-time junior employee who was simply learning from Mr. Tonca.

[11] Mr. Young argues that conspiracy is a difficult legal test to meet and the evidence does not support such a finding.

[12] The plaintiffs agree that this matter is suitable for summary trial. They argue that the documents speak for themselves and that they overwhelmingly point to fraud and conspiracy on the part of Mr. Young**,** making it unnecessary to assess his credibility. However, the plaintiffs say that if an assessment of credibility is required, then the matter must proceed to a traditional trial.

[13] The plaintiffs argue that Mr. Young is liable for fraudulent misrepresentation and conspiracy for any of the following reasons:

(1) he was fully engaged in the fraudulent misrepresentations himself;

(2) he was aware of the misrepresentations made by Mr. Tonca and did nothing to correct those; and

(3) he was willfully blind to Mr. Tonca's misrepresentations.

[14] The plaintiffs' argument states:

> Even if [Mr. Young] is successful in establishing that he did not subjectively know of a fraud (a finding that requires a credibility assessment and cannot be made on a summary trial), it is sufficient for a finding of civil conspiracy that [Mr. Young] ought to have known of the fraud.

[15] Their argument further states that even if the court believes:

> … that [Mr. Young] did not subjectively know of the unlawful acts perpetrated by [Mr. Tonca] and [GTC], the court must assess whether he ought to have

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> known. [Mr. Young's] wilful blindness is no defence. The plaintiffs submit that the facts overwhelmingly establish that [Mr. Young] ought to have known that misrepresentations were being made to the plaintiffs and others with the object of extracting investment based on those misrepresentations.

[16] The only case that Dr. Pollock was able to refer me, to in support of his argument that I can make the necessary findings on a summary trial application despite conflicting evidence, is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 215-16 (C.A.), which provides:

> [56] Lastly, I do not agree, as suggested in *Royal Bank v. Stonehocker*, that a chambers judge is obliged to remit a case to the trial list just because there are conflicting affidavits. In this connection I prefer the view expressed by Taggart J.A. in *Placer*, quoted at p. 15 [pp. 212-13] of these reasons. Subject to what I am about to say, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. It may be, however, notwithstanding sworn affidavit evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given. For example, in an action on a cheque, the alleged maker might by affidavit deny his signature while other believable evidence may satisfy the court that he did indeed sign it. Again, the variety of different kinds of cases which will arise is unlimited. In such cases, absent other circumstances or defences, judgment should be given.

[17] However, I note that no cases were referred to where this Court has made a finding of conspiracy or fraudulent misrepresentation on a summary trial application. While claims of conspiracy and fraudulent misrepresentation may be suitable for summary trial, I assume there are few, if any, cases where these allegations were actually found in a summary trial, as none were provided.

[18] As mentioned, for the reasons I will explain below, I find that this matter is not suitable for summary trial.

Background Facts

[19] The basic uncontested background facts are as follows:

a) Dr. Pollock met Mr. Tonca at an investment seminar organized by Mr. Tonca in 2013.

b) GTC was in the business of acquiring interests in other private companies.

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c) Mr. Young was a director of GTC from its inception, under a previous name until April 2016. From 2011 until April 2016, Mr. Young and Mr. Tonca were the two sole directors. Mr. Young resigned as a director in April 2016.

d) In 2013, Dr. Pollock decided not to invest in GTC. Dr. Pollock and Mr. Tonca stayed in touch in the intervening months. On July 25, 2014, the plaintiffs invested $150,000 in GTC and a further $20,000 on November 3, 2014, receiving shares in GTC in return for their investment.

e) The plaintiffs communicated with Mr. Tonca respecting the share purchase agreement. Dr. Pollock did not communicate with Mr. Young.

f) The plaintiffs lost their entire investment.

g) GTC was dissolved in August 2017 for failure to file annual reports.

[20] The plaintiffs filed their notice of civil claim on December 20, 2018, alleging fraudulent misrepresentation and conversion, among other things. They filed amendments to those pleadings on December 22, 2020, adding the claim for conspiracy. As the notice of trial had already been filed when the amendments were filed, leave was required. On the first day of the summary trial, the plaintiffs sought, and were granted, leave for their amended notice of civil claim.

[21] Aside from the above uncontested facts, the parties' evidence greatly differs in many key areas. The plaintiffs argue that the defendants represented that GTC was operating a successful business of acquiring private companies when, in fact, that was not true. The plaintiffs say they were provided fabricated documentation including annual reports, cash flow statements, balance sheets, and a securities portfolio to induce them to invest.

[22] Mr. Young denies making any misrepresentations to the plaintiffs and denies that Mr. Tonca made any misrepresentations. He says this is a case where the

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plaintiffs took the calculated risk of investing, and while it was unfortunate the investment was lost, that is not due to any actionable wrong by Mr. Young.

Suitability

[23] Mr. Young relies on *Cotter v. Point Grey Golf and Country Club*, 2016 BCCA 260 at para. 56, aff'g 2016 BCSC 10, for the proposition that summary disposition is appropriate if the fraud allegations are not supported by the evidence.

[24] In *Cotter*, the defendant brought a summary trial application to dismiss an employee's wrongful dismissal claim. The employee's claim included allegations of fraud. Justice Maisonville dismissed the employee's claim, finding the matter suitable for summary trial for a number of reasons, including the fact it was not of "extreme complexity", there was sufficient documentary evidence to resolve any conflicts in the affidavit evidence, and a summary trial was the "proportionate" way to resolve the dispute (see paras. 99–105).

[25] On appeal, Justice Fitch affirmed that the evidence was not conflicting on key points. He noted there were just two issues in which the parties gave conflicting evidence and neither had "any material bearing on the disposition of [the] action" (at para. 49). Justice Fitch also rejected the employee's argument that Maisonville J. erred in finding the matter was suitable for summary trial because of the fraud allegations. As Fitch J.A. explained at para. 56:

> [56] Mr. Cotter also argues that the trial judge erred in determining that the matter was suitable for determination by summary trial because of the fraud allegations he made. I do not agree. While allegations of fraud may make an action unsuitable for disposition by way of summary trial, the question must be assessed on a case-by-case basis. The fact that allegations of fraud are made by a party will not preclude the determination of an action under Rule 9-7. The fraud allegations advanced by Mr. Cotter are not supported by the evidence. In these circumstances, the judge made no reviewable error in determining that the action was suitable for disposition by summary trial. [Emphasis added.]

[26] Accordingly, claims of fraud *may be* suitable for summary trial; however, suitability should be determined on a case-by-case basis.

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[27] In the case at bar, the plaintiffs' conspiracy and fraud claims are core to their action. The plaintiffs have provided significant documentary evidence in support of their claims. How that documentary evidence is to be interpreted will be key. Unlike in *Cotter*, I cannot simply make the finding that the claims for fraud have no merit. However, on the evidence before me, I similarly cannot find the facts to decide that Mr. Young is liable either.

[28] I am not satisfied the issues, in particular credibility, can be resolved justly on the evidence adduced. This is a case where findings of fact on the fraud and conspiracy allegations can only be made after the witnesses have given *viva voce* testimony.

[29] The issues in this case are not straightforward. The summary trial took up five days. The trial is set for five days in a couple of months. Given the length of the summary trial and the expected evidence, more trial time will be required. Many volumes of affidavits, exhibits, transcripts from discovery, and written arguments were filed. Each party made a number of evidentiary objections.

[30] Much of the evidence is in dispute, as well as the interpretation of that evidence. I am mindful that the trial judge will have a more expansive view of the facts after *viva voce* evidence is given. This evidence may also differ from the affidavit evidence. Therefore, I will not make findings and will limit these reasons to highlighting why this case must proceed to a traditional trial. The following admissibility ruling from July 2 (day five of the application) illustrates the need for *viva voce* evidence.

Admissibility Ruling

[31] Mr. Young objected to the admissibility of a document referred to as "the Release" on the basis that it was inadmissible hearsay and was being used for the truth of its contents.

[32] The Release is a key document for the plaintiffs' claims. One of the contested facts between the parties is whether GTC acquired the company Trent Realty, Inc.

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("Trent Realty"). The plaintiffs say GTC never acquired Trent Realty and that Mr. Tonca lied to Dr. Pollock when he said it did, inducing him to invest. Mr. Young says that the deal between GTC and Trent Realty did, in fact, close and, therefore, no misrepresentation was made to Dr. Pollock.

[33] The Release is a document titled "Business Brokers of Florida, Release of Escrow Deposit(s) with Instructions" dated May 7, 2013. If true, the Release indicates that the acquisition of Trent Realty by GTC was terminated, and the parties released each other from the agreement on May 7, 2013.

[34] The Release is purportedly signed by Roy Trent (of Trent Realty), Theodor Tonca, and Andrew Cagnetta Jr. (for Transworld Business Brokers, LLC.). The Release further states that:

a) Mr. Trent and Mr. Tonca released each other on May 7, 2013, from a purchase and sale contract and GTC's $117,667 deposit was returned; and

b) Mr. Tonca personally received $71,467 and Transworld Business Brokers received $46,200 when the deposit was returned.

[35] As mentioned, the plaintiffs rely on the Release to argue that Trent Realty was never acquired by GTC and that Mr. Tonca misrepresented to Dr. Pollock that it had.

[36] This representation was important to Dr. Pollock who deposed that:

> I never would have invested in [GTC] if I had known that it had never actually acquired Trent Realty. I relied on the representations made by [Mr. Tonca] and the financial records I had received regarding Trent Realty to conclude that [GTC] had a stable source of cash flow from Trent Realty, which motivated me to invest in [GTC].

[37] In a September 2013 email, Mr. Tonca told Dr. Pollock that GTC purchased its first subsidiary back in May and that that business' "average free cash flow operations has been approx. 200-250k per annum". In another September 2013

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email, Mr. Tonca told Dr. Pollock that the acquisition of Trent Realty by GTC closed shortly after May 1, 2013.

[38] The plaintiffs argue that these statements are a lie since the deal between GTC and Trent Realty never actually closed, relying on the Release for this submission.

[39] The plaintiffs further argue that it is a "badge of fraud" that GTC paid the deposit of $117, 667, but that the money was personally returned to Mr. Tonca, and not the company itself.

[40] The plaintiffs brought the Release to the court's attention in response to Mr. Young's argument that Trent Realty had actually been purchased by GTC, pointing to a certain purchase document as proof that the acquisition took place. That document is titled "Agreement for Sale of Business" and is dated April 6, 2013, about a month before the Release was signed. The agreement is three pages long and, in brief, provides for the sale of a majority equity interest of 75% in Trent Realty to GTC for $385,000US. The agreement provides that the closing date for the sale shall be July 1, 2013.

[41] Mr. Young's response to civil claim states at para. 19 that:

> [GTC] operated as a business making reasonable and prudent business decisions to acquire majority interests in other private companies, including:
>
> On or about 01 July 2013, successfully acquiring a 75 percent interest in Trent Realty Inc, a company with operating income of approximately $425, 425 in the six months ending 31 December 2013; …

[42] This pleading captures the evidence adduced by Mr. Young, being that GTC did acquire Trent Realty.

[43] I admitted the Release on the basis that excluding it would result in a miscarriage of justice. The Release was needed to get at the truth of the matter. I agreed with Dr. Pollock that because Mr. Young relied on the purchase agreement between GTC and Trent Realty to show that the purchase took place, which is hearsay, it would be "inequitable in the extreme" to forbid the plaintiffs from also

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relying on hearsay evidence in response. I note that no objection was made to the purchase document.

[44] The plaintiffs objected to an affidavit filed by Mr. Young between days four and five of the hearing which deposed that he had no knowledge of the Release and only included it on his list of documents because he received it from Mr. Tonca. I admitted that affidavit, on the same basis that I admitted the Release, which is that it was in the overarching interests of justice in "getting at the truth".

[45] The affidavit states:

> 2. I came into possession of a copy of the document sworn as Exhibit "L" of Affidavit no. 1 of the plaintiff, [Mr. Pollock], [the Release], when I requested from [Mr. Tonca] all documents in his possession regarding this action.
>
> 3. I received the Release from Mr. Tonca, among several other documents, in or about mid 2019. Before receiving the Release from Mr. Tonca, I had never seen the Release or knew if its existence. I also do not know or understand what the Release relates to.
>
> 4. I provided the Release to my lawyer as part of my production obligations under Rule 7-1 of the *Supreme Court Rules*.

[46] I cannot find the facts as to whether GTC acquired Trent Realty, as urged by Mr. Young, or whether the parties to that transaction released each other from the agreement, as argued by the plaintiffs.

[47] Both documents are hearsay, and neither Mr. Tonca nor Mr. Roy Trent Jr. gave evidence at the summary trial. Accordingly, limited weight can be attached to these documents.

[48] There are many direct conflicts in the evidence and in the examination for discovery transcripts on key facts which could potentially affect the outcome of this matter. All this is challenging because the only affidavits are from Dr. Pollock, Mr. Young, and an employee at counsel's firm. There is no evidence from Mr. Tonca, for example. He was the one who communicated with Dr. Pollock. I am also mindful that affidavits are drafted by lawyers or paralegals and do not necessarily represent the words a witness would choose. A witness may give a very different impression at trial, when using their own language to describe things. A

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court must be cautious when deconstructing an affidavit and preferring one over another, particularly with these types of serious allegations.

[49] Dr. Pollock argues there are numerous documents and emails between Mr. Young and Mr. Tonca that show the extent of Mr. Young's involvement in the alleged fraud to support a finding of conspiracy. In reviewing the evidence, much would need to be inferred from these documents, which is difficult to do without assessing the credibility and reliability of witnesses' testimonies.

Conclusion

[50] For the reasons discussed, and in consideration of the well-known factors set out in *Inspiration Management Ltd.* at 214, this matter is not suitable for summary trial. Mr. Young's application is dismissed.

Costs

[51] The plaintiffs indicated that they wished to speak to costs after this decision was released. If either of the parties wishes to make submissions on costs, they may do so provided they contact Trial Scheduling within 30 days of receiving this decision to schedule a costs hearing. If neither party does so, the costs of this application will be payable in the cause.

"Choi J."

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Robert Hryniak *Appellant*

v.

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith *Respondents*

and

Ontario Trial Lawyers Association and Canadian Bar Association *Interveners*

Indexed as: Hryniak *v.* Mauldin

2014 SCC 7

File No.: 34641.

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 — Investors bringing action in civil fraud and subsequently bringing a motion for summary judgment — Motion judge granting summary judgment — Purpose of summary judgment motions — Access to justice — Proportionality — Interpretation of recent amendments to Ontario Rules of Civil Procedure — Trial management orders — Standard of review for summary judgment motions — Whether motion judge erred in granting summary judgment — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20.

In June 2001, two representatives of a group of American investors met with H and others to discuss an investment opportunity. The group wired US$1.2 million, which was pooled with other funds and transferred to H's company, Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank and the money disappeared. The investors brought an action for

Robert Hryniak *Appelant*

c.

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White et Athena Smith *Intimés*

et

Ontario Trial Lawyers Association et Association du Barreau canadien *Intervenantes*

Répertorié : Hryniak *c.* Mauldin

2014 CSC 7

N° du greffe : 34641.

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 —Requête en jugement sommaire accueillie — Objectif des requêtes en jugement sommaire — Accès à la justice — Proportionnalité — Interprétation des modifications récentes apportées aux Règles de procédure civile de l'Ontario — Ordonnances de gestion de l'instance — Norme de contrôle applicable aux requêtes en jugement sommaire — 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.

Au mois de juin 2001, deux représentants d'un groupe d'investisseurs américains ont rencontré H et d'autres personnes afin de discuter d'une possibilité d'investissement. Le groupe a viré 1,2 million de dollars américains et cette somme a été mise en commun avec d'autres fonds et transférée à Tropos, la société de H. Quelques mois plus tard, Tropos a transféré plus de

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civil fraud against H and others and subsequently brought a motion for summary judgment. The motion judge used his powers under Rule 20.04(2.1) of the Ontario *Rules of Civil Procedure* (amended in 2010) to weigh the evidence, evaluate credibility, and draw inferences. He concluded that a trial was not required against H. Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that H had committed the tort of civil fraud against the investors, and therefore dismissed H's appeal.

Held: The appeal should be dismissed.

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

A shift in culture is required. The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. Summary judgment motions provide an opportunity to simplify pre-trial procedures and move the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

Rule 20 was amended in 2010 to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the

10 millions de dollars américains à une banque étrangère et l'argent a disparu. Les investisseurs ont intenté contre H et d'autres personnes une action pour fraude civile et ont ensuite présenté une requête en jugement sommaire. Le juge saisi de la requête a exercé les pouvoirs que lui confère le par. 20.04(2.1) des *Règles de procédure civile* de l'Ontario (modifiées en 2010) pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions. Il a conclu que la tenue d'un procès n'était pas nécessaire dans l'instance intentée contre H. Bien qu'elle ait conclu que cette affaire ne se prêtait pas à un jugement sommaire, la Cour d'appel était convaincue que le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile à l'endroit des investisseurs et elle a par conséquent rejeté l'appel de H.

Arrêt : Le pourvoi est rejeté.

Notre système de justice civile repose sur le principe que le processus décisionnel doit être juste et équitable. Ce principe ne souffre aucun compromis. Or, les formalités excessives et les procès interminables occasionnant des dépenses et des délais inutiles peuvent faire obstacle au règlement juste et équitable des litiges. Si la procédure est disproportionnée par rapport à la nature du litige et aux intérêts en jeu, elle n'aboutira pas à un résultat juste et équitable.

Un virage culturel s'impose. Le principe de la proportionnalité trouve aujourd'hui son expression dans les règles de procédure de nombreuses provinces et peut constituer la pierre d'assise de l'accès au système de justice civile. Le principe de la proportionnalité veut que le meilleur forum pour régler un litige ne soit pas toujours celui dont la procédure est la plus laborieuse. La requête en jugement sommaire offre une possibilité de simplifier les procédures préalables au procès et d'insister moins sur la tenue d'un procès conventionnel et plus sur des procédures proportionnées et adaptées aux besoins de chaque affaire. Les règles régissant les jugements sommaires doivent recevoir une interprétation large et propice à la proportionnalité et à l'accès équitable à un règlement abordable, expéditif et juste des demandes.

La règle 20 a été modifiée en 2010 afin d'améliorer l'accès à la justice. Ces réformes incarnent l'évolution des règles régissant les jugements sommaires, lesquelles passent du statut d'outil à usage très restreint visant à écarter les demandes ou défenses manifestement dénuées de fondement à celui de solution de rechange légitime pour trancher et régler les litiges d'ordre juridique. Les juges disposent ainsi de nouveaux outils importants qui leur permettent de trancher plus de litiges sur requête

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

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

The new fact-finding powers granted to motion judges in Rule 20.04 may be employed on a motion for summary judgment unless it is in the interest of justice for them to be exercised only at trial. When the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. The power to hear oral evidence should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard. Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge and to provide a description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). Their use will not be against

en jugement sommaire et qui atténuent les risques lorsque pareille requête ne permet pas de trancher l'affaire dans son ensemble. Les nouveaux pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles augmentent le nombre d'affaires qui ne soulèvent pas de véritable question litigieuse nécessitant la tenue d'un procès en permettant au juge saisi d'une requête d'apprécier la preuve, d'évaluer la crédibilité et de tirer des conclusions raisonnables.

La requête en jugement sommaire doit être accueillie dans tous les cas où il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès. Il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès lorsque le juge est en mesure de statuer justement et équitablement au fond sur une requête en jugement sommaire. Ce sera le cas lorsque la procédure (1) permet au juge de tirer les conclusions de fait nécessaires, (2) lui permet d'appliquer les règles de droit aux faits et (3) constitue un moyen proportionné, plus expéditif et moins coûteux d'arriver à un résultat juste.

Le juge saisi d'une requête en jugement sommaire peut exercer les nouveaux pouvoirs en matière de recherche des faits que lui confère la règle 20.04 à moins qu'il ne soit dans l'intérêt de la justice de ne les exercer que lors d'un procès. Lorsqu'il permettrait au juge de trancher une demande de manière juste et équitable, l'exercice des nouveaux pouvoirs serait généralement dans l'intérêt de la justice. Le pouvoir d'entendre des témoignages oraux devrait être exercé lorsqu'il permet au juge de rendre une décision juste et équitable sur le fond et que son exercice constitue la marche à suivre proportionnée. Ce sera plus probablement le cas lorsque le témoignage oral requis est succinct, mais dans certains cas, la requête en jugement sommaire comportera l'audition de longs témoignages oraux. La partie qui cherche à présenter des témoignages oraux doit être prête à démontrer en quoi ils aideraient le juge saisi de la requête et à fournir un exposé de la preuve proposée afin de permettre au juge d'établir la portée de ces témoignages oraux.

Lors de l'audition d'une requête en jugement sommaire aux termes de la règle 20.04, le juge devrait en premier lieu décider, compte tenu uniquement de la preuve dont il dispose et *sans* recourir aux nouveaux pouvoirs en matière de recherche des faits, s'il existe une véritable question litigieuse nécessitant la tenue d'un procès. Il n'y aura pas de question de ce genre si la procédure de jugement sommaire fournit au juge la preuve nécessaire pour trancher justement et équitablement le litige et constitue une procédure expéditive, abordable et proportionnée selon l'al. 20.04(2)a) des Règles. S'il semble y avoir une véritable question nécessitant la tenue d'un procès,

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the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

Failed, or even partially successful, summary judgment motions add to costs and delay. This risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction. These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

Absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law which should not be overturned, absent palpable and overriding error. Similarly, the determination of whether it is in the interest of justice for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) is also a question of mixed fact and law which attracts deference.

The motion judge did not err in granting summary judgment in the present case. The tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss. In granting summary judgment to the group against H, the motion judge did not explicitly address the correct test for civil fraud but his findings are sufficient to make out the cause of action. The motion

le juge devrait alors déterminer si l'exercice des nouveaux pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles permettra d'écarter la nécessité d'un procès. L'exercice de ces pouvoirs ne sera pas contraire à l'intérêt de la justice s'il aboutit à un résultat juste et équitable et permettra d'atteindre les objectifs de célérité, d'accessibilité économique et de proportionnalité, compte tenu du litige dans son ensemble.

Qu'elle soit rejetée ou même accueillie en partie, la requête en jugement sommaire occasionne des frais et des délais additionnels. Le juge peut toutefois atténuer ce risque en exerçant la compétence inhérente du tribunal et les pouvoirs de gestion de l'instance prévus à la règle 20.05. Ces pouvoirs permettent au juge de mettre à profit les connaissances acquises lors de l'audition de la requête en jugement sommaire pour élaborer une procédure d'instruction de nature à régler le litige en tenant compte de la complexité et de l'importance de la question soulevée, de la somme en jeu et des efforts déployés lors de l'instruction de la requête rejetée. Le juge qui rejette une requête en jugement sommaire devrait également se saisir de l'instance à titre de juge du procès à moins que des raisons impérieuses l'en empêchent.

En l'absence d'une erreur de droit, l'exercice des pouvoirs que confère la nouvelle règle relative au jugement sommaire commande la retenue. Lorsque le juge saisi d'une requête exerce les nouveaux pouvoirs en matière de recherche des faits que lui confère le par. 20.04(2.1) des Règles et détermine s'il existe une véritable question litigieuse nécessitant la tenue d'un procès, il s'agit d'une question mixte de fait et de droit et sa décision ne doit pas être infirmée en l'absence d'erreur manifeste et dominante. De même, la décision quant à savoir s'il est dans l'intérêt de la justice que le juge saisi d'une requête exerce les nouveaux pouvoirs en matière de recherche des faits prévus au par. 20.04(2.1) des Règles constitue également une question mixte de fait et de droit qui commande la retenue.

Le juge saisi de la requête n'a pas eu tort de rendre un jugement sommaire en l'espèce. Le délit de fraude civile comporte quatre éléments dont il faut prouver l'existence selon la prépondérance des probabilités : (1) une fausse déclaration du défendeur; (2) une certaine connaissance de la fausseté de la déclaration de la part du défendeur (connaissance ou insouciance); (3) le fait que la fausse déclaration a amené le demandeur à agir; (4) le fait que les actes du demandeur ont entraîné une perte. Lorsqu'il a prononcé contre H un jugement sommaire en faveur du groupe, le juge saisi de la requête n'a pas traité explicitement du critère qu'il convient d'appliquer à la fraude

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judge found no credible evidence to support H's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

civile mais ses conclusions suffisent pour établir la cause d'action. Le juge saisi de la requête a conclu qu'il n'existait pas d'élément de preuve crédible à l'appui de la prétention de H selon laquelle ce dernier était un courtier légitime et l'issue était donc claire; ainsi le juge a conclu qu'il n'y avait pas de question litigieuse nécessitant la tenue d'un procès. L'exercice, par le juge, de ses pouvoirs en matière de recherche des faits n'allait pas à l'encontre de l'intérêt de la justice, et sa décision discrétionnaire d'exercer ces pouvoirs n'était pas non plus entachée d'erreur.

Cases Cited

Referred to: *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371; *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311; *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII); *Vaughan v. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

Jurisprudence

Arrêts mentionnés : *Bruno Appliance and Furniture, Inc. c. Hryniak*, 2014 CSC 8, [2014] 1 R.C.S. 126; *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46; *Medicine Shoppe Canada Inc. c. Devchand*, 2012 ABQB 375, 541 A.R. 312; *Saturley c. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371; *Szeto c. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311; *Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII); *Vaughan c. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242; *Canada (Procureur général) c. Lameman*, 2008 CSC 14, [2008] 1 R.C.S. 372; *Aguonie c. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; *Dawson c. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

Statutes and Regulations Cited

Code of Civil Procedure, R.S.Q., c. C-25, arts. 4.2, 54.1 *et seq.*, 165(4).
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 1.04(1), (1.1), 1.05, 20, 20.04(2)(a), (2.1), (2.2), 20.05, 20.06(a).
Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 1-3(2).

Lois et règlements cités

Code de procédure civile, L.R.Q., ch. C-25, art. 4.2, 54.1 et suiv., 165(4).
Règles de procédure civile, R.R.O. 1990, Règl. 194, règles 1.04(1), (1.1), 1.05, 20, 20.04(2)a), (2.1), (2.2), 20.05, 20.06a).
Supreme Court Civil Rules, B.C. Reg. 168/2009, règle 1-3(2).

Authors Cited

Agrast, Mark David, Juan Carlos Botero and Alejandro Ponce. *World Justice Project Rule of Law Index 2011*. Washington, D.C.: World Justice Project, 2011.
Ontario. Ministry of the Attorney General. *Civil Justice Reform Project: Summary of Findings and Recommendations*. Toronto: The Ministry, 2007.
Walsh, Teresa, and Lauren Posloski. "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2013*. Toronto: Thomson Carswell, 2013, 419.

Doctrine et autres documents cités

Agrast, Mark David, Juan Carlos Botero and Alejandro Ponce. *World Justice Project Rule of Law Index 2011*. Washington, D.C. : World Justice Project, 2011.
Ontario. Ministère du procureur général. *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations*. Toronto : Le ministère, 2007.
Walsh, Teresa, and Lauren Posloski. « Establishing a Workable Test for Summary Judgment : Are We There Yet? », in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2013*. Toronto : Thomson Carswell, 2013, 419.

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APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O. and Laskin, Sharpe, Armstrong and Rouleau JJ.A.), 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 (*sub nom. Combined Air Mechanical Services Inc. v. Flesch*), affirming a decision of Grace J., 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Appeal dismissed.

Sarit E. Batner, *Brandon Kain* and *Moya J. Graham*, for the appellant.

Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* and *Jonathan A. Odumeru*, for the respondents.

Allan Rouben and *Ronald P. Bohm*, for the intervener the Ontario Trial Lawyers Association.

Paul R. Sweeny and *David Sterns*, for the intervener the Canadian Bar Association.

The judgment of the Court was delivered by

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

[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pretrial

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 (*sub nom. Combined Air Mechanical Services Inc. c. Flesch*), qui a confirmé une décision du juge Grace, 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Pourvoi rejeté.

Sarit E. Batner, *Brandon Kain* et *Moya J. Graham*, pour l'appelant.

Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* et *Jonathan A. Odumeru*, pour les intimés.

Allan Rouben et *Ronald P. Bohm*, pour l'intervenante Ontario Trial Lawyers Association.

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 — De nos jours, garantir l'accès à la justice constitue le plus grand défi à relever pour assurer la primauté du droit au Canada. Les procès sont de plus en plus coûteux et longs. La plupart des Canadiens n'ont pas les moyens d'intenter une action en justice lorsqu'ils subissent un préjudice ou de se défendre lorsqu'ils sont poursuivis; ils n'ont pas les moyens d'aller en procès. À défaut de moyens efficaces et accessibles de faire respecter les droits, la primauté du droit est compromise. L'évolution de la common law ne peut se poursuivre si les affaires civiles ne sont pas tranchées en public.

[2] On reconnaît de plus en plus qu'un virage culturel s'impose afin de créer un environnement favorable à l'accès expéditif et abordable au système de justice civile. Ce virage implique que

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procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[3] Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (Ontario *Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, address the proper interpretation of the amended Rule 20 (summary judgment motion).

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

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

[6] As the Court of Appeal observed, the inappropriate use of summary judgment motions creates

l'on simplifie les procédures préalables au procès et que l'on insiste moins sur la tenue d'un procès conventionnel et plus sur des procédures proportionnées et adaptées aux besoins de chaque affaire. L'équilibre entre la procédure et l'accès à la justice qu'établit notre système de justice doit en venir à refléter la réalité contemporaine et à reconnaître que de nouveaux modèles de règlement des litiges peuvent être justes et équitables.

[3] La requête en vue d'obtenir un jugement sommaire offre une occasion d'atteindre ces objectifs. À la suite du rapport de 2007 intitulé *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (le rapport Osborne), l'Ontario a modifié ses *Règles de procédure civile*, R.R.O. 1990, Règl. 194 (les *Règles* de l'Ontario ou les Règles) afin d'améliorer l'accès à la justice. Le présent pourvoi et le pourvoi connexe, *Bruno Appliance and Furniture, Inc. c. Hryniak*, 2014 CSC 8, [2014] 1 R.C.S. 126, portent sur l'interprétation correcte de la règle 20 (requête en jugement sommaire) modifiée.

[4] Lorsqu'elle a interprété les dispositions de cette règle, la Cour d'appel de l'Ontario a accordé trop d'importance à la « pleine appréciation » que l'on peut faire de la preuve lors d'un procès conventionnel, étant donné que pareil procès ne constitue pas une solution de rechange réaliste pour la plupart des parties à un litige. À mon avis, la tenue d'un procès n'est pas nécessaire si une requête en jugement sommaire peut déboucher sur une décision juste et équitable, si elle offre un processus qui permet au juge de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit à ces faits et si elle constitue, par rapport au procès, un moyen proportionné, plus expéditif et moins onéreux d'arriver à un résultat juste.

[5] Je conclus à cette fin que les règles régissant les jugements sommaires doivent recevoir une interprétation large et propice à la proportionnalité et à l'accès équitable à un règlement abordable, expéditif et juste des demandes.

[6] Comme l'a indiqué la Cour d'appel, le recours inapproprié à la requête en jugement sommaire

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its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

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

I. Facts

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

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

[10] At the end of June 2001, the Mauldin Group wired US$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank, and the money disappeared. Hryniak claims that at this point, Tropos' funds, including the funds contributed by the Mauldin Group, were stolen.

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

occasionne lui-même des frais et des délais. Or, le juge peut atténuer ces risques en exerçant ses pouvoirs de gérer et de circonscrire la procédure et, si possible, en demeurant saisi de l'instance.

[7] Bien que mon interprétation de la règle 20 diffère en partie de celle de la Cour d'appel, je souscris à sa décision en l'espèce et je suis d'avis de rejeter le pourvoi.

I. Les faits

[8] Il y a plus de 10 ans, un groupe d'investisseurs américains, dirigé par Fred Mauldin (le Groupe Mauldin), ont confié leur argent à des « courtiers » canadiens. Robert Hryniak était le dirigeant de la société Tropos Capital Inc., qui faisait le commerce des obligations et des titres de créance; Gregory Peebles, un avocat spécialisé en droit des sociétés et en droit commercial (ancien avocat du cabinet Cassels Brock & Blackwell), représentait M. Hryniak, Tropos et Robert Cranston, l'ancien dirigeant d'une société panaméenne, Frontline Investments Inc.

[9] Au mois de juin 2001, deux membres du Groupe Mauldin ont rencontré MM. Cranston, Peebles et Hryniak pour discuter d'une possibilité d'investissement.

[10] À la fin juin 2001, le Groupe Mauldin a viré 1,2 million de dollars américains à Cassels Brock; cette somme a été mise en commun avec d'autres fonds et transférée à Tropos. Quelques mois plus tard, Tropos a transféré plus de 10 millions de dollars américains à une banque étrangère et l'argent a disparu. M. Hryniak soutient qu'à ce stade, les fonds appartenant à Tropos, y compris ceux versés par le Groupe Mauldin, ont été dérobés.

[11] À part un paiement modique de 9 600 dollars américains versé en février 2002, le Groupe Mauldin a perdu son placement.

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II. Judicial History

A. *Ontario Superior Court of Justice, 2010 ONSC 5490 (CanLII)*

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

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

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

II. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario, 2010 ONSC 5490 (CanLII)*

[12] Le Groupe Mauldin s'est joint à Bruno Appliance and Furniture, Inc. (l'appelante dans le pourvoi connexe) en vue d'intenter une action pour fraude civile contre M. Hryniak, M. Peebles et Cassels Brock. Ils ont présenté des requêtes en jugement sommaire qui ont été instruites ensemble.

[13] Lors de l'audition des requêtes, le juge a exercé les pouvoirs que lui confère le nouveau par. 20.04(2.1) des Règles pour apprécier la preuve, évaluer la crédibilité des témoins et tirer des conclusions de la preuve. Il a conclu que les fonds du Groupe Mauldin avaient été versés par Cassels Brock à la société de M. Hryniak, Tropos, mais qu'aucune preuve ne tendait à démontrer que Tropos ait jamais établi un programme de transaction de titres. Contrairement à la stratégie de placement que M. Hryniak avait présentée aux investisseurs, les fonds du Groupe Mauldin ont été placés dans un compte ouvert à une banque étrangère, la New Savings Bank, pour ensuite disparaître. Le juge a rejeté la prétention de M. Hryniak que des employés de la New Savings Bank avaient dérobé les fonds du Groupe Mauldin.

[14] Le juge saisi de la requête a conclu que la tenue d'un procès n'était pas nécessaire dans l'instance à l'égard de M. Hryniak. Toutefois, il a rejeté la requête du Groupe Mauldin visant à obtenir un jugement sommaire contre M. Peebles parce que cette demande soulevait des questions de fait, particulièrement en ce qui concerne la crédibilité de M. Peebles et sa participation à une réunion importante, questions qui nécessitaient la tenue d'un procès. Par conséquent, il a rejeté également la requête visant à obtenir un jugement sommaire contre Cassels Brock, puisque les demandes en cause reposaient sur la thèse selon laquelle ce cabinet était responsable du fait d'autrui pour la conduite de M. Peebles.

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

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

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

[17] The Court of Appeal suggested that cases requiring multiple factual findings, based on conflicting evidence from a number of witnesses, and involving an extensive record, are generally not fit for determination in this manner. Conversely, cases driven by documents, with few witnesses, and limited contentious factual issues are appropriate candidates for summary judgment.

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

B. *Cour d'appel de l'Ontario, 2011 ONCA 764, 108 O.R. (3d) 1*

[15] La Cour d'appel a entendu en même temps l'appel interjeté par M. Hryniak, l'appel connexe contre Bruno Appliance et trois autres affaires dont notre Cour n'est pas saisie. C'était la première occasion pour la Cour d'appel d'examiner la nouvelle règle 20.

[16] La Cour d'appel a énoncé un critère préliminaire applicable pour déterminer dans quelles circonstances un juge saisi d'une requête peut exercer les nouveaux pouvoirs en matière de preuve prévus au par. 20.04(2.1) des Règles pour rendre un jugement sommaire en vertu de l'al. 20.04(2)a). Selon ce critère, « l'intérêt de la justice » exige que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives sur une requête en jugement sommaire. Le juge saisi de la requête doit déterminer si les avantages qu'offre la tenue d'un procès, notamment la possibilité d'entendre et d'observer les témoins, de faire présenter les éléments de preuve sous forme de récit et de participer soi-même à la recherche des faits, sont nécessaires pour apprécier pleinement la preuve au dossier.

[17] Selon la Cour d'appel, il ne convient pas en général de trancher de cette manière les affaires qui exigent du tribunal qu'il tire de multiples conclusions de fait, dans lesquelles plusieurs témoins ont fait des dépositions contradictoires et dont le dossier est volumineux. À l'inverse, les affaires qui se prêtent bien au jugement sommaire sont celles dans lesquelles les documents occupent une place prépondérante; il y a peu de témoins et les questions de fait litigieuses sont limitées.

[18] La Cour d'appel a conseillé aux juges saisis d'une requête d'exercer le pouvoir d'entendre des témoignages oraux, aux termes du par. 20.04(2.2) des Règles, et de n'entendre qu'un nombre restreint de témoins sur des questions distinctes qui sont déterminantes pour l'issue de l'affaire.

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

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

III. Outline

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

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

IV. Analysis

A. *Access to Civil Justice: A Necessary Culture Shift*

[23] This appeal concerns the values and choices underlying our civil justice system, and the ability

[19] La Cour d'appel a conclu que l'action intentée par le Groupe Mauldin était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux. L'action exigeait l'audition de nombreux témoins, l'examen de plusieurs thèses relatives à la responsabilité de multiples défendeurs, l'examen de questions importantes de crédibilité et il n'y avait pas d'éléments de preuve documentaire fiables. De plus, puisque MM. Hryniak et Peebles avaient présenté des demandes entre défendeurs et qu'un procès serait néanmoins nécessaire contre les autres défendeurs, le jugement sommaire ne favoriserait pas le principe d'un meilleur accès à la justice, la proportionnalité et les économies.

[20] Bien qu'elle ait conclu que la présente affaire ne se prêtait pas à un jugement sommaire, la Cour d'appel était convaincue que le dossier étayait la conclusion selon laquelle M. Hryniak avait commis le délit de fraude civile à l'endroit du Groupe Mauldin et elle a par conséquent rejeté l'appel de M. Hryniak.

III. Aperçu

[21] Pour établir les principes généraux applicables en matière de jugement sommaire, je me pencherai d'abord sur les valeurs qui sous-tendent l'accès expéditif, abordable et équitable à la justice. J'examinerai ensuite de façon générale le rôle de la requête en jugement sommaire et, plus particulièrement, l'interprétation de la règle 20. J'examinerai alors les outils judiciaires précis de gestion des risques posés par la requête en jugement sommaire.

[22] Enfin, j'examinerai la norme de contrôle applicable et la question de savoir s'il y avait lieu de rendre un jugement sommaire en faveur des intimés.

IV. Analyse

A. *Accès au système de justice civile : un virage culturel nécessaire*

[23] Le présent pourvoi traite des valeurs et des choix à la base de notre système de justice

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of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

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

[25] Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great,

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

2 In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top 10 countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).

civile, ainsi que de la faculté, pour les Canadiens ordinaires, d'avoir accès à ce système. Notre système de justice civile repose sur le principe que le processus décisionnel doit être juste et équitable. Ce principe ne souffre aucun compromis.

[24] Or, les formalités excessives et les procès interminables occasionnant des dépenses et des délais inutiles peuvent *faire obstacle* au règlement juste et équitable des litiges. La tenue d'un procès complet est devenue largement illusoire parce que, sans une contribution financière de l'État[1], les Canadiens ordinaires n'ont pas les moyens d'avoir accès au règlement judiciaire des litiges civils[2]. Les coûts et les délais associés au processus traditionnel font en sorte que, comme l'a mentionné l'avocat de l'intervenante Advocates' Society (dans *Bruno Appliance*) à l'audition du présent pourvoi, le procès prive les gens ordinaires de la possibilité de faire trancher le litige. Alors que l'instruction d'une action en justice est depuis longtemps considérée comme une mesure de dernier recours, d'autres mécanismes de règlement des litiges, comme la médiation et la transaction, sont davantage susceptibles de donner des résultats justes et équitables lorsque la décision judiciaire demeure une solution de rechange réaliste.

[25] Le règlement expéditif des litiges par les tribunaux permet aux personnes concernées d'aller de l'avant. Toutefois, lorsque les coûts et les délais

1 Par exemple, l'État peut accorder des fonds dans des cas de protection de l'enfance à la suite d'ordonnances fondées sur l'arrêt *G. (J.)* même lorsque l'aide juridique n'est pas offerte (voir *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46), ou encore dans des cas où certains droits des minorités sont en jeu (voir le Programme d'appui aux droits linguistiques).

2 Dans l'édition de 2011 du *Rule of Law Index* de M. D. Agrast, J. C. Botero et A. Ponce, publié par le World Justice Project, le Canada se classait au 9e rang parmi 12 pays de l'Europe et de l'Amérique du Nord au chapitre de l'accès à la justice. Bien que le Canada se soit classé parmi les 10 premiers pays au monde dans quatre catégories liées à la primauté du droit (pouvoirs limités du gouvernement, maintien de l'ordre et de la sécurité, transparence du gouvernement et système de justice pénale efficace), il a enregistré ses résultats les plus faibles dans la catégorie de l'accès au système de justice civile. Ce classement [TRADUCTION] « s'explique en partie par les failles relevées dans l'accessibilité économique des conseils juridiques et des services de représentation ainsi que par la longue durée des instances civiles » (p. 23).

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people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

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

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

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

[29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the

judiciaires deviennent excessifs, les gens cherchent d'autres solutions ou renoncent tout simplement à obtenir justice. Ils décident parfois de se représenter eux-mêmes, ce qui entraîne souvent d'autres difficultés en raison de leur méconnaissance du droit.

[26] Dans certains milieux, l'arbitrage privé est de plus en plus considéré comme une solution de rechange à un processus judiciaire lent. Or, ce n'est pas la solution : en l'absence d'un forum public accessible pour faire trancher les litiges, la primauté du droit est compromise et l'évolution de la common law, freinée.

[27] Les solutions de rechange au règlement des différents recueillent de plus en plus d'appuis et il se dégage un consensus sur le fait que l'équilibre traditionnel entre les longues procédures préalables au procès et le procès conventionnel ne correspond plus à la réalité actuelle et doit être rajusté. L'atteinte d'un juste équilibre exige la mise en place de procédures de règlement des litiges simplifiées et proportionnées, et influe sur le rôle des avocats et des juges. Il faut reconnaître par cet équilibre qu'un processus peut être juste et équitable sans entraîner les dépenses et les délais propres au procès, et que les autres modèles de règlement des litiges sont aussi légitimes que le procès conventionnel.

[28] Un virage culturel s'impose. L'objectif principal demeure le même : une procédure équitable qui aboutit au règlement juste des litiges. Une procédure juste et équitable doit permettre au juge de dégager les faits nécessaires au règlement du litige et d'appliquer les principes juridiques pertinents aux faits établis. Or, cette procédure reste illusoire si elle n'est pas également accessible — soit proportionnée, expéditive et abordable. Le principe de la proportionnalité veut que le meilleur forum pour régler un litige ne soit pas toujours celui dont la procédure est la plus laborieuse.

[29] De toute évidence, il existe toujours un certain tiraillement entre l'accessibilité et la fonction de recherche de la vérité, mais, tout comme l'on ne s'attend pas à la tenue d'un procès avec jury dans le cas d'une contravention de stationnement contestée, les procédures en place pour trancher des

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nature of the dispute and the interests involved, then it will not achieve a fair and just result.

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

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

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

[32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks,

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

litiges civils doivent être adaptées à la nature de la demande. Si la procédure est disproportionnée par rapport à la nature du litige et aux intérêts en jeu, elle n'aboutira pas à un résultat juste et équitable.

[30] Le principe de la proportionnalité trouve aujourd'hui son expression dans les règles de procédure de nombreuses provinces et peut constituer la pierre d'assise de l'accès au système de justice civile[3]. Par exemple, les par. 1.04(1) et (1.1) des *Règles* de l'Ontario prévoient ce qui suit :

1.04 (1) Les présentes règles doivent recevoir une interprétation large afin d'assurer la résolution équitable sur le fond de chaque instance civile, de la façon la plus expéditive et la moins onéreuse.

(1.1) Lorsqu'il applique les présentes règles, le tribunal rend des ordonnances et donne des directives qui sont proportionnées à l'importance et au degré de complexité des questions en litige ainsi qu'au montant en jeu dans l'instance.

[31] Même si la proportionnalité n'est pas expressément codifiée, l'application de règles de procédure qui font intervenir un pouvoir discrétionnaire [TRADUCTION] « englobe [. . .] un principe sous-jacent de proportionnalité, selon lequel il faut tenir compte de l'opportunité de la procédure, de son coût, de son incidence sur le litige et de sa célérité, selon la nature et la complexité du litige » : *Szeto c. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, par. 53.

[32] Ce virage culturel oblige les juges à gérer activement le processus judiciaire dans le respect du principe de la proportionnalité. La requête en jugement sommaire peut permettre d'économiser temps et ressources, mais, à l'instar de la plupart des procédures préalables au procès, elle peut ralentir l'instance si elle est utilisée de manière

3 Ce principe a été expressément codifié en Colombie-Britannique, en Ontario et au Québec : *Supreme Court Civil Rules*, B.C. Reg. 168/2009, par. 1-3(2); *Règles* de l'Ontario, par. 1.04(1.1); et *Code de procédure civile*, L.R.Q., ch. C-25, art. 4.2. Certaines dispositions des règles de procédure de l'Alberta et de la Nouvelle-Écosse ont également été considérées comme illustrant la proportionnalité : *Medicine Shoppe Canada Inc. c. Devchand*, 2012 ABQB 375, 541 A.R. 312, par. 11; *Saturley c. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371, par. 12.

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counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

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

B. *Summary Judgment Motions*

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

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

4 Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 *et seq.* of the *Code of Civil Procedure*. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII). Moreover, s. 165(4) of the *Code* provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".

inappropriée. Bien que les juges puissent contribuer à la réduction de ce risque, et devraient le faire, les avocats doivent, conformément aux traditions de leur profession, agir de manière à faciliter plutôt qu'à empêcher l'accès à la justice. Ils devraient ainsi tenir compte des moyens limités de leurs clients et de la nature de leur dossier et élaborer des moyens proportionnés d'arriver à un résultat juste et équitable.

[33] Une demande complexe peut comporter un dossier volumineux et exiger un investissement important en temps et en argent. Toutefois, la proportionnalité est forcément de nature comparative; même les procédures lentes et coûteuses peuvent s'avérer proportionnées lorsqu'elles constituent la solution la plus rapide et la plus efficace. La question est de savoir si les frais et les délais additionnels occasionnés par la recherche des faits lors du procès sont essentiels à un processus décisionnel juste et équitable.

B. *Requêtes en jugement sommaire*

[34] La requête en jugement sommaire constitue un outil important pour faciliter l'accès à la justice parce qu'elle peut offrir une solution de rechange au procès complet plus abordable et plus rapide que celui-ci. À l'exception du Québec, toutes les provinces prévoient dans leurs règles de procédure civile respectives des dispositions relatives au jugement sommaire[4]. En règle générale, le tribunal peut rendre un jugement sommaire si aucune véritable question litigieuse ne requiert un procès.

[35] La règle 20 énonce la procédure de jugement sommaire à suivre en Ontario; une partie peut demander, par voie de requête, un jugement sommaire accueillant ou rejetant en totalité ou en partie la demande. Bien que la règle 20 de l'Ontario

4 Le Québec dispose d'un mécanisme procédural pour écarter sommairement les demandes abusives : voir les art. 54.1 et suiv. du *Code de procédure civile*. Bien qu'il ait une portée plus circonscrite à première vue, ce mécanisme a été assimilé au jugement sommaire : voir *Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII). De plus, selon le par. 165(4) du *Code*, le défendeur peut solliciter le rejet de l'action si la demande « n'est pas fondée en droit ».

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and principles underlying its interpretation are of general application.

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

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

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

aille en quelque sorte plus loin que d'autres règles applicables ailleurs au pays, les valeurs et les principes sur lesquels repose son interprétation sont d'application générale.

[36] Afin d'améliorer l'accès à la justice, la règle 20 a été modifiée en 2010 suivant les recommandations formulées dans le rapport Osborne. Ces réformes incarnent l'évolution des règles régissant les jugements sommaires, lesquelles passent du statut d'outil à usage très restreint visant à écarter les demandes ou défenses manifestement dénuées de fondement à celui de solution de rechange légitime pour trancher et régler les litiges d'ordre juridique.

[37] Les premières règles régissant les jugements sommaires avaient une portée assez limitée et seul pouvait y avoir recours le demandeur dont la réclamation visait une créance ou des dommages-intérêts conventionnels et à laquelle aucune véritable défense ne pouvait être opposée[5]. La procédure de jugement sommaire avait pour raison d'être de prévenir le recours injustifié au procès complet dans un cas manifeste.

[38] En 1985, ce qui était alors la nouvelle règle 20 a permis tant au demandeur qu'au défendeur de solliciter un jugement sommaire et a élargi l'éventail des affaires pouvant être tranchées sur requête en ce sens. Au départ, les dispositions de cette règle étaient interprétées libéralement, en conformité avec l'objet des modifications apportées à la règle[6]. Toutefois, les cours d'appel ont limité les pouvoirs des juges et circonscrit en fait l'objet des requêtes en jugement sommaire pour simplement faire en sorte que « les demandes qui n'ont aucune chance de succès soient écartées tôt dans le processus »[7].

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

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

7 *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 10.

5 Pour un examen approfondi de l'historique du jugement sommaire en Ontario, voir T. Walsh et L. Posloski, « Establishing a Workable Test for Summary Judgment : Are We There Yet? », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation 2013* (2013), 419, p. 422-432.

6 Walsh et Posloski, p. 426; voir, p. ex., *Vaughan c. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242 (H.C.J.).

7 *Canada (Procureur général) c. Lameman*, 2008 CSC 14, [2008] 1 R.C.S. 372, par. 10.

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

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

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

[42] Rule 20.04 now reads in part:[8]

20.04 . . .

(2) [General] The court shall grant summary judgment if,

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

[39] Le gouvernement de l'Ontario a demandé à l'ancien juge en chef adjoint de l'Ontario, M. Coulter Osborne, c.r., d'envisager des réformes pour rendre le système de justice civile ontarien plus accessible et abordable, ce qui a mené au rapport du Projet de réforme du système de justice civile. Le rapport Osborne conclut que peu de requêtes en jugement sommaire ont été présentées et que si la règle du jugement sommaire devait donner les résultats escomptés, il fallait infirmer les arrêts des cours d'appel qui en avaient restreint la portée et l'utilité (p. 35). L'auteur du rapport recommande entre autres choses que l'on rende plus accessible le recours à la procédure de jugement sommaire, que l'on accorde au juge saisi d'une requête en jugement sommaire le pouvoir d'apprécier la preuve, et que l'on confère au juge le pouvoir d'ordonner la présentation de témoignages oraux (p. 35-36).

[40] L'auteur du rapport recommande également l'adoption d'une procédure de procès sommaire semblable à celle appliquée en Colombie-Britannique (p. 37). Cette recommandation particulière n'a pas été adoptée et le législateur a choisi de maintenir la procédure de jugement sommaire comme procédure accessible.

[41] Bon nombre des recommandations du rapport Osborne ont été adoptées et mises en œuvre en 2010. Comme je l'ai déjà mentionné, ces modifications codifient le principe de la proportionnalité et prévoient un processus décisionnel efficace dans les cas où la tenue d'un procès conventionnel n'est pas nécessaire. Les juges disposent ainsi de nouveaux outils importants qui leur permettent de trancher plus de litiges sur requête en jugement sommaire et qui atténuent les risques lorsque pareille requête ne permet pas de trancher l'affaire dans son ensemble.

[42] Aujourd'hui, la règle 20.04 prévoit notamment ce qui suit[8] :

20.04 . . .

(2) [Dispositions générales] Le tribunal rend un jugement sommaire si, selon le cas :

8 Le texte intégral de la règle 20 figure en annexe.

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

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

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

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

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

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

a) il est convaincu qu'une demande ou une défense ne soulève pas de véritable question litigieuse nécessitant la tenue d'une instruction;

b) il est convaincu qu'il est approprié de rendre un jugement sommaire et les parties sont d'accord pour que tout ou partie de la demande soit décidé par jugement sommaire.

(2.1) [Pouvoirs] Lorsqu'il décide, aux termes de l'alinéa (2)a), s'il existe une véritable question litigieuse nécessitant la tenue d'une instruction, le tribunal tient compte des éléments de preuve présentés par les parties et, si la décision doit être rendue par un juge, ce dernier peut, à cette fin, exercer l'un ou l'autre des pouvoirs suivants, à moins qu'il ne soit dans l'intérêt de la justice de ne les exercer que lors d'un procès :

1. Apprécier la preuve.

2. Évaluer la crédibilité d'un déposant.

3. Tirer une conclusion raisonnable de la preuve.

(2.2) [Témoignage oral (mini-procès)] Un juge peut, dans le but d'exercer les pouvoirs prévus au paragraphe (2.1), ordonner que des témoignages oraux soient présentés par une ou plusieurs parties, avec ou sans limite de temps pour leur présentation.

[43] Les modifications apportées en Ontario ont eu pour effet de modifier le critère applicable aux jugements sommaires en remplaçant la question de savoir si la cause ne « soulève pas de question litigieuse » par celle de savoir si la cause soulève une « véritable question litigieuse nécessitant la tenue d'une instruction ». Il appert de la nouvelle règle, qui prévoit des pouvoirs accrus en matière de recherche des faits, que la tenue d'un procès ne constitue pas la procédure par défaut. En outre, afin de ne pas dissuader les parties de recourir à cette procédure, la nouvelle règle a eu pour effet de supprimer la présomption suivant laquelle l'auteur de la requête débouté devait être condamné aux dépens d'indemnisation substantielle.

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

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

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

(1) When Is There No Genuine Issue Requiring a Trial?

[47] Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine

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

[44] Les nouveaux pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles augmentent le nombre d'affaires qui ne soulèvent pas de véritable question litigieuse nécessitant la tenue d'un procès en permettant au juge saisi d'une requête d'apprécier la preuve, d'évaluer la crédibilité et de tirer des conclusions raisonnables[9].

[45] Ces nouveaux pouvoirs en matière de recherche des faits ont un caractère discrétionnaire et sont présumés pouvoir être exercés; ils peuvent l'être *à moins* qu'il ne soit dans l'intérêt de la justice de ne les exercer que lors d'un procès; par. 20.04(2.1) des Règles. Par conséquent, les modifications font en sorte que la règle 20 ne soit plus seulement un moyen d'écarter des demandes sans fondement mais qu'elle devienne un important modèle de rechange pour les décisions.

[46] Premièrement, j'examinerai les circonstances où le tribunal peut rendre un jugement sommaire en raison de l'absence de « véritable question litigieuse nécessitant la tenue d'une instruction » (al. 20.04(2)a) des Règles). Deuxièmement, j'examinerai les circonstances dans lesquelles il est contraire à « l'intérêt de la justice » d'exercer les nouveaux pouvoirs en matière de recherche des faits prévus au par. 20.04(2.1) des Règles lors de l'audition d'une requête en jugement sommaire. Troisièmement, j'examinerai le pouvoir d'ordonner la présentation de témoignages oraux et, enfin, j'énoncerai la procédure à suivre dans le cas d'une requête en jugement sommaire.

(1) Dans quels cas n'y a-t-il aucune véritable question litigieuse nécessitant la tenue d'un procès?

[47] La requête en jugement sommaire doit être accueillie dans tous les cas où il n'existe pas de véritable question litigieuse nécessitant la tenue

9 Comme l'a expliqué en détail la Cour d'appel, les pouvoirs prévus au par. 20.04(2.1) des Règles visaient explicitement à infirmer plusieurs arrêts de longue date des cours d'appel qui avaient restreint considérablement le recours à la règle; *Aguonie c. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Dawson c. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (C.A. Ont.).

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whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

[48] The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.

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

[50] These principles are interconnected and all speak to whether summary judgment will provide

d'un procès (al. 20.04(2)a) des Règles). Pour exposer la façon de déterminer l'existence d'une telle question, je m'attache aux objectifs et aux principes sous-jacents à la décision d'accueillir ou non une requête en jugement sommaire. Une telle façon de faire permet l'évolution naturelle de l'application de la règle, sinon les catégories de cas seront considérées comme des règles ou des conditions préalables qui risquent de nuire à la métamorphose du système en décourageant le recours au jugement sommaire.

[48] La Cour d'appel n'a pas explicitement déterminé les circonstances dans lesquelles il existe une véritable question litigieuse nécessitant la tenue d'un procès. Or, en se demandant si l'exercice des nouveaux pouvoirs en matière de recherche des faits est contraire à l'intérêt de la justice, elle a laissé entendre qu'il est le plus souvent indiqué de rendre un jugement sommaire dans des affaires où les documents occupent une place prépondérante, où il y a peu de témoins et de questions de fait litigieuses, ou encore des affaires dans lesquelles il est possible de compléter le dossier en présentant des témoignages oraux sur des points distincts. Voilà autant d'observations utiles qui, comme la Cour d'appel l'a elle-même reconnu, ne devraient cependant pas être considérées comme circonscrivant des catégories étanches de cas où il convient ou non de rendre un jugement sommaire. Par exemple, malgré la complexité de la présente affaire et son dossier volumineux, la Cour d'appel a finalement reconnu l'absence de question litigieuse nécessitant la tenue d'un procès.

[49] Il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès lorsque le juge est en mesure de statuer justement et équitablement au fond sur une requête en jugement sommaire. Ce sera le cas lorsque la procédure de jugement sommaire (1) permet au juge de tirer les conclusions de fait nécessaires, (2) lui permet d'appliquer les règles de droit aux faits et (3) constitue un moyen proportionné, plus expéditif et moins coûteux d'arriver à un résultat juste.

[50] Ces principes sont interreliés et reviennent tous à se demander si le jugement sommaire

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

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

(2) The Interest of Justice

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

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

[54] The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of

constituera une décision juste et équitable. Lorsqu'une requête en jugement sommaire permet au juge d'établir les faits nécessaires et de régler le litige, la tenue d'un procès ne serait généralement ni proportionnée, ni expéditive, ni économique. Dans le même ordre d'idées, un processus qui ne permet pas au juge de tirer ses conclusions avec confiance ne saurait jamais constituer un moyen proportionné de régler un litige. Il importe de répéter que la norme d'équité consiste à déterminer non pas si la procédure visée est aussi exhaustive que la tenue d'un procès, mais si elle permet au juge de pouvoir, avec confiance, établir les faits nécessaires et appliquer les principes juridiques pertinents pour régler le litige.

[51] Souvent, il est possible de dissiper les doutes concernant la crédibilité ou d'éclaircir la preuve par la présentation de témoignages oraux au moment de l'audition de la requête elle-même. Toutefois, il peut y avoir des cas où, vu la nature des questions soulevées et la preuve à produire, le juge ne peut tirer les conclusions de fait nécessaires, ni appliquer les principes juridiques qui permettent d'arriver à une décision juste et équitable.

(2) L'intérêt de la justice

[52] Lors de l'audition d'une requête en jugement sommaire, le juge peut exercer les pouvoirs accrus en matière de recherche des faits que lui confère le par. 20.04(2.1) des Règles, à moins qu'il ne soit dans « l'intérêt de la justice » de ne les exercer que lors d'un procès. L'expression « intérêt de la justice » n'est pas définie dans les Règles.

[53] Pour déterminer s'il était dans l'intérêt de la justice que le juge saisi d'une requête exerce ses nouveaux pouvoirs, la Cour d'appel a obligé ce dernier à se poser la question suivante : [TRADUCTION] « . . . la pleine appréciation de la preuve et des questions litigieuses qui s'impose pour tirer des conclusions décisives peut-elle se faire par voie de jugement sommaire ou uniquement au moyen d'un procès? » (par. 50).

[54] La Cour d'appel a recensé les avantages de la tenue d'un procès qui contribuent à cette pleine

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the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

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

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

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

appréciation de la preuve, à savoir l'exposé que l'avocat peut présenter lors d'un procès, la possibilité pour les témoins de s'exprimer dans leurs propres mots et l'aide des avocats pour passer en revue les éléments de preuve (par. 54).

[55] Les intimés ainsi que les intervenants, soit l'Association du Barreau canadien, le procureur général de l'Ontario et l'Advocates' Society, plaident que l'importance accordée par la Cour d'appel aux vertus du procès traditionnel est injustifiée et indûment restrictive. De plus, selon certains intervenants, cette approche peut donner lieu à la création de catégories de cas qui ne se prêtent pas à un jugement sommaire, ce qui aura pour effet de freiner l'évolution de la procédure de jugement sommaire.

[56] Je conviens certes que le juge saisi d'une requête doit avoir une connaissance de la preuve nécessaire pour tirer des conclusions décisives, mais le procès n'est pas le seul moyen d'acquérir cette connaissance. Mettre l'accent sur la quantité et la nature des éléments de preuve qui peuvent être présentés au procès, plutôt que sur la question de savoir si la tenue d'un procès est « nécessaire », comme le prévoit la règle, pourrait amener le juge à fixer un critère trop exigeant. L'intérêt de la justice ne saurait être limité aux caractéristiques avantageuses du procès conventionnel et il doit tenir compte de la proportionnalité, de la célérité et de l'accessibilité économique. Sinon, le processus décisionnel permis par les nouveaux pouvoirs — ainsi que l'objet des modifications — seraient contrecarrés.

[57] Dans le cadre de la procédure par jugement sommaire, il n'est pas nécessaire que la preuve soit la même que celle présentée lors d'un procès, mais elle doit être telle que le juge soit confiant de pouvoir résoudre équitablement le litige. La preuve documentaire, surtout si elle est complétée au moyen des nouveaux outils de recherche des faits, y compris des témoignages oraux, est souvent suffisante pour trancher des questions importantes de manière juste et équitable. L'exercice des pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles peut déboucher sur une recherche des faits tout aussi valable, voire plus brève.

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

[58] Cette analyse de l'intérêt de la justice est, de par sa nature, comparative. La proportionnalité se mesure à l'aune du procès complet. Le juge saisi d'une requête peut devoir évaluer l'efficacité relative de la procédure de jugement sommaire par rapport au procès. Cette analyse impliquerait une comparaison, entre autres facteurs, du coût et de la rapidité des deux procédures. (La procédure de jugement sommaire peut s'avérer onéreuse et prendre beaucoup de temps, comme en l'espèce, mais la tenue d'un procès peut être encore plus coûteuse et plus lente.) L'analyse peut impliquer aussi une comparaison de la preuve qui sera présentée au procès et de la preuve qui accompagne la requête, ainsi que de la possibilité d'apprécier équitablement la preuve. (Même si la preuve présentée avec la requête est limitée, il n'y a peut-être aucune raison de croire qu'une meilleure preuve sera présentée lors du procès.)

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

[59] En pratique, la question de savoir si l'exercice des nouveaux pouvoirs en matière de recherche des faits est contraire à « l'intérêt de la justice » équivaudra souvent à se demander s'il existe une « véritable question litigieuse nécessitant la tenue d'une instruction ». Logiquement, lorsqu'il permettrait au juge de trancher une demande de manière juste et équitable, l'exercice des nouveaux pouvoirs serait généralement dans l'intérêt de la justice. Le caractère juste et équitable de la décision dépend de la nature des questions litigieuses, de la nature et de la valeur probante de la preuve, ainsi que de ce qui constitue la procédure proportionnée.

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

[60] L'analyse de « l'intérêt de la justice » va plus loin et tient également compte des répercussions de la requête dans le contexte du litige dans son ensemble. Par exemple, si certaines des demandes contre certaines des parties seront de toute façon tranchées à l'issue d'un procès, il peut ne pas être dans l'intérêt de la justice d'exercer les nouveaux pouvoirs en matière de recherche des faits pour rendre un jugement sommaire contre un seul défendeur. Un tel jugement sommaire partiel risque d'entraîner des procédures répétitives ou de mener à des conclusions de fait contradictoires; par conséquent, l'exercice de ces pouvoirs n'est peut-être pas dans

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access to justice, and be the most proportionate, timely and cost effective approach.

(3) The Power to Hear Oral Evidence

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

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

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

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

[63] This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard

l'intérêt de la justice. Par contre, le règlement d'une demande importante visant une partie clé pourrait favoriser nettement l'accès à la justice et constituer la mesure la plus proportionnée, expéditive et économique.

(3) Le pouvoir d'entendre des témoignages oraux

[61] Le paragraphe 20.04(2.2) des Règles confère au juge saisi d'une requête le pouvoir d'entendre des témoignages oraux pour tirer plus facilement des conclusions aux termes du par. 20.04(2.1). La décision d'autoriser la présentation d'un témoignage oral appartient au juge puisque, comme l'a souligné la Cour d'appel, [TRADUCTION] « c'est le juge saisi de la requête, et non les avocats, qui peut exercer un contrôle sur l'étendue de la preuve à présenter et sur les questions auxquelles se rapporte celle-ci » (par. 60).

[62] Selon la Cour d'appel, le juge saisi d'une requête ne devrait exercer ce pouvoir que lorsque

[TRADUCTION]

> (1) il est possible d'entendre, dans un délai raisonnable, les témoignages oraux d'un nombre restreint de témoins;
>
> (2) toute question à traiter par la présentation d'un témoignage oral aura vraisemblablement une incidence importante sur l'accueil ou le rejet de la requête en jugement sommaire; et
>
> (3) une telle question est précise et distincte — c'est-à-dire que la question peut être tranchée séparément et n'est pas liée aux autres questions sur lesquelles porte la requête. [par. 103]

Ces indications sont utiles pour assurer que l'audition des témoignages oraux ne devient pas ingérable; toutefois, comme l'a reconnu la Cour d'appel, ces règles ne sont pas absolues.

[63] Ce pouvoir devrait être exercé lorsqu'il permet au juge de rendre une décision juste et équitable sur le fond et que son exercice constitue la marche à suivre proportionnée. Ce sera plus probablement le cas lorsque le témoignage oral requis est succinct, mais dans certains cas, la requête en jugement

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on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

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

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

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

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

sommaire comportera l'audition de longs témoignages oraux, ce qui permettra d'éviter des procès plus longs et plus complexes sans compromettre l'équité de la procédure.

[64] La partie qui cherche à présenter des témoignages oraux doit être prête, d'une part, à démontrer en quoi ils aideraient le juge saisi de la requête à apprécier la preuve, à évaluer la crédibilité des déposants ou à tirer des conclusions de la preuve et, d'autre part, à fournir une déclaration anticipée ou un autre exposé de la preuve proposée afin de permettre au juge d'établir la portée des témoignages oraux.

[65] Ainsi, le pouvoir d'ordonner la présentation de témoignages oraux devrait servir à favoriser le règlement juste et équitable du litige compte tenu des principes de proportionnalité, de célérité et d'accessibilité économique. Lorsqu'il établit la nature et l'étendue des témoignages oraux qui seront entendus, le juge saisi de la requête devrait s'inspirer de ces principes et se rappeler que ce processus ne constitue pas un procès complet sur le fond mais qu'il vise plutôt à déterminer s'il existe une véritable question litigieuse nécessitant la tenue d'un procès.

(4) Marche à suivre pour trancher une requête en jugement sommaire

[66] Lors de l'audition d'une requête en jugement sommaire aux termes de la règle 20.04, le juge devrait en premier lieu décider, compte tenu uniquement de la preuve dont il dispose et *sans* recourir aux nouveaux pouvoirs en matière de recherche des faits, s'il existe une véritable question litigieuse nécessitant la tenue d'un procès. Il n'y aura pas de question de ce genre si la procédure de jugement sommaire lui fournit la preuve nécessaire pour trancher justement et équitablement le litige et constitue une procédure expéditive, abordable et proportionnée selon l'al. 20.04(2)a) des Règles. S'il semble y avoir une véritable question nécessitant la tenue d'un procès, le juge devrait alors déterminer si l'exercice des nouveaux pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles écartera la nécessité d'un procès. Le juge peut exercer ces

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serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

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

[68] While summary judgment *must* be granted if there is no genuine issue requiring a trial,[10] the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary.[11] The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion

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

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

pouvoirs à son gré, pourvu que leur exercice ne soit pas contraire à l'intérêt de la justice. Leur exercice ne sera pas contraire à l'intérêt de la justice s'il aboutit à un résultat juste et équitable et permettra d'atteindre les objectifs de célérité, d'accessibilité économique et de proportionnalité, compte tenu du litige dans son ensemble.

[67] En cherchant d'abord à déterminer si l'exercice des pouvoirs prévus au par. 20.04(2.1) des Règles permettra de régler le litige par voie de jugement sommaire, avant de se demander s'il est dans l'intérêt de la justice que ces pouvoirs ne soient exercés que lors d'un procès, on souligne le fait que ces pouvoirs peuvent être exercés en règle générale, plutôt qu'à titre exceptionnel, conformément à l'objectif d'un règlement des litiges proportionné, économique et expéditif. De même, lorsqu'on détermine en premier lieu les conséquences du recours à ces nouveaux pouvoirs, les avantages qu'offre leur exercice apparaissent plus clairement. Cette façon de procéder aidera à déterminer s'il est dans l'intérêt de la justice que ces pouvoirs ne soient exercés que lors d'un procès.

[68] Bien qu'un jugement sommaire *doive* être rendu en l'absence d'une véritable question litigieuse nécessitant la tenue d'un procès[10], la décision d'exercer le pouvoir élargi en matière de recherche des faits ou le pouvoir d'ordonner la présentation de témoignages oraux est de nature discrétionnaire[11]. Ce caractère discrétionnaire de la décision du juge lui laisse une certaine latitude lorsqu'il décide de la marche à suivre. De plus, la nature discrétionnaire de cette décision peut servir de soupape dans les cas où l'exercice de ces pouvoirs serait de toute évidence inapproprié. Le risque de recours abusif à des requêtes en jugement sommaire clairement dénuées

10 Paragraphe 20.04(2) des Règles : « Le tribunal rend un jugement sommaire si, selon le cas : a) il est convaincu qu'une demande ou une défense ne soulève pas de véritable question litigieuse nécessitant la tenue d'une instruction . . . »

11 Paragraphe 20.04(2.1) des Règles : « Lorsqu'il décide [. . .] s'il existe une véritable question litigieuse nécessitant la tenue d'une instruction [. . .] et, si la décision doit être rendue par un juge, ce dernier peut, à cette fin, exercer l'un ou l'autre des pouvoirs suivants [. . .] 1. Apprécier la preuve. 2. Évaluer la crédibilité d'un déposant. 3. Tirer une conclusion raisonnable de la preuve. » Paragraphe 20.04(2.2) des Règles : « Un juge peut [. . .] ordonner que des témoignages oraux soient présentés . . . »

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to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

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

(1) Controlling the Scope of a Summary Judgment Motion

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

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

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

[72] I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity

de fondement comme tactique pour entraîner des frais et des retards est toujours présent. Dans ces cas, le juge peut refuser d'exercer son pouvoir discrétionnaire et rejeter la requête en jugement sommaire sans procéder à l'analyse complète exposée ci-dessus.

C. *Outils permettant d'optimiser l'efficacité de la requête en jugement sommaire*

(1) Circonscrire la portée de la requête en jugement sommaire

[69] Les *Règles* de l'Ontario et la compétence inhérente d'une cour supérieure permettent au juge saisi d'une requête d'intervenir rapidement après la présentation de la requête afin de limiter la taille du dossier, et de continuer de jouer un rôle actif si la requête ne permet pas de trancher tout le litige.

[70] Les Règles prévoient l'intervention hâtive du tribunal par l'application de la règle 1.05, qui permet de lui demander par requête des directives pour gérer les délais et les dépens afférents à une requête en jugement sommaire. Le juge peut ainsi donner des directives relatives aux délais de dépôt des affidavits, à la durée des contre-interrogatoires et à la nature et la quantité des éléments de preuve à déposer. Toutefois, le juge doit également prendre garde d'imposer des mesures administratives qui entraînent des frais supplémentaires non nécessaires.

[71] La requête en jugement sommaire ne nécessite pas dans tous les cas une demande de directives. Toutefois, l'omission de présenter une telle demande lorsqu'il était évident que le dossier serait complexe ou volumineux peut être prise en compte au moment d'attribuer des dépens en application de l'al. 20.06a) des Règles. Conformément au principe de la proportionnalité, le juge qui instruit la requête en vue d'obtenir des directives devrait généralement être saisi de la requête en jugement sommaire elle-même pour assurer que la connaissance qu'il a acquise du dossier ne serve pas à rien.

[72] Je suis d'accord avec la Cour d'appel (par. 58 et 258) pour dire que la requête en vue d'obtenir des directives donne également à l'intimé l'occasion de

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to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.

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

(2) Salvaging a Failed Summary Judgment Motion

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

[75] Rules 20.05(1) and (2) provide in part:

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

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just . . . .

[76] Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the

demander la suspension ou le rejet d'une requête en jugement sommaire prématurée ou irrégulière. Une telle demande peut permettre de contester des requêtes longues et complexes, surtout lorsque celles-ci ne feraient pas progresser suffisamment l'instance ou ne favoriseraient pas les objectifs de proportionnalité, de célérité et d'accessibilité économique.

[73] La requête en jugement sommaire ne constituera pas toujours le moyen le plus proportionné de trancher une action en justice. Par exemple, il arrive qu'un court procès puisse avoir lieu tôt ou que les parties soient disposées à procéder par procès sommaire. Les avocats devraient toujours tenir compte de la procédure la plus proportionnée pour leur client et le dossier.

(2) Mettre à profit les éléments d'une requête en jugement sommaire rejetée

[74] Qu'elle soit rejetée ou même accueillie en partie, la requête en jugement sommaire occasionne des frais et des délais additionnels — parfois astronomiques. Le juge peut toutefois atténuer ce risque en exerçant la compétence inhérente du tribunal et les pouvoirs de gestion de l'instance prévus à la règle 20.05.

[75] Les paragraphes 20.05(1) et (2) des Règles prévoient notamment ce qui suit :

20.05 (1) Si le jugement sommaire est refusé ou n'est accordé qu'en partie, le tribunal peut rendre une ordonnance dans laquelle il précise les faits pertinents qui ne sont pas en litige et les questions qui doivent être instruites. Il peut également ordonner que l'action soit instruite de façon expéditive.

(2) Le tribunal qui ordonne l'instruction d'une action en vertu du paragraphe (1) peut donner les directives ou imposer les conditions qu'il estime justes . . .

[76] Les alinéas 20.05(2)a) à p) des Règles énumèrent plusieurs ordonnances précises de gestion de l'instance qui peuvent convenir. Le tribunal peut dresser un calendrier, établir un plan d'enquête préalable assorti de limites, fixer la date du procès, ordonner la consignation de la somme demandée ou le versement d'un cautionnement pour dépens. Le

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parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

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

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

> saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

[79] While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the

tribunal peut aussi ordonner la remise par les parties d'un résumé concis de leur déclaration préliminaire, la remise par les parties d'un résumé écrit de la déposition prévue d'un témoin, la limitation de la durée de tout interrogatoire oral d'un témoin au procès, ou la présentation par affidavit de tout ou partie de la déposition d'un témoin.

[77] Ces pouvoirs permettent au juge de mettre à profit les connaissances acquises lors de l'audition de la requête en jugement sommaire pour élaborer une procédure d'instruction de nature à régler le litige en tenant compte de la complexité et de l'importance de la question soulevée, de la somme en jeu et des efforts déployés lors de l'instruction de la requête rejetée. Le juge saisi de la requête devrait s'inspirer de la procédure d'instruction sommaire, en particulier lorsque les affidavits déposés serviraient de dépositions, sous réserve d'interrogatoires et de contre-interrogatoires d'une durée limitée. Bien que les Règles n'aient pas adopté le modèle de l'instruction sommaire recommandé dans le rapport Osborne, ce modèle est déjà prévu par les règles simplifiées ou peut être utilisé du consentement des parties. À mon avis, le modèle de l'instruction sommaire pourrait également s'appliquer si le juge exerce les vastes pouvoirs que lui confère le par. 20.05(2) des Règles.

[78] Le juge qui rejette une requête en jugement sommaire devrait également se saisir de l'instance à titre de juge du procès à moins que des raisons impérieuses l'en empêchent. Je suis d'accord avec le rapport Osborne pour dire que la gestion du litige par un seul fonctionnaire judiciaire

> permet à la cour d'économiser du temps étant donné que les parties n'ont pas à mettre un juge différent au fait chaque fois qu'un problème survient relativement à la cause. Elle peut également avoir un effet de modération sur le comportement des parties litigantes et des avocats, qui en viendront à prévoir la façon dont le fonctionnaire judiciaire affecté à la cause pourrait statuer sur une question donnée. [p. 105]

[79] Une telle approche risque de compliquer l'établissement du calendrier, dans la mesure où les pratiques actuelles en la matière empêchent de recourir de façon efficace et économique à la

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courts should be prepared to change their practices in order to facilitate access to justice.

D. *Standard of Review*

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

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

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

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

requête en jugement sommaire, mais les tribunaux devraient être disposés à modifier leurs habitudes afin de faciliter l'accès à la justice.

D. *Norme de contrôle*

[80] La Cour d'appel a conclu que le choix du critère à appliquer en matière de jugement sommaire — déterminer s'il existe une véritable question litigieuse nécessitant la tenue d'un procès — est une question de droit, susceptible de révision selon la norme de la décision correcte, alors que les conclusions de fait tirées par le juge saisi de la requête commandent la retenue.

[81] À mon avis, en l'absence d'une erreur de droit, l'exercice des pouvoirs que confère la nouvelle règle relative au jugement sommaire commande la retenue. Lorsque le juge saisi d'une requête exerce ses nouveaux pouvoirs en matière de recherche des faits, que lui confère le par. 20.04(2.1) des Règles, et détermine s'il existe une véritable question litigieuse nécessitant la tenue d'un procès, il s'agit d'une question mixte de fait et de droit. Lorsqu'il n'y a aucune erreur de principe isolable, les conclusions mixtes de fait et de droit ne doivent pas être infirmées en l'absence d'erreur manifeste et dominante : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 36.

[82] De même, la réponse à la question de savoir s'il est dans « l'intérêt de la justice » que le juge saisi d'une requête exerce les nouveaux pouvoirs en matière de recherche des faits prévus au par. 20.04(2.1) des Règles dépend de la preuve relative présentée lors de l'audition de la requête en jugement sommaire et au procès, de la nature, de l'envergure, de la complexité et du coût du litige, ainsi que d'autres facteurs contextuels. Cette décision constitue également une question mixte de fait et de droit qui commande la retenue.

[83] Pourvu qu'elle ne soit pas contraire à « l'intérêt de la justice », la décision du juge saisi d'une requête d'exercer les nouveaux pouvoirs est de nature discrétionnaire. Par conséquent, à moins que le juge ne se soit fondé sur des considérations erronées ou que sa décision soit erronée au point de créer une injustice, il n'y a pas lieu de modifier sa décision.

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

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

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

(1) The Tort of Civil Fraud

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

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

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

[88] In granting summary judgment to the Mauldin Group against Hryniak, the motion judge did not explicitly address the correct test for civil

[84] Évidemment, si le juge saisi d'une requête applique un mauvais principe de droit ou fait erreur relativement à une pure question de droit, comme les éléments dont le demandeur doit prouver l'existence pour établir sa cause d'action, la norme de contrôle applicable sera celle de la décision correcte : *Housen*, par. 8.

E. *Le juge saisi de la requête a-t-il eu tort de rendre un jugement sommaire?*

[85] Le juge saisi de la requête a rendu un jugement sommaire en faveur du Groupe Mauldin. Bien qu'elle ait conclu que l'action n'aurait pas dû être tranchée par jugement sommaire, la Cour d'appel a quand même rejeté l'appel. Selon M. Hryniak, la Cour d'appel a fait un [TRADUCTION] « revirement pour l'avenir » mais, vu ma conclusion selon laquelle le juge pouvait à bon droit trancher l'action par jugement sommaire, je n'ai pas à examiner plus à fond ces arguments. Pour les motifs qui suivent, je suis convaincue que le juge n'a pas eu tort de rendre un jugement sommaire.

(1) Le délit de fraude civile

[86] C'est une action pour fraude civile intentée contre M. Hryniak, M. Peebles et le cabinet Cassels Brock qui est à l'origine de la requête en jugement sommaire.

[87] Comme il est expliqué dans le pourvoi connexe *Bruno Appliance*, le délit de fraude civile comporte quatre éléments dont il faut prouver l'existence selon la prépondérance des probabilités : (1) une fausse déclaration du défendeur; (2) une certaine connaissance de la fausseté de la déclaration de la part du défendeur (connaissance ou insouciance); (3) le fait que la fausse déclaration a amené le demandeur à agir; (4) le fait que les actes du demandeur ont entraîné une perte.

(2) Existait-il une véritable question litigieuse nécessitant la tenue d'un procès?

[88] Le juge saisi de la requête n'a pas traité explicitement du critère qu'il convient d'appliquer à la fraude civile lorsqu'il a prononcé un jugement

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fraud but, like the Court of Appeal, I am satisfied that his findings support that result.

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

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

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

[92] The final requirement of civil fraud, loss, is clearly present. The Mauldin Group invested

sommaire en faveur du Groupe Mauldin contre M. Hryniak. Toutefois, à l'instar de la Cour d'appel, je suis convaincue que les conclusions du juge étayent ce résultat.

[89] Une fausse déclaration du défendeur constitue le premier élément de la fraude civile. La Cour d'appel partageait l'avis du juge que [TRADUCTION] « [s]ans aucun doute, le Groupe Mauldin a été amené à investir avec Hryniak en raison des propos adressés par M. Hryniak à Fred Mauldin » lors de la réunion du 19 juin 2001 (par. 158), ce que l'appelant ne conteste pas dans son mémoire.

[90] Le juge saisi de la requête a conclu à l'existence de la connaissance ou de l'insouciance requise quant à la fausseté de la déclaration, en l'occurrence le deuxième élément de la fraude civile, en raison de l'absence de démarches de la part de M. Hryniak pour s'assurer que les fonds seraient adéquatement investis et de son omission de vérifier que le destinataire éventuel des fonds, la New Savings Bank, était un établissement sûr. Le juge a également rejeté la thèse invoquée en défense selon laquelle les fonds avaient été dérobés, soulignant les démarches limitées prises par M. Hryniak pour recouvrer les fonds, celui-ci ayant attendu quelque 15 mois avant de signaler le vol apparent de 10,2 millions de dollars américains.

[91] Le juge saisi de la requête a conclu également à l'intention de M. Hryniak que ses fausses déclarations incitent le Groupe Mauldin à agir, ce qui constitue le troisième élément de la fraude civile. M. Hryniak a contracté un prêt de 76 000 dollars américains pour le compte de Fred Mauldin et a [TRADUCTION] « simulé une transaction », des gestes qui, selon le juge, ont été « posés [. . .] dans le but de dissuader le Groupe Mauldin d'exiger le remboursement de son placement » (par. 113). De plus, le juge a exposé en détail le rôle capital joué par M. Hryniak dans la multitude de tromperies qui ont amené le Groupe Mauldin à investir ses fonds et qui l'ont dissuadé de demander leur remboursement pendant quelque temps après que les fonds eurent été dérobés.

[92] Le dernier élément de la fraude civile, la perte, est manifestement présent. Le Groupe

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US$1.2 million and, but for a small return of US$9,600 in February 2002, lost its investment.

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

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

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

[95] Despite the fact that the Mauldin Group's claims against Peebles and Cassels Brock had to

Mauldin a investi 1,2 million de dollars américains et, à part un rendement pour la modique somme de 9 600 dollars américains reçue en février 2002, il a perdu son placement.

[93] Le juge saisi de la requête a conclu qu'il n'existait pas d'élément de preuve crédible à l'appui de la prétention de M. Hryniak selon laquelle ce dernier était un courtier légitime et l'issue était donc claire. Le juge a par conséquent conclu qu'il n'y avait pas de question litigieuse nécessitant la tenue d'un procès. Il n'a pas commis d'erreur manifeste et dominante en rendant un jugement sommaire.

(3) L'intérêt de la justice empêchait-il le juge saisi de la requête d'exercer les pouvoirs que lui confère la règle 20.04?

[94] Le juge saisi de la requête n'a pas commis d'erreur en exerçant les pouvoirs en matière de recherche des faits que lui confère le par. 20.04(2.1) des Règles. Il était disposé à examiner minutieusement le dossier détaillé et était d'avis que les éléments de preuve présentés sur tous les points pertinents suffisaient pour lui permettre de tirer les inférences nécessaires à la formulation de conclusions décisives en vertu de la règle 20. En outre, malgré l'importance de la somme en cause, les moyens invoqués par M. Hryniak dans sa défense étaient relativement simples. Comme l'a indiqué la Cour d'appel, il s'agissait fondamentalement de savoir si M. Hryniak avait mis en place un programme légitime de transaction de titres qui a mal tourné lorsque les fonds ont été dérobés, ou si son programme était factice depuis le début (par. 159). Les demandeurs forment un groupe d'investisseurs américains âgés qui, à la date de l'audition de la requête, avaient été privés de leurs fonds depuis près de 10 ans. Le dossier était suffisant pour permettre de rendre une décision juste et équitable et il fallait trancher l'affaire de façon expéditive. Bien que la requête se soit révélée complexe et onéreuse, la tenue d'un procès aurait été encore plus coûteuse et aurait duré encore plus longtemps.

[95] Même si les actions intentées par le Groupe Mauldin contre M. Peebles et le cabinet Cassels

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

Brock devaient être instruites, il n'y a pas vraiment lieu de croire qu'un jugement sommaire rendu contre M. Hryniak aurait nui à l'instruction des autres questions litigieuses. Bien que l'étendue de la participation des autres défendeurs à la fraude nécessite la tenue d'un procès, la conclusion selon laquelle M. Hryniak était manifestement l'*un* des auteurs de la fraude ne résout pas d'avance cette question. Les conclusions du juge saisi de la requête traitent spécifiquement de la participation de M. Hryniak et ne reposent pas sur la responsabilité d'autres personnes, ni ne sont incompatibles avec leur responsabilité. Ses conclusions étaient clairement étayées par la preuve. L'exercice, par le juge, de ses pouvoirs en matière de recherche des faits n'allait pas à l'encontre de l'intérêt de la justice, et sa décision discrétionnaire d'exercer ces pouvoirs n'était pas non plus entachée d'erreur.

V. Conclusion

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

V. Conclusion

[96] Par conséquent, je suis d'avis de rejeter le pourvoi avec dépens en faveur des intimés.

APPENDIX

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

RULE 20 SUMMARY JUDGMENT

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

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

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

ANNEXE

Règles de procédure civile, R.R.O. 1990, Règl. 194

RÈGLE 20 JUGEMENT SOMMAIRE

20.01 [Applicabilité] (1) [Au demandeur] Le demandeur peut, après que le défendeur a remis une défense ou signifié un avis de motion, demander, par voie de motion, appuyée d'un affidavit ou d'autres éléments de preuve, un jugement sommaire sur la totalité ou une partie de la demande formulée dans la déclaration.

(2) Le demandeur peut demander, par voie de motion présentée sans préavis, l'autorisation de signifier avec la déclaration un avis de motion en vue d'obtenir un jugement sommaire. L'autorisation peut être accordée en cas d'urgence extraordinaire, sous réserve de directives justes.

(3) [Au défendeur] Le défendeur peut, après avoir remis une défense, demander, par voie de motion appuyée d'un affidavit ou d'autres éléments de preuve, un jugement sommaire rejetant en totalité ou en partie la demande formulée dans la déclaration.

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

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

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

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

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

(4) Revoked.

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

(2) The court shall grant summary judgment if,

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

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

(2.1) [Powers] In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the

20.02 [Preuves à l'appui d'une motion] (1) Dans un affidavit à l'appui d'une motion visant à obtenir un jugement sommaire, une partie peut faire état des éléments qu'elle tient pour véridiques sur la foi de renseignements, comme le prévoit le paragraphe 39.01(4). Toutefois, dans le cas où la partie ne fournit pas le témoignage de toute personne ayant une connaissance directe des faits contestés, le tribunal peut en tirer des conclusions défavorables, s'il y a lieu, lors de l'audition de la motion.

(2) Lorsqu'une motion en vue d'obtenir un jugement sommaire est appuyée d'un affidavit ou d'autres éléments de preuve, la partie intimée ne peut pas se contenter uniquement des allégations ou dénégations contenues dans ses actes de procédure. Elle doit préciser, au moyen d'un affidavit ou d'autres éléments de preuve, des faits spécifiques indiquant qu'il y a une véritable question litigieuse nécessitant la tenue d'une instruction.

20.03 [Mémoires requis] (1) Dans le cas d'une motion en vue d'obtenir un jugement sommaire, chaque partie signifie aux autres parties à la motion un mémoire comprenant une argumentation concise exposant les faits et les règles de droit qu'elle invoque.

(2) Le mémoire de l'auteur de la motion est signifié et déposé, avec la preuve de la signification, au greffe du tribunal où la motion doit être entendue, au moins sept jours avant l'audience.

(3) Le mémoire de la partie intimée est signifié et déposé, avec la preuve de la signification, au greffe du tribunal où la motion doit être entendue, au moins quatre jours avant l'audience.

(4) Abrogé.

20.04 [Décision sur la motion] (1) [Dispositions générales] Abrogé.

(2) Le tribunal rend un jugement sommaire si, selon le cas :

a) il est convaincu qu'une demande ou une défense ne soulève pas de véritable question litigieuse nécessitant la tenue d'une instruction;

b) il est convaincu qu'il est approprié de rendre un jugement sommaire et les parties sont d'accord pour que tout ou partie de la demande soit décidé par jugement sommaire.

(2.1) [Pouvoirs] Lorsqu'il décide, aux termes de l'alinéa (2)a), s'il existe une véritable question litigieuse

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court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

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

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

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

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

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

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

nécessitant la tenue d'une instruction, le tribunal tient compte des éléments de preuve présentés par les parties et, si la décision doit être rendue par un juge, ce dernier peut, à cette fin, exercer l'un ou l'autre des pouvoirs suivants, à moins qu'il ne soit dans l'intérêt de la justice de ne les exercer que lors d'un procès :

1. Apprécier la preuve.

2. Évaluer la crédibilité d'un déposant.

3. Tirer une conclusion raisonnable de la preuve.

(2.2) [Témoignage oral (mini-procès)] Un juge peut, dans le but d'exercer les pouvoirs prévus au paragraphe (2.1), ordonner que des témoignages oraux soient présentés par une ou plusieurs parties, avec ou sans limite de temps pour leur présentation.

(3) [Si la seule question litigieuse est le montant de la demande] Le tribunal, s'il est convaincu que la seule véritable question litigieuse porte sur le montant auquel l'auteur de la motion a droit, peut ordonner l'instruction de la question ou rendre un jugement et ordonner un renvoi afin de fixer le montant.

(4) [Si la seule question litigieuse est une question de droit] Le tribunal, s'il est convaincu que la seule véritable question litigieuse porte sur une question de droit, peut trancher cette question et rendre un jugement en conséquence. Toutefois, si la motion est présentée à un protonotaire, elle est déférée à un juge pour audition.

(5) [Demande de reddition de comptes seulement] Si le demandeur est l'auteur de la motion et qu'il demande une reddition de comptes, le tribunal peut rendre jugement sur la demande et ordonner un renvoi pour la reddition des comptes, à moins que le défendeur ne convainque le tribunal qu'une question préliminaire doit être instruite.

20.05 [Nécessité d'une instruction] (1) [Pouvoirs du tribunal] Si le jugement sommaire est refusé ou n'est accordé qu'en partie, le tribunal peut rendre une ordonnance dans laquelle il précise les faits pertinents qui ne sont pas en litige et les questions qui doivent être instruites. Il peut également ordonner que l'action soit instruite de façon expéditive.

(2) [Directives et conditions] Le tribunal qui ordonne l'instruction d'une action en vertu du paragraphe (1) peut donner les directives ou imposer les conditions qu'il estime justes, et ordonner notamment :

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

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

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

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

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

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

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

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

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

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

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the

a) la remise par chaque partie, dans un délai déterminé, d'un affidavit de documents conformément aux directives du tribunal;

b) la présentation des motions dans un délai déterminé;

c) le dépôt, dans un délai déterminé, d'un exposé des faits pertinents qui ne sont pas en litige;

d) le déroulement des interrogatoires préalables conformément à un plan d'enquête préalable établi par le tribunal, dans lequel un calendrier des interrogatoires peut être fixé et des limites au droit à l'interrogatoire préalable qui sont justes peuvent être imposées, y compris la limitation de l'enquête préalable à des questions qui n'ont pas été traitées dans les affidavits ou les autres éléments de preuve présentés à l'appui de la motion et dans les contre-interrogatoires sur ceux-ci;

e) la modification d'un plan d'enquête préalable convenu par les parties en application de la Règle 29.1 (plan d'enquête préalable);

f) l'utilisation, à l'instruction, des affidavits ou des autres éléments de preuve présentés à l'appui de la motion et des contre-interrogatoires sur ceux-ci comme s'il s'agissait d'interrogatoires préalables;

g) la limitation de la durée de tout interrogatoire d'une personne prévu à la Règle 36 (obtention de dépositions avant l'instruction);

h) la remise par une partie, dans un délai déterminé, d'un résumé écrit de la déposition prévue d'un témoin;

i) la limitation de la durée de tout interrogatoire oral d'un témoin à l'instruction;

j) la présentation par affidavit de tout ou partie de la déposition d'un témoin;

k) la rencontre, sous toutes réserves, des experts engagés par les parties ou en leur nom relativement à l'action pour déterminer les questions en litige sur lesquelles ils s'entendent et celles sur lesquelles ils ne s'entendent pas, pour tenter de clarifier et régler toute question en litige qui fait l'objet d'un désaccord et pour rédiger une déclaration conjointe exposant les sujets d'entente et de désaccord ainsi que les motifs de ceux-ci, s'il estime que les économies de temps ou d'argent ou les autres avantages qui peuvent

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meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

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

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

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

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

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

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

(p) for security for costs.

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

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

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

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

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

en découler sont proportionnels aux sommes en jeu ou à l'importance des questions en litige dans la cause et que, selon le cas :

(i) il y a des perspectives raisonnables d'en arriver à un accord sur une partie ou l'ensemble des questions en litige,

(ii) le fondement des opinions d'experts contraires est inconnu et qu'une clarification des questions faisant l'objet d'un désaccord aiderait les parties ou le tribunal;

l) la remise par chacune des parties d'un résumé concis de sa déclaration préliminaire;

m) la comparution des parties devant le tribunal au plus tard à une date déterminée, comparution au cours de laquelle le tribunal peut rendre toute ordonnance qu'autorise le présent paragraphe;

n) l'inscription de l'action pour instruction à une date donnée ou son inscription à un rôle donné, sous réserve des directives du juge principal régional;

o) la consignation de la totalité ou d'une partie de la somme demandée;

p) le versement d'un cautionnement pour dépens.

(3) [Faits précisés] Lors de l'instruction, les faits précisés conformément au paragraphe (1) ou à l'alinéa (2)c) sont réputés établis, à moins que le juge du procès n'ordonne autrement afin d'éviter une injustice.

(4) [Ordonnance : déposition par affidavit] Lorsqu'il est décidé si une ordonnance doit être rendue en vertu de l'alinéa (2)j), le fait qu'une partie opposée peut être fondée à exiger la présence du déposant à l'instruction pour le contre-interroger constitue un facteur pertinent.

(5) [Ordonnance : experts, dépens] Si une ordonnance est rendue en vertu de l'alinéa (2)k), chaque partie paie ses propres dépens.

(6) [Défaut de se conformer à l'ordonnance] Si une partie ne se conforme pas à une ordonnance de consignation prévue à l'alinéa (2)o) ou à une ordonnance de cautionnement pour dépens prévue à l'alinéa (2)p), le tribunal peut, sur motion de la partie adverse, rejeter l'action, radier la défense ou rendre une autre ordonnance juste.

(7) Si la défense est radiée sur motion présentée en application du paragraphe (6), le défendeur est réputé constaté en défaut.

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

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

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

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

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

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

Appeal dismissed with costs.

Solicitors for the appellant: McCarthy Tétrault, Toronto.

Solicitors for the respondents: Heydary Hamilton, Toronto.

Solicitors for the intervener the Ontario Trial Lawyers Association: Allan Rouben, Toronto; SBMB Law, Richmond Hill, Ontario.

Solicitors for the intervener the Canadian Bar Association: Evans Sweeny Bordin, Hamilton; Sotos, Toronto.

20.06 [Condamnation aux dépens pour usage abusif de la règle] Le tribunal peut fixer les dépens d'une motion visant à obtenir un jugement sommaire sur une base d'indemnisation substantielle et en ordonner le paiement par une partie si, selon le cas :

a) la partie a agi déraisonnablement en présentant la motion ou en y répondant;

b) la partie a agi de mauvaise foi dans l'intention de causer des retards.

20.07 [Effet du jugement sommaire] Le demandeur qui obtient un jugement sommaire peut poursuivre le même défendeur pour d'autres mesures de redressement.

20.08 [Sursis d'exécution] Le tribunal, s'il constate qu'il devrait être sursis à l'exécution d'un jugement sommaire en attendant le règlement d'une autre question en litige dans l'action, d'une demande reconventionnelle, d'une demande entre défendeurs ou d'une mise en cause, peut ordonner le sursis à des conditions justes.

20.09 [Application aux demandes reconventionnelles, aux demandes entre défendeurs et aux mises en cause] Les règles 20.01 à 20.08 s'appliquent, avec les modifications nécessaires, aux demandes reconventionnelles, aux demandes entre défendeurs et aux mises en cause.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant : McCarthy Tétrault, Toronto.

Procureurs des intimés : Heydary Hamilton, Toronto.

Procureurs de l'intervenante Ontario Trial Lawyers Association : Allan Rouben, Toronto; SBMB Law, Richmond Hill, Ontario.

Procureurs de l'intervenante l'Association du Barreau canadien : Evans Sweeny Bordin, Hamilton; Sotos, Toronto.

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1994 CanLII 17491 (NB KB)

Omer Brideau (plaintiff) v. Clifford Boucher, Elden Duguay, Denis Mazerolle, Laurier Boucher, Daniel Boucher and Lucien Roy (defendants) (B/SC/679/85, B/SC/680/85, B/SC/681/85, B/SC/682/85, B/SC/683/85, B/SC/684/85)

Indexed As: Brideau v. Boucher et autres

New Brunswick Court of Queen's Bench
Trial Division
Judicial District of Bathurst
Deschênes, J.
November 25, 1994.

Omer Brideau (demandeur) c. Clifford Boucher, Elden Duguay, Denis Mazerolle, Laurier Boucher, Daniel Boucher et Lucien Roy (défendeurs) (B/SC/679/85, B/SC/680/85, B/SC/681/85, B/SC/682/85, B/SC/683/85, B/SC/684/85)

Répertorié: Brideau c. Boucher et autres

Cour du Banc de la Reine
du Nouveau-Brunswick
Division de première instance
Circonscription judiciaire de Bathurst
Le juge Deschênes
Le 25 novembre 1994

BOA COMPEER000084

1994 CanLII 17491 (NB KB)

Counsel:

Omer Brideau, on his own behalf;
Richard Duke, for the defendants.

This action was heard on November 24, 1994 before Deschênes, J., of the New Brunswick Court of Queen's Bench, Trial Division, Judicial District of Bathurst.

Avocats:

Omer Brideau, pour lui-même;
Richard Duke, pour les défendeurs.

Cette action fut entendue le 24 novembre 1994 par le juge Deschênes de la Cour du Banc de la Reine du Nouveau-Brunswick, Division de première instance, circonscription judiciaire de Bathurst.

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Deschênes, J., delivered the following decision on November 25, 1994.

Le juge Deschênes rendit la décision qui suit le 25 novembre 1994.

[1] Deschênes, J. [Translation]: The plaintiff was fired by the New Brunswick Housing Corporation in February 1985.

[2] A few days earlier, the six defendants had signed a letter indicating their dissatisfaction with the plaintiff who was in charge of the warehouse where the defendants worked from time to time.

[3] The plaintiff contends that the defendants conspired or agreed to write a letter that would cause the plaintiff's dismissal, which letter resulted in the plaintiff's dismissal, his loss of salary and inconvenience that followed.

[4] The plaintiff's claim is based on the tort of conspiracy. In **Hunt v. T & N plc et al.**, [1990] 2 S.C.R. 959; 117 N.R. 321; 74 D.L.R.(4th) 321, at p. 981 S.C.R., the Supreme Court stated that the tort of conspiracy may apply in at least two situations:

(i) where the defendants agree to use lawful means to harm the plaintiff and

(ii) where the defendants use unlawful means to harm the plaintiff.

[5] The most important principle laid down in **Hunt** is that "where a plaintiff alleges that the defendants entered into an agreement whose predominant purpose was to injure the plaintiff and where the plaintiff alleges that he or she has in fact suffered damage as a result of the agreement, then regardless of the lawfulness of the means that the defen-

[1] Le juge Deschênes: Le demandeur a été congédié par la Société d'habitation du Nouveau-Brunswick en février 1985.

[2] Quelques jours auparavant, les six défendeurs avaient signé une lettre indiquant leur mécontentement envers le demandeur en tant que personne en charge d'un entrepôt où les défendeurs travaillaient de temps à autre.

[3] Le demandeur prétend que les défendeurs ont comploté ou encore se sont entendus pour rédiger une lettre dans le but de causer le congédiement du demandeur, ce qui a eu comme résultat son congédiement et les partes de salaire et inconvénients qui s'en suivirent.

[4] Le demandeur fonde sa réclamation sur le délit civil de complot. Dans l'arrêt **Hunt c. T & N plc et al.**, [1990] 2 R.C.S. 959; 117 N.R. 321; 74 D.L.R.(4th) 321, à la p. 981 R.C.S., la Cour suprême a statué que le délit civil de complot peut s'appliquer à tout le moins dans deux situations:

(i) lorsque les défendeurs conviennent de recourir à des moyens légaux pour causer un préjudice au demandeur et

(ii) lorsque les défendeurs recourent à des moyens illégaux pour causer un préjudice au demandeur.

[5] Dans **Hunt**, le principe le plus important à retenir est que "lorsqu'un demandeur prétend que les défendeurs ont conclu une entente dont l'objet prédominant était de nuire au demandeur et lorsque le demandeur allègue qu'il a, dans les faits, subi un préjudice par suite de l'entente, alors, sans égard à la légalité des moyens que les défendeurs

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dants are alleged to have used to implement the agreement the plaintiff will have made out a cognizable claim in the tort of conspiracy". (see **Hunt**, p. 984 S.C.R.).

[6] In this case, I have examined the evidence as a whole and I am not satisfied, on a balance of probabilities, that the plaintiff has established all of the elements constituting the tort of conspiracy. Quite to the contrary, I believe that the evidence shows without a doubt, that relations between the plaintiff and his employer had been difficult for a long time and that the New Brunswick Housing Corporation had decided to fire the plaintiff before receiving the defendants' letter and was to act on this decision regardless of the six defendants' feelings of dissatisfaction. In other words, I am not at all convinced that the plaintiff's dismissal resulted from the agreement; on the contrary, I think that the plaintiff's dismissal had nothing to do with the letter that the defendants wrote about him and that he would have been dismissed even if the defendants had not intervened.

[7] Also, I am not at all convinced that the defendants entered into an agreement with the predominant purpose of injuring the plaintiff.

[8] On the contrary, the evidence has shown that:

(a) the defendants had no knowledge, at the time, of the plaintiff's difficulties with the employer, and

(b) the defendants did not want nor did they ask for the plaintiff to be fired.

[9] For these reasons, the plaintiff's claim is

avaient utilisé pour exécuter l'entente, le demandeur aura fait la preuve qu'il a un recours recevable pour délit civil de complot". (Voir **Hunt**, p. 981 R.C.S.)

[6] En l'espèce, j'ai examiné la preuve dans son ensemble et je ne suis pas convaincu, par une prépondérance de la preuve, que le demandeur a prouvé les éléments constitutifs d'un délit civil de complot. Au contraire, j'estime que la preuve démontre sans l'ombre d'un doute, que des relations difficiles entre le demandeur et son employeur existaient depuis fort longtemps et qu'avant même la réception de la lettre écrite par les défendeurs, la décision touchant le congédiement du demandeur avait été prise par la Société d'habitation du Nouveau-Brunswick et devait se concrétiser indépendamment des sentiments de mécontentement des six défendeurs en cause. En d'autres mots, je suis loin d'être convaincu que le congédiement du demandeur a été par suite de l'entente; au contraire, j'estime que le congédiement du demandeur n'avait rien à voir avec la lettre que les défendeurs ont écrite à son sujet et que ce congédiement allait se concrétiser même sans l'intervention des défendeurs.

[7] Je suis loin d'être convaincu aussi que les défendeurs ont conclu une entente dont l'objet prédominant était de nuire au demandeur.

[8] Au contraire, la preuve a plutôt démontré:

(a) que les défendeurs ne savaient pas que le demandeur, à cette époque, vivait de sérieuses difficultés avec son employeur, et

(b) que les défendeurs ne désiraient pas et n'ont jamais demandé le congédiement du demandeur.

[9] Pour ces raisons, la réclamation du de-

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dismissed.

[10] In order to clarify this court file, it should be noted that six actions in the tort of conspiracy (B/SC/679/85, B/SC/680/85, B/SC/681/85, B/SC/682/85, B/SC/683/85 and B/SC/684/85) were consolidated and heard in one and the same trial and that this decision applies to the six actions.

Action dismissed.

mandeur est rejetée.

[10] Afin de clarifier le dossier, on devrait remarquer que les six poursuites pour délit civil de complot (B/SC/679/85, B/SC/680/85, B/SC/681/85, B/SC/682/85, B/SC/683/85 et B/SC/684/85) ont été consolidées et entendues dans le cours d'un seul procès et que cette décision touche ces six poursuites.

Action rejetée.

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In the Court of Appeal of Alberta

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

Date: 20190206
Docket: 1703-0218-AC
Registry: Edmonton

2019 ABCA 49 (CanLII)

Between:

Weir-Jones Technical Services Incorporated

Appellant
(Respondent/Plaintiff)

- and -

Purolator Courier Ltd., Purolator Inc. and Purolator Freight

Respondents
(Applicants/Defendants)

The Court:

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

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

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

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

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Reasons for Judgment Reserved
of the Honourable Mr. Justice Slatter

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

Facts

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

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

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

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

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

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

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

Issues and Standards of Review

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

a) the chambers judge erred in concluding that the limitation period commenced prior to the termination of the contract on August 21, 2009;

b) the limitation period was effectively extended by the uncertainty over whether the arbitration proceedings afforded a venue for resolution of the dispute; and

c) the limitation period was suspended or waived during the period of negotiations.

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

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

a) conclusions on issues of law are reviewed for correctness: ***Housen*** at para. 8,

b) findings of fact, including inferences drawn from the facts, are reviewed for palpable and overriding error: ***Housen*** at paras. 10, 23; ***H.L. v Canada (Attorney General),*** 2005 SCC 25 at para. 74, [2005] 1 SCR 401, and

c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": ***Housen*** at paras. 28, 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: ***Housen*** at paras. 33, 36.

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

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

The Test for Summary Dismissal

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

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.

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

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

> ***Can*** at para. 20: Summary judgment is appropriate if the nonmoving party's position is without merit. *Alberta Rules of Court*, r. 7.3. "A party's position is without merit if the facts and law make the moving party's position unassailable … A party's position is unassailable if it is so compelling that the likelihood of success is very high". *Beier v. Proper Cat Construction Ltd.*, 564 A.R. 357, 374 (Q.B. 2013). Mr. Can's claims are without merit. Justice Bensler's decision was correct and hence, reasonable.
>
> ***Stefanyk*** at para. 17: Therefore, in this appeal the issue is not whether the appellant's position is "unassailable". The first question is whether the record is sufficient to decide if the appellant is liable for the plaintiff's injuries. There are no material facts in dispute, no overwhelming issues of credibility, and the court is able to apply the law to the facts. It is unlikely that the cost and expense of a

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

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

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

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

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

> 23 This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.
>
> 24 However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. The cost and delay associated with the traditional process means that . . . the trial process denies ordinary people the opportunity to have adjudication. . . . (emphasis in original)

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> 28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible - proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
>
> 34 The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure. Generally, summary judgment is available where there is no genuine issue for trial.

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

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

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

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

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

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

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

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

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

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

> (a) *Allow the judge to make the necessary findings of fact*. An important thing to observe about this part of the test is that it assumes the summary judgment judge (or Master) is able to make findings of fact. The judge is entitled, where possible, to make those findings from the record and draw the necessary inferences. The parameters on fact finding are discussed, *infra*, para. 38. Summary judgment is not limited to cases where the facts are not in dispute. If the summary judgment judge is not able to make the necessary findings of fact, that is an indication that there is a "genuine issue requiring a trial". This issue is discussed, *infra*, paras. 27ff.
>
> (b) *Allow the judge to apply the law to the facts*. There are cases where the facts are not seriously in dispute, and the real question is how the law applies to those facts. Those cases are ideally suited for summary judgment: ***Tottrup v Clearwater (Municipal District No. 99)***, 2006 ABCA 380 at para. 11, 68 Alta LR (4th) 237, 401 AR 88. If the

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> record allows the judge to make the necessary findings of fact (as contemplated by the first part of the test), applying the law to those facts essentially comes down to a question of law. Cases like this one, based on the expiration of the limitation period, often fall into this category, as do those that turn on the interpretation of documents.
>
> (c) Assuming the first two parts of the test are met, *summary disposition must be a proportionate, more expeditious and less expensive means to achieve a just result*. This third criterion is a final check, to ensure that the use of a summary judgment procedure (rather than a trial) will not cause any procedural or substantive injustice to either party. Summary judgment will almost always be "more expeditious and less expensive" than a trial. In the end, if the judge finds that summary adjudication might be possible, but might not "achieve a just result" there is a discretion to send the matter to trial. This discretion, however, should not be used as a pretext to avoid resolving the dispute when possible.

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

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

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

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

I. Principles of Summary Judgment

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

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

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

II. Principles of Proof

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

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

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

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

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

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

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

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

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

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

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

III. Principles Relating to the Record in Summary Dispositions

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

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

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

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

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

> 39 … Not every conflict in the evidence precludes the chambers judge from drawing inferences from the admitted facts, the undisputed evidence, the conduct of the parties, and the corroborating evidence (such as documents with objective reliability) . . .
>
> 40 The mere fact that there might be some conflicting evidence on the record does not mean that a "fair and just adjudication" is not possible …

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

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

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

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

IV. Principles of Fairness

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

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

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

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

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

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

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

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

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

V. Summary of the Application of the Principles

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

a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

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

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

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

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The Limitation Period

[50] The *Limitations Act* provides:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

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

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

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

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

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

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

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

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

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

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

Settlement Negotiations

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

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

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

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

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

Conclusion

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

Appeal heard on September 7, 2018

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

Slatter J.A.

I concur: Fraser C.J.A.

I concur: Watson J.A.

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

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

I. Introduction

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

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

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

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

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

the standard in force throughout the common law world.[3] It has been utilized in Alberta[4] and other provinces[5] long before the Supreme Court released *Hryniak v. Mauldin*.

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

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

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

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

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

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

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

position will ultimately prevail is very high[7] – the strength of the moving party's case is many times that of the nonmoving party.[8]

[67] I adhere to this school of thought.

[68] So does Justice Brown, now of the Supreme Court of Canada. He has unequivocally endorsed this standard both before[9] and after[10] the Supreme Court's judgment in *Hryniak v. Mauldin* came out. In *Orr v. Fort McKay First Nation*,[11] delivered after *Hryniak v. Mauldin*, he said this:

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

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

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

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

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

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

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

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

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

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

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

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II. Questions Presented

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

[73] If so, to what effect?

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

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

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

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

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

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

[15] R.S.A. 2000, c. L-12, s. 3(1)(a).

[16] Alta. Reg. 124/2010.

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

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

III. Brief Answers

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

[79] It makes two transcendent statements.

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

[81] Second, it confirms the assessment made long ago by the House of Lords,[18] the English Court of Appeal[19] and the United States Supreme Court[20] that summary judgment is not an inferior dispute resolution device that sacrifices procedural fairness in the pursuit of economical and expeditious resolution of disputes.

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

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

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

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[17] 2014 SCC 7, [2014] 1 S.C.R. 87.

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

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

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

[21] Alta. Reg. 124/2010.

[22] R.S.A. 2000, c. I-8, s. 10.

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

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

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

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

A. Current Rules

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

> Part 1: Foundational Rules
>
> Division 1
>
> Purpose and Intention of These Rules
>
> …
>
> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,

[23] R.S.A. 2000, c. L-12, c. 3(1)(a).

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

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

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

…

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

…

Part 7: Resolving Claims Without Full Trial

Division 1

Trial of Particular Questions or Issues

7.1(1) On application, the Court may

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

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

(ii) substantially shortening a trial, or

(iii) saving expense … .

…

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

…

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

…

Division 2

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Summary Judgment

…

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

(a) there is no defence to a claim or part of it;

(b) there is no merit to a claim or part of it;

(c) the only real issue is the amount to be awarded.

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

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

(a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;

(b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;

(c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

...

Division 3

Summary Trials

…

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

(2) The application must

(a) be in Form 36,

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> (b) specify the issue or question to be determined, or that the claim as a whole is to be determined,
>
> (c) include reasons why the matter is suitable for determination by way of summary trial,
>
> (d) be accompanied with an affidavit or any other evidence to be relied on, and
>
> (e) specify a date for the hearing of the summary trial scheduled by the court clerk, which must be one month or longer after service of notice of the application on the respondent.
>
> (3) The applicant may not file anything else for the purposes of the application except
>
> (a) to adduce evidence that would, at trial, be admitted as rebuttal evidence, or
>
> (b) with the judge's permission.
>
> 7.6 The respondent to an application for judgment by way of a summary trial must, 10 days or more before the date scheduled for the hearing of the application, file and serve on the applicant any affidavit or other evidence on which the respondent intends to rely at the hearing of the application.

B. Historical Antecedents

1. January 1, 1969 to October 31, 2010

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

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

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

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

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

…

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

…

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

(a) admissions of fact have been made on the pleadings or otherwise, or

(b) the only evidence consists of documents and such affidavits as are sufficient to prove their execution or identity.

2. July 1, 1944 to December 31, 1968

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

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

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

[27] O.C. 716/44.

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

3. September 1, 1914 to June 30, 1944

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

> 129 Upon the hearing of the motion, unless the defendant by affidavit or his *viva voce* evidence or otherwise shall satisfy the judge that he has a good defence to the action on the merits or disclose such facts as may be deemed sufficient to entitle him to defend or shall bring into court the amount verified, the judge may direct that judgment be entered accordingly … .
>
> 130 If it appears that the defence set up by the defendant applies only to part of the plaintiff's claim or that any part of his claim is admitted, the judge may, if the circumstances make it convenient, direct that the plaintiff have judgment forthwith for or in respect of such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution or the payment of the amount levied or any part thereof into court by the sheriff; the taxation of costs or otherwise as the judge may think fit; and the defendant may be allowed to defend as to the residue of the plaintiff's claim.
>
> 131 If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action and that any other defendant has not such a defence and ought not to be permitted to defend, the former may be permitted to defend; and the judge may, if the circumstances make it convenient, direct that the plaintiff have judgment against the latter and the plaintiff may enforce such judgment without prejudice to his right to proceed with his action against the former.

C. *Limitations Act*

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

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[28] O.C. August 12, 1914.

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> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> > (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> >
> > > (i) that the injury for which the claimant seeks a remedial order had occurred,
> >
> > > (ii) that the injury was attributable to conduct of the defendant, and
> >
> > > (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> > (b) 10 years after the claim arose, whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

V. Statement of Facts

A. Purolator's Business Structure

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

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

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

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

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[29] R.S.A. 2000, c. L-12.

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

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

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

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

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

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

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

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

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

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

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

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

> In Q3 2007 staff from Weir-Jones Technical Services commenced a series of discussions with Purolator management from your Edmonton offices. This discussion concerned the implementation of innovative low carbon footprint vehicles on line haul routes initially in Northern Alberta. The vehicles would utilize thermal efficiency enhancement technologies, something which we have been working on for a number of years. The objectives were (a) to demonstrate the efficiency of the technologies (b) to enable Purolator to show, in a very practical manner, that they were committed to reducing their corporate carbon footprint, (c) to implement a technology which would have an immediate impact on Purolator's operating costs, and (d) to provide … [Weir-Jones Technical] with a long term revenue stream.
>
> The discussions continued and, in Q4 2007, Mike Gieck assumed the role of point man for Purolator. In summary Mr. Gieck made commitments that one or more line-haul routes would be awarded to … [Weir-Jones Technical], however, in order to facilitate this he requested that we enter into contracts for the provision of local delivery services on routes in Bonnyville and Cold Lake. This was done in January 2008 and, subsequent to commencing these contracts discussions continued in great detail about the promised line-haul routes. … [I]n the final analysis Mr. Gieck reneged on this commitment to make one or more line-haul routes available to us. In the words of a Purolator manager "*Mike conned you and led you up the garden path – all he really wanted was someone to handle the Bonnyville and Cold Lake routes*".
>
> Our position is that we have incurred significant expenses, both capital and operational, in order to provide the services which were requested of us by Mr. Gieck. *Since September 2008 it has become apparent to us that Mr. Gieck's objectives were not as he represented to us*.

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

[33] Emphasis added.

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

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

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

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

D. Weir-Jones Technical Invokes the Teamsters' Assistance

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

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

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

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

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

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

> 3. On or about February 2008 through August 2009, the parties entered into an agreement for services and supplies which provided, inter alia, that the Plaintiff would perform courier services on behalf of the Defendant [sic] in and around Bonnyville … and supply proprietary fuel saving technology installations for the Defendant's courier truck fleet. In addition, by agreement with the Defendant [sic], the Plaintiff performed repairs on trucks which the Defendant [sic] rented from Ryder's Connection truck rental services. In addition, the Defendant [sic] agreed to reimburse the … [Plaintiff] for travel and accommodation costs incurred for performing its contractual obligations to the Defendant [sic] in and around Bonnyville, Alberta.
>
> 4. On or about February 2008, through August 2009, the Defendant [sic] represented that it would provide line haul contracts to the Plaintiff for all oil field supplies and deliveries within the Cold Lake/Bonnyville areas. In reliance upon the Defendants' representation(s), the Plaintiff incurred expenses for the placement of equipment and vehicles in the area for the provision of the oil field services.

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

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

> 12. The Plaintiff knew or ought to have known by October of 2008, of all facts giving rise to any potential claim.
>
> 13. The Defendants plead and rely upon the *Limitations Act*, RSA 2000, c L-12.

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

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

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

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

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

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

[118] The deponent advanced three reasons.

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

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

[121] Third, the deponent thought that the two-year limitation period expired August 18, 2011:[40]

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

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[35] Affidavit of Mike Gieck sworn October 14, 2015.

[36] Id. ¶ 10.

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

[38] December 4, 2015 affidavit, ¶ 19.

[39] April 8, 2016 affidavit, ¶ 26.

[40] Id. ¶ 6.

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

G. The Chambers Judge Granted Purolator Summary Judgment

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

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

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

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

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

VI. Analysis

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

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[41] 2017 ABQB 491.

[42] 2017 ABQB 491, ¶¶ 36, 37 & 42.

[43] Id. ¶ 40.

[44] Id. ¶¶ 40 & 41.

[45] R.S.A. 2000, c. L-12.

[46] 2017 ABQB 491, ¶ 24.

[47] Id. ¶¶ 36 & 42.

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

[128] There is an inverse relationship between the importance of summary judgment and other expedited dispute resolution procedures and the efficacy of the traditional trial process. As the amount of time that separates the commencement of an action and its resolution by conventional trial[50] escalates[51] – the passage of time diminishes the value of the conventional trial[52] – the need to have a functioning summary judgment model increases in importance.[53]

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

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

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

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

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

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

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

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

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

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

[55] Alta. Reg. 124/2010.

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

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

[132] Part 7 introduces distinct[58] protocols that authorize a court to determine relatively early in the civil procedure process questions of fact or law in order to expedite the resolution of all or part of a claim or to grant judgment under an application for summary judgment or summary trial.[59] "Alberta's summary judgment protocol and the other procedures in the Part 7 suite of

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

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

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

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

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

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

[134] This expedited dispute resolution process is also an important aspect of the civil procedure regimes of all Canadian jurisdictions[63] and those of England and Wales,[64]

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

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

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

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

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

Australia,[65] New Zealand,[66] Hong Kong[67] and the United States.[68] Sophisticated civil process systems recognize that the public interest is best served by mechanisms that allow a court to

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

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

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

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

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

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

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

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

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

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

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

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introduced a streamlined civil process for the resolution of a small number of specified actions[71] the outcome of which could be safely predicted or, in other words, was obvious.[72]

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

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

[136] Summary judgment may be granted if the moving party discharges the legal or persuasive burden[73] and satisfies the court that the likelihood its position will prevail is very high and the likelihood that the nonmoving party will succeed is very low.[74] The disparity

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[70] 18 & 19 Vict., c. 67.

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

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

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

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

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

[137] I have stated before that[76] "the comparative strengths of the moving and nonmoving parties' positions need not be so disparate that the nonmoving party's prospects of success must be close to zero before summary judgment may be granted. If that was the law, the purpose of summary judgment would be frustrated".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[82] 18 & 19 Vict., c. 67, recital.

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

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

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

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

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

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

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

[86] 477 U.S. 242, 251-52 (1986).

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

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

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

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

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

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

2. There Must Be an Incontrovertible Factual Foundation

a. Relevant Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[100] 2018 ABCA 281, ¶ 26.

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

> Taking into account… the text of the whole document, the purpose accounting for the technology transfer agreement and the business environment in which it would operate, we unhesitatingly conclude that Composite Technologies transferred to Proflex Pipe any interest it had in the issued and pending patents described in schedule A, any interest it may have in future patents relating to flexible composite pipe technology and any other proprietary information not protected by the issued or pending patents disclosed in schedule A… . This is a comprehensive sale on the part of Composite Technologies.
>
> There is no other plausible interpretation of the text.
>
> This inescapable interpretation of the technology transfer agreement, by itself, completely undermines the position of Composite Technologies.

b. Irrelevant Facts

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

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

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[101] 2017 ABCA 160, 100 C.P.C. 7th 52.

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

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

[104] 2014 ABCA 322, 315 C.C.C. 3d 337.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[171] Recognizing a trend that started in 1855 with the Westminster Parliament's passage of *The Summary Procedure on Bills of Exchange Act*[116] and that has gained momentum with each passing decade and the observable increase in the cost of litigation and the time it consumes,[117] the Supreme Court of Canada declared its unequivocal support for summary judgment.[118] In doing so, the Supreme Court followed the lead of the House of Lords,[119] the English Court of Appeal[120] and the United States Supreme Court.[121]

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

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

[116] 18 & 19 Vict., c. 67.

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

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

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

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

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

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

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

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

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

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

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

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

[175] The Supreme Court's strong endorsement of the merits of summary judgment squares with the commitment of Alberta courts to resolve disputes in the least amount of time practicable and at the lowest possible cost[125] and the direction that they do so in r. 1.2(2)(b) of the *Alberta Rules of Court*.[126] Alberta courts are cheerleaders for summary judgment and expedited dispute resolution generally.[127]

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

[177] Noteworthy is his and my conclusion[129] that *Hryniak v. Mauldin* does not have any effect on the summary judgment test in force in Alberta before the Supreme Court released *Hryniak v. Mauldin*.

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

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

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

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

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

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

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

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

[181] This assertion is easy to illustrate.

[182] Suppose that Alberta's court rules bestowed the right to apply for summary judgment only on a plaintiff claiming to enforce a promissory note. Indeed, a defendant could not apply for summary judgment in Alberta until June 19, 1986.[131]

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

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

[130] Supra note 4.

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

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

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

[186] Rule 20 of Ontario's *Rules of Civil Procedure* is fundamentally different from Alberta's r. 7.3.[135] A cursory reading of the two rules reveals this. The Supreme Court's interpretation of r. 20 could not affect Alberta's r. 7.3.

[187] The governing statutory principles are straightforward.

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

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

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

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

[188] First, a court must read the entire statute.[136] It must give the text[137] its ordinary meaning.[138] A court may never give text a meaning it cannot support.[139] "Words must not be given meanings they cannot possibly bear".[140]

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

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

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[136] *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 41 (the Court approved this statement: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[195] Both of the world's leading English language dictionaries – The Oxford English Dictionary[146] and Webster's Third New International Dictionary of the English Language[147] – state that "no" as an adjective means "not any". Webster's gives these illustrations: "< let there be ~ strife between you and me ... > < and ~ birds sing ... > < with ~ dancing in the streets or ritual bonfires ... >". Here are some of the examples Oxford offers: "England had never no thoughts of securing this Right of the Flag by a formal Treaty ... There was no evidence that Nunney had authority to arrest".

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

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

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

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

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

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

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

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

[148] R.S.A. 2000, c. I-8.

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

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

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

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

> 20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.
>
> . . .
>
> (3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.
>
> . . .
>
> 20.04(2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

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

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

> Presumably Ontario welded these additional fact-finding features onto its summary judgment model because summary trial is not part of Ontario's expedited dispute resolution procedures. ... The conditions which prompted Ontario to marry two distinct concepts do not exist in Alberta. ...
>
> …
>
> [A] r. 7.3 summary judgment application is not an expedited dispute resolution protocol that has to be distorted to resolve disputes in less time and cost than a trial would necessitate. Part 7 of the *Alberta Rules of Court* introduces two other discrete models – trial of an issue and summary trial – that were created for that purpose. The trial of an issue and summary trial options may be more suitable than summary judgment in some fact patterns. But the point is this: their existence eliminates the need to convert Alberta's summary judgment vehicle into the hybrid model Ontario's rule makers built.
>
> The wisdom of converting a protocol designed to remove disputes from the active file list because the nonmoving party's position is without merit into one which resolves legitimate issues – both the moving and nonmoving parties' positions have merit – is not clear. Other components of the Part 7 suite of expedited dispute resolution tools are available to resolve disputes the outcomes of which are not obvious.

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

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

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

> The fact that the Supreme Court declared in *Hryniak v. Mauldin* ... that its positive evaluation of expedited dispute resolution mechanisms is of 'general application' does not mean that Alberta's robust Part 7 suite of 'rocket docket' provisions is in any respect deficient. ... *Hryniak v. Mauldin* does not, in any way, support the notion that the existing principles which govern Alberta's summary judgment rule need to be revised.
>
> …
>
> There is no need to revisit either the purpose or the principles used to implement the summary judgment rule. Rule 7.3 and its predecessors have been in place since 1914.

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

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

[207] Insisting that summary judgment may be granted only if the ultimate disposition of a dispute is obvious does not diminish in any way the ability of the Court of Queen's Bench to resolve in an expeditious manner disputes the outcomes of which are not obvious[154] but are otherwise ripe for adjudication.

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

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

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

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

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

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

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

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

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

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

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

[212] A summary trial or a determination of an issue may be appropriate if a dispute has features that promote a just resolution without accessing all aspects of the trial protocol – no need for questioning, for example. A dispute may largely turn on the resolution of a credibility issue[159] or simply require the application of a known legal standard to an agreed fact pattern, the outcome of which is not obvious.[160] Sometimes a final disposition is the most important

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

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

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

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

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

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

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

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

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

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

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

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

[162] 2015 ABQB 141, 41 C.L.R. 4th 51.

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

[164] R.S.A. 2000, c. L-12, s. 3(1)(b).

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

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

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

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

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

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

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

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[165] 2017 ABQB 491, ¶ 36.

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

[167] 2017 ABQB 491, ¶ 39.

[168] Id. ¶¶ 40 & 41.

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

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

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

VII. Conclusion

[225] This appeal is dismissed.

Appeal heard on September 7, 2018

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

Wakeling J.A.

2019 ABCA 49 (CanLII)

Appearances:

T.J. Byron
for the Appellant

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

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SUPREME COURT OF CANADA

2014 SCC 71 (CanLII)

CITATION: Bhasin *v.* Hrynew, 2014 SCC 71, [2014] 3 S.C.R. 494 **DATE:** 20141113
DOCKET: 35380

BETWEEN:

Harish Bhasin, carrying on business as Bhasin & Associates
Appellant
and
Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited)
Respondents

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

REASONS FOR JUDGMENT: (paras. 1 to 112) Cromwell J. (McLachlin C.J. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring)

Harish Bhasin, carrying on business as Bhasin & Associates *Appellant*

v.

Larry Hrynew and
Heritage Education Funds Inc.

(formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited) *Respondents*

2014 SCC 71 (CanLII)

Indexed as: Bhasin *v.* Hrynew

2014 SCC 71

File No.: 35380.

2014: February 12; 2014: November 13.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Contracts — Breach — Performance — Non-renewal provision — Duty of good faith — Duty of honest performance — Agreement governing relationship between company and retail dealer providing for automatic contract renewal at end of three-year term unless parties giving six months' written notice to contrary — Company deciding not to renew dealership agreement — Retail dealer lost value of business and majority of sales agents solicited by competitor agency — Retail dealer suing company and competitor agency — Whether common law requiring new general duty of honesty in contractual performance — Whether company breaching that duty.

Damages — Quantum — Contracts — Breach — Performance — Non-renewal provision — Duty of good faith — Duty of honest performance — Agreement governing relationship between company and retail dealer providing for automatic contract renewal at end of three-year term unless parties giving six months' written notice to contrary — Company deciding not to renew dealership agreement — Retail dealer lost value of business and majority of sales agents solicited by competitor agency — Retail dealer suing company and competitor agency — What is appropriate measure of damages.

C markets education savings plans to investors through retail dealers, known as enrollment directors, such as B. An enrollment director's agreement that took effect in 1998 governed the relationship between C and B. The term of the contract was three years. The applicable provision provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

H was another enrollment director and was a competitor of B. H wanted to capture B's lucrative niche market and previously approached B to propose a merger of their agencies on numerous occasions. He also actively encouraged C to force the merger. B had refused to participate in such a merger. C appointed H as the provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C's enrollment directors. The role required H to conduct

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audits of C's enrollment directors. B objected to having H, a competitor, review his confidential business records.

During C's discussions with the Commission about compliance, it was clear that C was considering a restructuring of its agencies in Alberta that involved B. In June 2000, C outlined its plans to the Commission and they included B working for H's agency. None of this was known by B. C repeatedly misled B by telling him that H, as PTO, was under an obligation to treat the information confidentially. It also responded equivocally when B asked in August 2000 whether the merger was a "done deal". When B continued to refuse to allow H to audit his records, C threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Agreement. At the expiry of the contract term, B lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by H's agency.

B sued C and H. The trial judge found C was in breach of the implied term of good faith, H had intentionally induced breach of contract, and both C and H were liable for civil conspiracy. The Court of Appeal allowed the appeal and dismissed B's lawsuit.

Held: The appeal with respect to C should be allowed and the appeal with respect to H dismissed. The trial judge's assessment of damages should be varied to $87,000 plus interest.

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Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear. Two incremental steps are in order to make the common law more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second step is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations. Taking these two steps will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

There is an organizing principle of good faith that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. An organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations. It is a standard that helps to understand and develop the law in a coherent and principled way.

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The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. However, this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

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The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties.

The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

The objection to C's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty

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of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

Under this new general duty of honesty in contractual performance, parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step.

This new duty of honest performance is a general doctrine of contract law that imposes as a contractual duty a minimum standard of honesty in contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability. However, the precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements.

The duty of honest performance should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner

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in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.

In this case, the trial judge did not make a reversible error by adjudicating the issue of good faith. C breached the 1998 Agreement when it failed to act honestly with B in exercising the non-renewal clause. The trial judge concluded that C acted dishonestly with B throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to H's role as PTO. The trial judge's detailed findings amply support this overall conclusion.

C is liable for damages calculated on the basis of what B's economic position would have been had C fulfilled its duty. While the trial judge did not assess damages on that basis given the different findings in relation to liability, the trial judge made findings that permit this Court to do so. These findings permit damages to be assessed on the basis that if C had performed the contract honestly, B would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to H. It is clear from the findings of the trial judge and from the record that the value of the business around the time of non-renewal was $87,000. B is entitled to damages in the amount of $87,000. The Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy. As such, it follows that the claims against H were rightly dismissed.

Cases Cited

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Referred to: *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634; *Mills v. Mills* (1938), 60 C.L.R. 150; *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113; *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162; *Herbert v. Mercantile Fire Ins. Co.* (1878), 43 U.C.Q.B. 384; *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180, aff'd (1992), 112 N.S.R. (2d) 180; *McDonald's Restaurant of Canada Ltd. v. British Columbia* (1997), 29 B.C.L.R. (3d) 303; *Crawford v. Agricultural Development Board (N.B.)* (1997), 192 N.B.R. (2d) 68; *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457; *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187; *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp.*, 2013 ONCA 494, 365 D.L.R. (4th) 15; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] 1 Q.B. 433; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235; *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43; *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072; *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187; *Mason v. Freedman*, [1958] S.C.R. 483; *Honda*

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Canada Inc. v. Keays, 2008 SCC 39, [2008] 2 S.C.R. 362; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3; *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595; *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Yam Seng Pte Ltd. v. International Trade Corporation Ltd.*, [2013] EWHC 111, [2013] 1 All E.R. (Comm.) 1321; *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200 (BAILII); *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992), 26 N.S.W.L.R. 234; *Burger King Corporation v. Hungry Jack's Pty Ltd.*, [2001] NSWCA 187, 69 N.S.W.L.R. 558; *R. v. Jones*, [1994] 2 S.C.R. 229; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177; *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533; *GEC Marconi Systems Pty Ltd. v. BHP Information Technology Pty Ltd.*, [2003] FCA 50 (AustLII); *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429; *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79 (1933); *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Bank of Montreal v. Bail Ltée*, [1992]

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2 S.C.R. 554; *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (1981); *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50; *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306; *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1; *Shell Oil Co. v. Marinello*, 294 A.2d 253 (1972), aff'd 307 A.2d 598 (1973); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (1978); *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F.Supp. 1173 (1984); *Pitney-Bowes, Inc. v. Mestre*, 517 F.Supp. 52 (1981), cert. denied, 464 U.S. 893 (1983); *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427.

Statutes and Regulations Cited

Civil Code of Lower Canada.

Civil Code of Québec, arts. 6, 7, 1375.

Franchises Act, R.S.A. 2000, c. F-23, s. 7.

Restatement (Second) of Contracts, § 205 (1981).

Uniform Commercial Code, §§ 1-201(b)(20) "good faith", 1-302, 1-304 (2012).

Authors Cited

Baudouin, Jean-Louis, et Pierre-Gabriel Jobin. *Les obligations*, 7e éd. par Pierre-Gabriel Jobin et Nathalie Vézina. Cowansville, Qué.: Yvon Blais, 2013.

Beale, Hugh, and Tony Dugdale. "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law & Soc.* 45.

2014 SCC 71 (CanLII)

Belobaba, Edward P. "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends*. Don Mills, Ont.: De Boo, 1985, 73.

Bridge, Michael G. "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 *Can. Bus. L.J.* 385.

Burton, Steven J. "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1981), 94 *Harv. L. Rev.* 369.

Campbell, David. "Good Faith and the Ubiquity of the 'Relational' Contract" (2014), 77 *Mod. L. Rev.* 475.

Cheshire and Fifoot's Law of Contract, 9th Australian ed., by N. C. Seddon and M. P. Ellinghaus. Chatswood, N.S.W.: LexisNexis Butterworths, 2008.

Chitty on Contracts, 31st ed., vol. I, *General Principles*, by H. G. Beale et al., eds. London: Sweet & Maxwell, 2012.

Clark, Don. "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 *Advocates' Q.* 435.

Dixon, Bill. "Common law obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

Dworkin, R. M. "Is Law a System of Rules?", in R. M. Dworkin, ed., *The Philosophy of Law*. Oxford: Oxford University Press, 1977, 38.

Farnsworth, E. Allan. "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev.* 666.

Fridman, G. H. L. *The Law of Contract in Canada*, 6th ed. Toronto: Carswell, 2011.

Goldwasser, Vivien, and Tony Ciro. "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369.

Grover, Warren. "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends*. Don Mills, Ont.: De Boo, 1985, 93.

Hall, Geoff R. *Canadian Contractual Interpretation Law*, 2nd ed. Markham, Ont.: LexisNexis, 2012.

Macaulay, Stewart. "An Empirical View of Contract", [1985] *Wis. L. Rev.* 465.

Macaulay, Stewart. "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev.* 55.

2014 SCC 71 (CanLII)

MacDougall, Bruce. *Estoppel*. Markham, Ont.: LexisNexis, 2012.

Mason, Anthony. "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *Law Q. Rev*. 66.

McCamus, John D. *The Law of Contracts*, 2nd ed. Toronto: Irwin Law, 2012.

McKendrick, Ewan. *Contract Law*, 9th ed. Basingstoke, England: Palgrave Macmillan, 2011.

McNeely, Anne C. *Canadian Law of Competitive Bidding and Procurement*. Aurora, Ont.: Canada Law Book, 2010.

Miller, Alan D., and Ronen Perry. "Good Faith Performance" (2013), 98 *Iowa L. Rev*. 689.

O'Byrne, Shannon Kathleen. "Good Faith in Contractual Performance: Recent Developments" (1995), 74 *Can. Bar Rev*. 70.

O'Byrne, Shannon Kathleen. "The Implied Term of Good Faith and Fair Dealing: Recent Developments" (2007), 86 *Can. Bar Rev*. 193.

O'Connor, J. F. *Good Faith in English Law*. Aldershot, England: Dartmouth, 1990.

Ontario. Law Reform Commission. *Report on Amendment of the Law of Contract*. Toronto: Ministry of the Attorney General, 1987.

Peden, Elisabeth. "Good faith in the performance of contract law" (2004), 42 *L.S.J.* 64.

Peden, Elisabeth. "When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (2005), 21 *J.C.L.* 226.

Pineau, Jean. "La discrétion judiciaire a-t-elle fait des ravages en matière contractuelle?", dans Service de la formation permanente du Barreau du Québec, vol. 113, *La réforme du Code civil, cinq ans plus tard*. Cowansville, Qué.: Yvon Blais, 1998, 141.

Powell, Raphael. "Good Faith in Contracts" (1956), 9 *Curr. Legal Probs.* 16.

Reiter, B. J. "Good Faith in Contracts" (1983), 17 *Val. U.L. Rev*. 705.

Steyn, Johan. "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *Law Q. Rev*. 433.

Summers, Robert S. "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968), 54 *Va. L. Rev*. 195.

2014 SCC 71 (CanLII)

Swan, Angela, and Jakub Adamski. *Canadian Contract Law*, 3rd ed. Markham, Ont.: LexisNexis, 2012.

Swan, John. "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts*. Don Mills, Ont.: De Boo, 1984, 125.

Waddams, S. M. "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 *J.C.L.* 55.

Waddams, S. M. *The Law of Contracts*, 6th ed. Aurora, Ont.: Canada Law Book, 2010.

Yee, Woo Pei. "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195.

APPEAL from a judgment of the Alberta Court of Appeal (Côté and Paperny JJ.A. and Belzil J. (*ad hoc*)), 2013 ABCA 98, 84 Alta. L.R. (5th) 68, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, [2013] 11 W.W.R. 459, [2013] A.J. No. 395 (QL), 2013 CarswellAlta 822, setting aside a decision of Moen J., 2011 ABQB 637, 526 A.R. 1, 96 B.L.R. (4th) 73, [2012] 9 W.W.R. 728, [2011] A.J. No. 1223 (QL), 2011 CarswellAlta 1905. Appeal allowed in part.

Neil Finkelstein, *Brandon Kain*, *John McCamus* and *Stephen Moreau*, for the appellant.

Eli S. Lederman, *Jon Laxer* and *Constanza Pauchulo*, for the respondents.

The judgment of the Court was delivered by

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CROMWELL J. —

I. Introduction

[1] The key issues on this appeal come down to two straightforward questions: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly? And, if so, did either of the respondents breach that duty? I would answer both questions in the affirmative. Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations. It will also bring a measure of justice to the appellant, Mr. Bhasin, who was misled and lost the value of his business as a result.

II. Facts and Judicial History

Overview and Issues

[2] The appellant, Mr. Bhasin, through his business Bhasin & Associates, was an enrollment director for Canadian American Financial Corp. ("Can-Am") beginning in 1989. The relationship between Mr. Bhasin and Can-Am soured in 1999 and ultimately Can-Am decided not to renew the dealership agreement with him. The litigation leading to this appeal ensued.

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[3] Can-Am markets education savings plans ("ESPs") to investors through retail dealers, known as enrollment directors, such as Mr. Bhasin. It pays the enrollment directors compensation and bonuses for selling ESPs. The enrollment directors are in effect small business owners and the success of their businesses depends on them building a sales force. It took Mr. Bhasin approximately 10 years to build his sales force, but his business thrived and Can-Am gave him numerous awards and prizes recognizing him as one of their top enrollment directors in Canada: 2011 ABQB 637, 526 A.R. 1, at paras. 51, 238 and 474.

[4] An enrollment director's agreement that took effect in 1998 governed the relationship between Can-Am and Mr. Bhasin. (That Agreement replaced a previous agreement of an indefinite term that had governed their relationship since the outset in 1989.) The Agreement was a commercial dealership agreement, not a franchise agreement. There was no franchise fee and it was not covered by the statutory duty of fair dealing such as that provided for in s. 7 of the *Franchises Act*, R.S.A. 2000, c. F-23.

[5] That said, there were some features of the 1998 Agreement that are similar to provisions typically found in franchise agreements. Mr. Bhasin was obliged to sell Can-Am investment products exclusively and owed it a fiduciary duty. Can-Am owned the client lists, was responsible for branding and implemented central policies that applied to all enrollment directors: see cls. 4.1, 5.2, 5.3 and 4.7. Mr.

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Bhasin could not sell, transfer, or merge his operation without Can-Am's consent, which was not to be withheld unreasonably: see cls. 4.5 and 11.4.

[6] The term of the contract was three years. Clauses 8.3 and 8.4 allowed termination on short notice for misconduct or other cause. Clause 3.3 — the provision at the centre of this case — provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

[7] Mr. Hrynew, one of the respondents and another enrollment director, was a competitor of Mr. Bhasin and there was considerable animosity between them: trial reasons, at para. 461. The trial judge found, in effect, that Mr. Hrynew pressured Can-Am not to renew its Agreement with Mr. Bhasin and that Can-Am dealt dishonestly with Mr. Bhasin and ultimately gave in to that pressure.

[8] When Mr. Hrynew moved his agency to Can-Am from one of its competitors many years before the events in question, Can-Am promised him that he would be given consideration for mergers that would take place and he in fact merged with other agencies in Calgary after joining Can-Am: trial reasons, at para. 238. He was in a strong position with Can-Am because he had the largest agency in Alberta and a good working relationship with the Alberta Securities Commission, which regulated Can-Am's business: para. 284.

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[9] Mr. Hrynew wanted to capture Mr. Bhasin's lucrative niche market around which he had built his business: trial reasons, at para. 303. Mr. Hrynew personally approached Mr. Bhasin to propose a merger of their agencies on numerous occasions: para. 238. He also actively encouraged Can-Am to force the merger and made "veiled threats" that he would leave if no merger took place: para. 282; see also paras. 251 and 287. The trial judge found that the proposed "merger" was in effect a hostile takeover of Mr. Bhasin's agency by Mr. Hrynew: para. 240. Mr. Bhasin steadfastly refused to participate in such a merger: para. 247.

[10] The Alberta Securities Commission raised concerns about compliance issues among Can-Am's enrollment directors. In late 1999, the Commission required Can-Am to appoint a single provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws: trial reasons, at paras. 149, 152 and 160. Can-Am appointed Mr. Hrynew to that position in September of that year. The role required him to conduct audits of Can-Am's enrollment directors. Mr. Bhasin and Mr. Hon, another enrollment director, objected to having Mr. Hrynew, a competitor, review their confidential business records: paras. 189-96.

[11] Can-Am became worried that the Commission might revoke its licence and, in 1999 and 2000, it had many discussions with the Commission about compliance. During those discussions, it was clear that Can-Am was considering a restructuring of its agencies in Alberta that involved Mr. Bhasin. In June 2000, Can-Am outlined its plans to the Commission and they included Mr. Bhasin working for

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Mr. Hrynew's agency. The trial judge found that this plan had been formulated before June 2000: para. 256. None of this was known by Mr. Bhasin: paras. 243-46.

[12] In fact, Can-Am repeatedly misled Mr. Bhasin by telling him that Mr. Hrynew, as PTO, was under an obligation to treat the information confidentially and that the Commission had rejected a proposal to have an outside PTO, neither of which was true: trial reasons, at para. 195. It also responded equivocally when Mr. Bhasin asked in August 2000 whether the merger was a "done deal": para. 247. When Mr. Bhasin continued to refuse to allow Mr. Hrynew to audit his records, Can-Am threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Agreement: paras. 207-11.

[13] At the expiry of the contract term, Mr. Bhasin lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by Mr. Hrynew's agency. Mr. Bhasin was obliged to take less remunerative work with one of Can-Am's competitors.

[14] Mr. Bhasin sued Can-Am and Mr. Hrynew. Moen J. in the Alberta Court of Queen's Bench found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The court held that the corporate respondent was in breach of the implied term of good faith, that Mr. Hrynew had intentionally induced breach of contract, and that the respondents were liable for civil conspiracy.

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[15] The trial judge found that Can-Am acted dishonestly with Mr. Bhasin throughout the events leading up to the non-renewal: it misled him about its intentions with respect to the merger and about the fact that it had already proposed the new structure to the Commission; it did not communicate to him that the decision was already made and final, even though he asked; and it did not communicate with him that it was working closely with Mr. Hrynew to bring about a new corporate structure with Hrynew's being the main agency in Alberta. The trial judge also found that, had Can-Am acted honestly, Mr. Bhasin could have "governed himself accordingly so as to retain the value in his agency": para. 258.

[16] The Alberta Court of Appeal allowed the respondents' appeal and dismissed Mr. Bhasin's lawsuit. The court found his pleadings to be insufficient and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause: 2013 ABCA 98, 84 Alta. L.R. (5th) 68.

[17] The appeal raises four issues:

(a) Did Mr. Bhasin properly plead breach of the duty of good faith?

(b) Did Can-Am owe Mr. Bhasin a duty of good faith? If so, did it breach that duty?

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(c) Are the respondents liable for the torts of inducing breach of contract or civil conspiracy?

(d) If there was a breach, what is the appropriate measure of damages?

III. Analysis

A. *Did Mr. Bhasin Properly Plead Breach of the Duty of Good Faith?*

[18] The Court of Appeal held that Mr. Bhasin had not properly pleaded the good faith issue and that the trial judge had therefore erred in considering it. Mr. Bhasin contests this conclusion, while the respondents support it. I agree with Mr. Bhasin.

[19] The allegations in the statement of claim clearly put the questions of improper purpose and dishonesty in issue. These facts are sufficient to put Can-Am's good faith in issue. The question of whether this conduct amounted to a breach of the duty of good faith is a legal conclusion that did not need to be pleaded separately. The defendants did not move to strike the pleadings or seek particulars of the allegation of wrongful termination in the statement of claim. Good faith was a live issue that was fully canvassed in a lengthy trial: A.F., at paras. 92-94. Written submissions by both parties at trial referred to the good faith issue and, even in his opening at trial, Mr. Bhasin's counsel raised the issue of good faith.

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[20] The trial judge held that any deficiency in the pleadings did not cause prejudice to the respondents: paras. 23 and 48. This is an assessment she was uniquely positioned to make and her conclusion ought to be treated with deference on appeal. The good faith issue was fully argued in and addressed by the Court of Appeal and has been fully argued on the merits in this Court.

[21] In my view, the trial judge did not make a reversible error by adjudicating the issue of good faith and we should address the merits of that issue.

B. *Did Can-Am Owe Mr. Bhasin a Duty of Good Faith?*

(1) Decisions and Positions of the Parties

(a) *Decisions*

[22] The trial judge accepted Mr. Bhasin's position that there was a duty of good faith in this case and that it had been breached. In brief, her reasoning was as follows.

[23] First, the trial judge decided that the 1998 Agreement was a type of agreement which as a matter of law requires good faith performance. She recognized that the 1998 Agreement did not fall within any of the existing categories of contract, such as employment, insurance and franchise agreements, which have been held to require good faith performance. She concluded, however, that the Agreement was

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analogous to a franchise or employment contract, and so by analogy to these cases, she implied a term of good faith performance as a matter of law. The contract was not balanced from its inception and the relationship placed the enrollment director in a position of inherent and predictable vulnerability: paras. 67-86.

[24] Second, and in the alternative, the trial judge held that a term of good faith performance should be implied based on the intentions of the parties in order to give business efficacy to the agreement. She concluded that "[w]hen one considers the whole of the relationship . . . it is clear that the parties had to operate in good faith and there was a requirement of fairness between them. In other words, good faith was necessary to give business efficacy to the whole 1998 Agreement": para. 101.

[25] The 1998 Agreement contained an "entire agreement clause" stating that there were no "agreements, express, implied or statutory, other than expressly set out" in it: cl. 11.2. The trial judge held, however, that this clause did not preclude the implication of a duty of good faith. The parties, she reasoned, cannot rely on exclusion clauses to avoid contractual obligations where there is an imbalance of power, and courts refuse to let parties shelter under entire agreement clauses where it would be unjust or inequitable to do so: paras. 116-18.

[26] Turning to the issue of breach, the trial judge found that Can-Am had breached the agreement, first by requiring Mr. Bhasin to submit to an audit by Mr. Hrynew and to provide the latter with access to his business records, and second by exercising the non-renewal clause in a dishonest and misleading manner and for an

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improper purpose. The non-renewal clause was not intended to permit Can-Am to force a merger of the Bhasin and Hrynew agencies, but that was the purpose for which Can-Am exercised this power: para. 261. The trial judge also found both respondents liable for unlawful means conspiracy and found Mr. Hrynew liable for inducing Can-Am's breach of its contract with Mr. Bhasin.

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[27] The Court of Appeal reversed and held that there had been no breach of contract. The duty of good faith in employment contracts could not be extended by analogy to other types of contract. In any event, the duty of good faith in the employment context is limited to the manner of termination and does not include reasons for non-renewal: C.A. reasons, at paras. 27 and 31. Nor was this a circumstance in which a term could be implied because it was so obvious it was not thought necessary to mention or was necessary to make the contract work: para. 32. Even if there were an implied duty of good faith in this case, the impugned conduct concerned the non-renewal of a contract, which occurs on expiry, unlike a termination clause: para. 31.

[28] Moreover, the Court of Appeal held that a term cannot be implied where it goes against an express term of the contract. Here, the parties did not intend a perpetual contract, since they included a term allowing either party to unilaterally trigger its expiration prior to the end of each three-year term. The trial judge's approach was inconsistent with the non-renewal provision of the contract. The motive for triggering expiration was not restricted under the Agreement. The

implication of a term of good faith also violated the entire agreement clause. The court held that the evidence of assurances given by Can-Am as to how the non-renewal power would be exercised fell afoul of the parol evidence rule and should not have been considered. Since the Court of Appeal held there was no breach of contract, the basis for the claims in unlawful means conspiracy and inducing breach of contract also disappeared.

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(b) *Positions of the Parties*

[29] Mr. Bhasin advances two related positions on appeal. His broad submission is that the Court should recognize a general duty of good faith in contract. The duty arises where the agreement gives the defendant the power to unilaterally defeat a legitimate contractual objective of the plaintiff and it does not clearly allow the defendant to exercise its power without regard for that objective: A.F., at para. 51. This duty of good faith prevents conduct which, while consonant with the letter of a contract, exhibits dishonesty, ill will, improper motive or similar departures from reasonable business expectations. Mr. Bhasin contends that common law in Canada is increasingly isolated as other jurisdictions embrace a greater role for good faith in contract law: A.F., at paras. 27-32. The recognition of a general duty of good faith would constitute an incremental advance in the law, given the numerous specific situations that already give rise to a duty of good faith. Mr. Bhasin relies on the findings of the trial judge that the respondents improperly and dishonestly used their non-renewal right to compel Mr. Bhasin to merge with his competitor. Mr. Bhasin

contends that the respondents had no legitimate business reason for not renewing the contract. He also says that the entire agreement clause should be construed narrowly, and that express language is needed for such a clause to derogate from a duty of good faith: A.F., at para. 83.

[30] Mr. Bhasin's second position, emphasized in oral argument, is that the Court should at least recognize a duty of honest performance of contractual obligations: transcript, at pp. 8, 10 and 24. Mr. Bhasin relies on the trial judge's findings that Can-Am acted dishonestly towards Mr. Bhasin throughout the period leading up to the non-renewal. It repeatedly lied to him about the nature of the organizational changes required by the Alberta Securities Commission, the nature of the audits that were to be carried out by Mr. Hrynew, and was dishonest about its intention to force him out: trial reasons, at paras. 195, 221, 246-47 and 267.

[31] Unsurprisingly, the respondents see things very differently. While they accept that good faith plays a role in Canadian contract law, they submit that this role is much more modest than Mr. Bhasin suggests. They say that such a duty arises only in certain classes of contract, such as employment contracts, and in contracts involving discretionary powers: R.F., at para. 52. In the employment context, the duty applies only to the manner in which a contract is terminated. The contract in this case was negotiated between commercial parties to whom the policy considerations underlying employment law doctrine do not apply. Mr. Bhasin is alleging a right to a perpetual, or at least indefinite, contract with the respondents. The contract in this

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case could not be said to be discretionary, because it provided simply that on six months' notice, either party could terminate the Agreement. The respondents submit that there is no ambiguity in the wording of the non-renewal clause of the contract and so there is no basis for implying other terms or for relying on extrinsic evidence of the parties' intentions. The entire agreement clause specifically precluded the implication of any terms other than the express terms of the contract.

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(2) Analysis

(a) *Overview*

[32] The notion of good faith has deep roots in contract law and permeates many of its rules. Nonetheless, Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts. The result is an "unsettled and incoherent body of law" that has developed "piecemeal" and which is "difficult to analyze": Ontario Law Reform Commission ("OLRC"), *Report on Amendment of the Law of Contract* (1987), at p. 169. This approach is out of step with the civil law of Quebec and most jurisdictions in the United States and produces results that are not consistent with the reasonable expectations of commercial parties.

[33] In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing

principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

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[34] In my view, taking these two steps is perfectly consistent with the Court's responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

(b) *Good Faith as a General Organizing Principle*

(i) Background

[35] The doctrine of good faith traces its history to Roman law and found acceptance in early English contract law. For example, Lord Northington wrote in *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634, at p. 637, cited in *Mills v. Mills* (1938), 60 C.L.R. 150 (H.C.A.), at p. 185, that "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." Similarly, Lord Kenyon wrote in *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113, "in contracts of all kinds, it is of the highest

importance that courts of law should compel the observance of honesty and good faith": p. 113-14. In *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162, at p. 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts; see also *Herbert v. Mercantile Fire Ins. Co.* (1878), 43 U.C.Q.B. 384; R. Powell, "Good Faith in Contracts" (1956), 9 *Curr. Legal Probs.* 16.

[36] However, these broad pronouncements have been, for the most part, restricted by subsequent jurisprudence to specific types of contracts and relationships, such as insurance contracts, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts: *Chitty on Contracts* (31st ed. 2012), vol. I, *General Principles*, at para. 1-039; W. P. Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195, at p. 195; E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 73, at p. 75. One leading Canadian contracts scholar went so far as to say that the common law has taken a "kind of perverted pride" in the absence of any general notion of good faith, as if accepting that notion "would be admitting to the presence of some kind of embarrassing social disease": J. Swan, "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984), 125, at p. 148.

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[37] This Court has not examined whether there is a general duty of good faith contractual performance. However, there has been an active debate in other courts and among scholars for decades over whether there is, or should be, a general or "stand-alone" duty of good faith in the performance of contracts. Canadian courts have reached different conclusions on this point.

[38] Some suggest that there is a general duty of good faith: *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (S.C. (T.D.)), aff'd on narrower grounds (1992), 112 N.S.R. (2d) 180 (S.C. (App. Div.)); *McDonald's Restaurant of Canada Ltd. v. British Columbia* (1997), 29 B.C.L.R. (3d) 303 (C.A.), at para. 99; *Crawford v. Agricultural Development Board (N.B.)* (1997), 192 N.B.R. (2d) 68 (C.A.), at paras. 7-8. They see a broad role for good faith as an implied term in all contracts that establishes minimum standards of acceptable commercial behaviour. As Kelly J. put it in *Gateway Realty*, at para. 38:

> The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith" — a conduct that is contrary to community standards of honesty, reasonableness or fairness.

[39] Other courts are of the view that there exists no such general duty of good faith in all contracts: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at paras. 53-54; *Mesa Operating Limited Partnership v. Amoco*

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Canada Resources Ltd. (1994), 149 A.R. 187 (C.A.), at paras. 15-19, *per* Kerans J.A., *dubitante*; *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp.*, 2013 ONCA 494, 365 D.L.R. (4th) 15, at para. 131; see G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 338-46. The detractors of such a general duty of good faith have accepted a limited role for good faith in certain contexts but have held that it would create commercial uncertainty and undermine freedom of contract to recognize a general duty of good faith that would permit courts to interfere with the express terms of a contract.

[40] This Court ought to develop the common law to keep in step with the "dynamic and evolving fabric of our society" where it can do so in an incremental fashion and where the ramifications of the development are "not incapable of assessment": *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93; see also *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-64; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 85; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 46. This is even more appropriate where, as here, what is contemplated is not the reversal of some settled rule, but a development directed to bringing greater certainty and coherence to a complex and troublesome area of the common law.

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[41] As I see it, the developments that I propose are desirable as a result of several considerations. First, the current Canadian common law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada — Quebec and the United States: see, e.g., Hall, at p. 347. While the developments which I propose will not completely address these problems, they will bring a measure of coherence and predictability to the law and will bring the law closer to what reasonable commercial parties would expect it to be.

(ii) Survey of the Current State of the Common Law

[42] Anglo-Canadian common law has developed a number of rules and doctrines that call upon the notion of good faith in contractual dealings; it is a concept that underlies many elements of modern contract law: S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at para. 550; J. D. McCamus *The Law of Contracts* (2nd ed. 2012), at pp. 835-38; OLRC, at p. 165; Belobaba, at pp. 75-76; J. F. O'Connor, *Good Faith in English Law* (1990), at pp. 17-49; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *Law Q. Rev*. 433. The approach, not unfairly, has been characterized as developing "piecemeal solutions in response to demonstrated problems": *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] 1 Q.B. 433 (C.A.), at p. 439, *per* Bingham L.J. (as he then was). Thus we see, for example, that good faith notions have been applied to

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particular types of contracts, particular types of contractual provisions and particular contractual relationships. It also underlies doctrines that explicitly deal with fairness in contracts, such as unconscionability, and plays a role in interpreting and implying contractual terms. The difficulty with this "piecemeal" approach, however, is that it often fails to take a consistent or principled approach to similar problems. A brief review of the current landscape of good faith will show the extent to which this is the case.

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[43] Considerations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability. This doctrine is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other: G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at pp. 329-30; E. Peden, "When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (2005), 21 *J.C.L.* 226; Belobaba, at p. 86; S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 *J.C.L.* 55.

[44] Good faith also plays a role in the law of implied terms, particularly with respect to terms implied by law. Terms implied by law redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at p. 457, *per* McLachlin J. (as she then was); see also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, *per* McLachlin J., concurring. The implication

of terms plays a functionally similar role in common law contract law to the doctrine of good faith in civil law jurisdictions by filling in gaps in the written agreement of the parties: *Chitty on Contracts*, at para. 1-051. In *Mesa Operating*, the Alberta Court of Appeal implied a term that a power of pooling properties for the purpose of determining royalty payments be exercised reasonably. The court implied this term in order to give effect to the intentions of the parties rather than as a requirement of good faith, but Kerans J.A. stated that "[t]he rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith": para. 22. Many other examples may be found in Waddams, *The Law of Contracts*, at paras. 499-506.

[45] Considerations of good faith are also apparent in contract interpretation: *Chitty on Contracts*, at para. 1-050; Hall, at p. 347. The primary object of contractual interpretation is of course to give effect to the intentions of the parties at the time of contract formation. However, considerations of good faith inform this process. Parties may generally be assumed to intend certain minimum standards of conduct. Further, as Lord Reid observed in *Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235 (H.L.), at p. 251, "[t]he more unreasonable the result the more unlikely it is that the parties can have intended it". As A. Swan and J. Adamski put it, the duty of good faith "is not an externally imposed requirement but inheres in the parties' relation": *Canadian Contract Law* (3rd ed. 2012), at §§ 8.134-8.146.

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[46] Good faith also appears in numerous contexts in a more explicit form. The concept of "good faith" is used in hundreds of statutes across Canada, including statutory duties of good faith and fair dealing in franchise legislation and good faith bargaining in labour law: S. K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 *Can. Bar Rev*. 70, at p. 71.

[47] There have been many attempts to bring a measure of coherence to this piecemeal accretion of appeals to good faith: see, among many others, McCamus, at pp. 835-68; S. K. O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments" (2007), 86 *Can. Bar Rev*. 193, at pp. 196-204; Waddams, *The Law of Contracts*, at paras. 494-508; R. S. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968), 54 *Va. L. Rev*. 195; S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1981), 94 *Harv. L. Rev*. 369. By way of example, Professor McCamus has identified three broad types of situations in which a duty of good faith performance of some kind has been found to exist: (1) where the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties (pp. 840-56; *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43, at paras. 49-50).

[48] While these types of cases overlap to some extent, they provide a useful analytical tool to appreciate the current state of the law on the duty of good faith.

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They also reveal some of the lack of coherence in the current approach. It is often unclear whether a good faith obligation is being imposed as a matter of law, as a matter of implication or as a matter of interpretation. Professor McCamus notes:

> Although the line between the two types of implication is difficult to draw, it may be realistic to assume that implied duties of good faith are likely, on occasion at least, to slide into the category of legal incidents rather than mere presumed intentions. Certainly, it would be difficult to defend the implication of terms on each of the cases considered here on the basis of the traditional business efficiency or officious bystander test. In the control of contractual discretion cases, for example, it may be more realistic to suggest that the implied limitation on the exercise of the discretion is intended to give effect to the "reasonable expectations of the parties." [pp. 865-66]

[49] The first type of situation (contracts requiring the cooperation of the parties to achieve the objects of the contract) is reflected in the jurisprudence of this Court. In *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, the parties to a real estate transaction failed to specify in the purchase-sale agreement which party was to be responsible for obtaining planning permission for a subdivision of the property. By law, the vendor was the only party capable of obtaining such permission. The Court held that the vendor was under an obligation to use reasonable efforts to secure the permission, or as Dickson J. (as he then was) put it, "[t]he vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale": p. 1084. It is not completely clear whether this duty was imposed as a matter of law or was implied based on the parties' intentions: see p. 1083; see also *Gateway Realty* and *CivicLife.com*.

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[50] *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187, is an example of the second type of situation (exercise of contractual discretion). The lease of a helicopter included an option to buy at the "reasonable fair market value of the helicopter as established by Lessor": para. 2. This Court held, at para. 34, that, "[c]learly, the lessor is not in a position, by virtue of clause 32, to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the reasonable fair market value of the helicopters, which is the price that the parties had initially agreed would be the exercise price of the option." The Court did not discuss the basis for implying the term, but suggested that in the absence of a reasonableness requirement, the option would be a mere agreement to agree and thus would be unenforceable, which means that the implication of the term was necessary to give business efficacy to the agreement.

[51] This Court's decision in *Mason v. Freedman*, [1958] S.C.R. 483, falls in the third type of situation in which a duty of good faith arises (where a contractual power is used to evade a contractual duty). In that case, the vendor in a real estate transaction regretted the bargain he had made. He then sought to repudiate the contract by failing to convey title in fee simple because he claimed his wife would not provide a bar of dower. The issue was whether he could take advantage of a clause permitting him to repudiate the transaction in the event that he was "unable or unwilling" to remove this defect in title even though he had made no efforts to do so by trying to obtain the bar of dower. Judson J. held that the clause did not "enable a person to repudiate a contract for a cause which he himself has brought about" or

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permit "a capricious or arbitrary repudiation": p. 486. On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner": p. 487.

[52] The jurisprudence is not always very clear about the source of the good faith obligations found in these cases. The categories of terms implied as a matter of law, terms implied as a matter of intention and terms arising as a matter of interpretation sometimes are blurred or even ignored, resulting in uncertainty and a lack of coherence at the level of principle.

[53] Apart from these types of situations in which a duty of good faith arises, common law Canadian courts have also recognized that there are classes of relationships that call for a duty of good faith to be implied by law.

[54] For example, this Court confirmed that there is a duty of good faith in the employment context in *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362. Mr. Keays was diagnosed with chronic fatigue syndrome and was frequently absent from work. Honda grew concerned with the frequency of the absences. It ordered Mr. Keays to undergo an examination by a doctor chosen by the employer, required him to provide a doctor's note for any absences, and discouraged him from retaining outside counsel. The majority held that in all employment contracts there was an implied term of good faith governing the manner of termination. In particular, the employer should not engage in conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" when dismissing an

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employee: para. 57, citing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 98. Good faith in this context did not extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce: *Wallace*, at para. 76.

[55] This Court has also affirmed the duty of good faith which requires an insurer to deal with its insured's claim fairly, both with respect to the manner in which it investigates and assesses the claim and to the decision whether or not to pay it: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 63, citing *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29. The breach of this duty may support an award of punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595. This duty of good faith is also reciprocal: the insurer must not act in bad faith when dealing with a claim, which is typically made by someone in a vulnerable situation, and the insured must act in good faith by disclosing facts material to the insurance policy (para. 83, citing *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Q.B.), at paras. 84-85, *per* Murray J.).

[56] This Court has also recognized that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context. When a company tenders a contract, it comes under a duty of fairness in considering the bids submitted under the tendering process, as a result of the expense incurred by parties submitting these bids: *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R.

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860, at para. 88; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 58-59; A. C. McNeely, *Canadian Law of Competitive Bidding and Procurement* (2010), at pp. 245-54.

[57] Developments in the United Kingdom and Australia point to enhanced attention to the notion of good faith, mitigated by reluctance to embrace it as a stand-alone doctrine. Good faith in contract performance has received increasing prominence in English law, despite its "traditional . . . hostility" to the concept: *Yam Seng Pte Ltd. v. International Trade Corporation Ltd.*, [2013] EWHC 111, [2013] 1 AII E.R. (Comm.) 1321 (Q.B.), at para. 123, citing E. McKendrick, *Contract Law* (9th ed. 2011), at pp. 221-22; see also *Chitty on Contracts*, at para. 1-039. In *Yam Seng*, Leggatt J. held that a number of specific duties embodying good faith can be implied based on the presumed intentions of the parties according to the traditional approach for implying terms: para. 131. Leggatt J. identified a number of these implied duties, including honesty, fidelity to the parties' bargain, cooperation, and fair dealing: paras. 135-50. Leggatt J. stated that "[a] paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust": para. 135; see D. Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract" (2014), 77 *Mod. L. Rev*. 475. The Court of Appeal considered the *Yam Seng* decision in *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200 (BAILII), where it confirmed that good faith was

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not a general principle of English law, but that it could be an implied term in certain categories of cases: paras. 105 and 150.

[58] Australian courts have also moved towards a greater role for good faith in contract performance: *Cheshire and Fifoot's Law of Contract* (9th Australian ed. 2008), at paras. 10.43-10.47. The duty of good faith in its modern form was recognized by Priestley J.A. in *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992), 26 N.S.W.L.R. 234 (C.A.). There is no generally applicable duty of good faith, but one will be implied into contracts in certain circumstances. The duty of good faith can be implied as a matter of law or as a matter of fact, although the cases are not always clear on the basis on which the term is being implied. Australian courts have taken a broad view of what constitutes good faith: see, e.g., *Burger King Corporation v. Hungry Jack's Pty Ltd.*, [2001] NSWCA 187, 69 N.S.W.L.R. 558. The law of good faith performance in Australia is still developing and remains unsettled: E. Peden, "Good faith in the performance of contract law" (2004), 42 *L.S.J.* 64, at p. 64. However, it is clear that the duty of good faith requires adherence to standards of honest conduct: A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *Law Q. Rev*. 66, at p. 76; *Burger King*, at paras. 171 and 189.

(iii) The Way Forward

[59] This selective survey supports the view that Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear:

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Belobaba; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 95; B. J. Reiter, "Good Faith in Contracts" (1983), 17 *Val. U.L. Rev*. 705, at pp. 711-12. It also shows that in Canada, as well as in the United Kingdom and Australia, there is increasing attention to the notion of good faith, particularly in the area of contractual performance. Opponents of any general obligation of good faith prefer the traditional, organic development of solutions to address particular problems as they arise: see, e.g., M. G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 *Can. Bus. L.J.* 385; D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 *Advocates' Q.* 435, at pp. 436 and 440. However, foreclosing some incremental development of the law at the level of principle would go beyond what prudent caution requires and evidence an almost "perverted pride" — to use Swan's term, at p. 148 — in the law's failings.

[60] Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see Swan and Adamski, at §1.24.

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[61] The fact that commercial parties expect honesty on the part of their contracting partners can also be seen from the fact that it was the American Bar Association's Section of Corporation, Banking and Business Law that urged the adoption of "honesty in fact" in the original drafting of the Uniform Commercial Code ("U.C.C."): E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev*. 666, at p. 673. Moreover, empirical research suggests that commercial parties do in fact expect that their contracting parties will conduct themselves in good faith: see, e.g., S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev*. 55, at p. 58; H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law & Soc.* 45, at pp. 47-48; S. Macaulay, "An Empirical View of Contract", [1985] *Wis. L. Rev*. 465; V. Goldwasser and T. Ciro, "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369, at pp. 372-77. It is, to say the least, counterintuitive to think that reasonable commercial parties would accept a contract which contained a provision to the effect that they were not obliged to act honestly in performing their contractual obligations.

[62] I conclude from this review that enunciating a general organizing principle of good faith and recognizing a duty to perform contracts honestly will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations.

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(iv) Towards an Organizing Principle of Good Faith

[63] The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

[64] As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: see, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229, at p. 249; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. 124; R. M. Dworkin, "Is Law a System of Rules?", in R. M. Dworkin, ed., *The Philosophy of Law* (1977), 38, at p. 47. It is a standard that helps to understand and develop the law in a coherent and principled way.

[65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those

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interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

[66] This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

[67] This approach is consistent with that taken in the case of unjust enrichment. McLachlin J. outlined the approach in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at pp. 786 and 788:

> This case presents the Court with the difficult task of mediating between, if not resolving, the conflicting views of the proper scope of the doctrine of unjust enrichment. It is my conclusion that we must choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery . . . .

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. . .

> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

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[68] The flexible approach that was taken in *Peel* recognizes that "[a]t the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain": p. 788. In that case, this Court further developed the law through application of an organizing principle without displacing the existing specific doctrines. This is what I propose to do with regards to the organizing principle of good faith.

[69] The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at § 1.24; B. Dixon, "Common law

obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

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[70] The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

[71] Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.

(v) Should There Be a New Duty?

[72] In my view, the objection to Can-Am's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. The relationship between Can-Am and Mr. Bhasin was not an employment or franchise relationship. Classifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation. After all, a party almost always has some amount of discretion in how to perform a contract. It would also be difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.

[73] In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in

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Contractual Performance: Recent Developments", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

[74] There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law: see *Mesa Operating*, at paras. 15-19. I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

[75] Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it: see *CivicLife.com*, at para. 52.

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[76] It is true that the Anglo-Canadian common law of contract has been reluctant to impose mandatory rules not based on the agreement of the parties, because they are thought to interfere with freedom of contract: see *Gateway Realty*, *per* Kelly J.; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 95; Farnsworth, at pp. 677-78. As discussed above, however, the duty of honest performance interferes very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations.

[77] That said, I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context. The precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements. The approach I outline here is similar in principle to that in § 1-302(b) of the U.C.C. (2012):

> The obligations of good faith, diligence, reasonableness, and care . . . may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.

[78] Certainly, any modification of the duty of honest performance would need to be in express terms. A generically worded entire agreement clause such as cl. 11.2 of the Agreement does not indicate any intention of the parties to depart from the basic tenets of honest performance: see *GEC Marconi Systems Pty Ltd. v. BHP*

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Information Technology Pty Ltd., [2003] FCA 50 (AustLII), at para. 922, *per* Finn J.; see also O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 96.

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[79] Two arguments are typically raised against an increased role for a duty of good faith in the law of contract: see Bridge; Clark; and Peden, "When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability". The first is that "good faith" is an inherently unclear concept that will permit *ad hoc* judicial moralism to undermine the certainty of commercial transactions. The second is that imposing a duty of good faith is inconsistent with the basic principle of freedom of contract. I do not have to decide here whether or not these points are valid in relation to a broad, generalized duty of good faith. However, they carry no weight in relation to adopting a rule of honest performance.

[80] Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith: W. Grover, "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 93, at pp. 106-

7. A rule of honest performance in my view will promote, not detract from, certainty in commercial dealings.

[81] Any interference by the duty of honest performance with freedom of contract is more theoretical than real. It will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations.

[82] Those who fear that this modest step would create uncertainty or impede freedom of contract may take comfort from experience of the civil law of Quebec and the common and statute law of many jurisdictions in the United States.

[83] The *Civil Code of Québec* recognizes a broad duty of good faith which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights: see arts. 6, 7 and 1375. While this is not the place to expound in detail on good faith in the Quebec civil law, it is worth noting that good faith is seen as having two main aspects. The first is the subjective aspect, which is concerned with the state of mind of the actor, and addresses conduct that is, for example, malicious or intentional. The second is the objective aspect which is concerned with whether conduct is unacceptable according to the standards of reasonable people. As J.-L. Baudouin and P.-G. Jobin explain, [TRANSLATION] "a person can be in good faith (in the subjective sense), that is, act without malicious intent or without knowledge of certain facts, yet his or her conduct may nevertheless be contrary to the requirements of good faith in that it violates objective standards of

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conduct that are generally accepted in society": *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 132. The notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract: *ibid.*, at para. 161; *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429, at p. 436.

[84] In the United States, § 1-304 of the U.C.C. provides that "[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." The U.C.C. has been enacted by legislation in all 50 states. While the provisions of the U.C.C. apply only to commercial contracts, § 205 of the *Restatement (Second) of Contracts* (1981) provides for a general duty of good faith in all contracts. This provision of the *Restatement* has been followed by courts in the vast majority of states. The notion of "good faith" in the *Restatement* substantially followed the definition proposed by Robert Summers in an influential article, where he proposed that "good faith" is best understood as an "excluder" of various categories of bad faith conduct: p. 206; see § 205, comment a. The general definition of "good faith" in the U.C.C. is also quite broad, encompassing honesty and adherence to "reasonable commercial standards": § 1-201(b)(20). This definition was originally limited to "honesty in fact", that is, a duty of honesty in performance, and was only later expanded: A. D. Miller and R. Perry, "Good Faith Performance" (2013), 98 *Iowa L. Rev.* 689, at pp. 719-20. Honesty in performance is also a key component of "good faith" under the *Restatement*: § 205, comments a and d.

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[85] Experience in Quebec and the United States shows that even very broad conceptions of the duty of good faith have not impeded contractual activity or contractual stability: see, e.g., J. Pineau, "La discrétion judiciaire a-t-elle fait des ravages en matière contractuelle?", in *La réforme du Code civil, cinq ans plus tard* (1998), 141. It is also worth noting that in both the United States and Quebec, judicial developments preceded legislative action in codifying good faith. In the United States, courts had recognized the existence of a general duty of good faith before the promulgation of the U.C.C.: see, e.g., *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79 (1933). Similarly, though there was no express provision of "good faith" in the *Civil Code of Lower Canada*, the Court implied such a general duty from more specific provisions of the *Code*: see *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554. The duty of good faith was subsequently included in the revisions leading to the enactment of the *Civil Code of Québec*.

[86] The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose

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material facts: *Whiten*. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

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[87] This distinction explains the result reached by the court in *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981). The terminating party had decided in advance of the required notice period that it was going to terminate the contract. The court held that no disclosure of this intention was required other than what was stipulated in the notice requirement. The court stated:

> . . . there is very little to be said in favor of a rule of law that good faith requires one possessing a right of termination to inform the other party promptly of any decision to exercise the right. A tenant under a month-to-month lease may decide in January to vacate the premises at the end of September. It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision soon after January. Though the landlord may have found earlier notice convenient, formal exercise of the right of termination in August will do. [pp. 989-90]

United Roasters makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract.

[88] The duty of honest performance has similarities with the existing law in relation to civil fraud and estoppel, but it is not subsumed by them. Unlike promissory estoppel and estoppel by representation, the contractual duty of honest performance

does not require that the defendant intend that his or her representation be relied on and it is not subject to the uncertainty around whether estoppel can be used to found an independent cause of action: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 5; *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50; Waddams, *The Law of Contracts*, at paras. 195-203; B. MacDougall, *Estoppel* (2012), at pp. 142-44. As for the tort of civil fraud, breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on, and breach of it supports a claim for damages according to the contractual rather than the tortious measure: see, e.g., *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306, cited with approval in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 19.

[89] Mr. Bhasin, supported by many judicial and academic authorities, has argued for wholesale adoption of a more expansive duty of good faith in contrast to the modest, incremental change that I propose: A.F., at para. 51; Summers, at p. 206; Belobaba; *Gateway Realty*. In many of its manifestations, good faith requires more than honesty on the part of a contracting party. For example, in *Dynamic Transport*, this Court held that good faith in the context of that contract required a party to take reasonable steps to obtain the planning permission that was a condition precedent to a sale of property. In other cases, the courts have required that discretionary powers not be exercised in a manner that is "capricious" or "arbitrary": *Mason*, at p. 487; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (C.A.), at p. 7. In other contexts, this

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Court has been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts: *Wallace*, at para. 76.

[90] It is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith. This is because it is unclear to me how any broader duty would assist Mr. Bhasin here. After all, the contract was subject to non-renewal. It is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration. This in my view is the principal difficulty in the trial judge's reasoning because, in the result, her decision turned a three year contract that was subject to an express provision relating to non-renewal into a contract of roughly nine years' duration. As the Court of Appeal pointed out, in my view correctly, "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary": para. 32. Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract. Since no damages flow from this breach, it is unnecessary to decide whether reliance on a discretionary power to achieve a purpose extraneous to the contract and which undermined one of its key objectives might call for further development under the organizing principle of good faith contractual performance.

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[91] I note as well that, even in jurisdictions that embrace a broader role for the duty of good faith, plaintiffs have met with only mixed success in alleging bad faith failure to renew a contract. Some cases have treated non-renewal as equivalent to termination and thus subject to a duty of good faith: *Shell Oil Co. v. Marinello*, 294 A.2d 253 (N.J. Super. Ct. 1972), aff'd 307 A.2d 598 (N.J. 1973); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (Pa. 1978), at pp. 741-42. Other courts have seen non-renewal as fundamentally different, especially where the express terms of the contract contemplate the expiry of contractual obligations and leave no room for any sort of duty to renew: *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F.Supp. 1173 (D. Mass. 1984), at p. 1184; *Pitney-Bowes, Inc. v. Mestre*, 517 F.Supp. 52 (S.D. Fla. 1981), cert. denied, 464 U.S. 893 (1983).

[92] I conclude that at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.

[93] A summary of the principles is in order:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

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(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

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(3) Application

[94] The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.

[95] The immediate dispute in this case centred on the non-renewal clause contained in cl. 3.3 of the 1998 Agreement which Mr. Bhasin entered into in November 1998. It provided that the Agreement was for a three-year term and would be automatically renewed unless one of the parties gave notice to the contrary at least six months before the end of the initial or any renewed term:

> 3.3 The term of this Agreement shall be for a period of three years from the date hereof (the "Initial Term") and thereafter shall be automatically renewed for successive three year periods (a "Renewal Term"), subject to earlier termination as provided for in section 8 hereof, unless either [Can-Am] or the Enrollment Director notifies the other in writing at least six months prior to expiry of the Initial Term or any Renewal Term that the notifying party desires expiry of the Agreement, in which event the Agreement shall expire at the end of such Initial Term or Renewal Term, as applicable.

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[96] The factual matrix in which the judge made her finding of dishonest performance is complicated and I will only outline it in very broad terms in order to put that finding in context. There were two main interrelated story lines.

[97] The first concerns Mr. Hrynew's persistent attempts to take over Mr. Bhasin's market through a merger — in effect a takeover by him of Mr. Bhasin's agency. The second concerns the difficulties, beginning in early April 1999, that Can-Am was having with the Alberta Securities Commission, which regulated its business and its enrollment directors in Alberta. The Commission insisted that Can-Am appoint a full-time employee to be a PTO responsible for compliance with Alberta securities law. Can-Am ultimately appointed Mr. Hrynew, with the result that he would audit his competitor agencies, including Mr. Bhasin's, and therefore have access to their confidential business information. Mr. Bhasin's refusal to allow Mr. Hrynew access to this information led to the final confrontation with Can-Am and its giving notice of non-renewal in May 2001. Can-Am, for its part, wanted to force a merger of the Bhasin agency under the Hrynew agency, effectively giving Mr.

Bhasin's business to Mr. Hrynew. It was in the context of this situation that the trial judge made her findings of dishonesty on the part of Can-Am.

[98] The trial judge concluded that Can-Am acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to Mr. Hrynew's role as PTO. Her detailed findings amply support this overall conclusion.

[99] By early 2000, Can-Am was considering a significant reorganization of its activities in Alberta; by June of that year, it sent an organizational chart to the Commission showing that Mr. Bhasin's agency was to be merged under Mr. Hrynew's. But it had said nothing of this to Mr. Bhasin: trial reasons, at paras. 167-68. The trial judge found that these representations made by Can-Am to the Commission were clearly false if, as she concluded, they intended to refer to Mr. Bhasin: para. 246. She also found that Can-Am, by June 2000, was fearful that the Commission was going to pull its licence in Alberta and that it was prepared to do whatever it could to forestall that possibility. "However, it was not dealing honestly with [Mr.] Bhasin about the realities of the situation as [it] saw them": para. 246.

[100] In August 2000, Mr. Bhasin first heard of Can-Am's merger plans for him during a meeting with Can-Am's regional vice-president. But when questioned about Can-Am's intentions with respect to the merger, the official "equivocated" and did not tell him the truth that from Can-Am's perspective this was a "done deal". The

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trial judge concluded that the official was "not honest with [Mr.] Bhasin" at that meeting: para. 247.

[101] When Mr. Bhasin complained about Mr. Hrynew's conflict of interest in being both auditor and competitor, Can-Am in effect blamed the Commission, claiming that the Commission had rejected its proposal to appoint a third party PTO. This was not truthful. Can-Am failed to mention that it had proposed to appoint a non-resident of Alberta who was clearly not qualified according to the Commission's criteria or that it had decided to appoint Mr. Hrynew even though he did not meet the Commission's criteria either: trial reasons, at paras. 195 and 221. It also misrepresented — repeatedly — to Mr. Bhasin that Mr. Hrynew was bound by duties of confidentiality and segregation of activities in the course of an audit, when in fact there was no such requirement. Can-Am did not even finalize its PTO contract with Mr. Hrynew until March 2001 and, notwithstanding its assurances to Mr. Bhasin, it failed to include such a provision in the contract: paras. 190-221. As the trial judge found, Can-Am "could not possibly have missed this honestly in the PTO agreement, given that [Mr. Bhasin's] very protests about [Mr.] Hrynew's appointment as PTO were about confidentiality and segregation of activities": para. 221. The judge also found that Can-Am repeated these "lies" about Mr. Hrynew's supposed obligations of confidentiality even after the PTO agreement, without these protections, had been signed: para. 204.

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[102] Can-Am pushed on with the requirement that Mr. Hrynew audit Mr. Bhasin's agency as if it were required to do so by the Commission even though it had arranged to have one of its employees conduct the audit of Mr. Hrynew's agency: trial reasons, at para. 198.

[103] As the trial judge found, this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision. I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause.

C. *Liability for Civil Conspiracy and Inducing Breach of Contract*

[104] In light of this conclusion, I agree with the Court of Appeal's rejection of Mr. Bhasin's claims based on the torts of inducing breach of contract and unlawful means conspiracy.

[105] The trial judge specifically found that Mr. Hrynew did not encourage Can-Am to act dishonestly in its dealings with Mr. Bhasin and that Can-Am's dishonest conduct was not fairly attributable to Mr. Hrynew: paras. 271 and 287. It follows that Mr. Hrynew did not induce Can-Am's breach of its contractual duty of honest performance.

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[106] The trial judge dismissed the claim for conspiracy to injure and there is no basis to interfere with that finding. However, the trial judge held the respondents liable for unlawful means conspiracy, with the unlawful means being the breach of contract and inducing breach of contract: para. 326. Because, in light of my conclusions, the only relevant breach of contract in this case is the breach of the duty of honest performance and there was no inducement of breach of contract, the only relevant unlawful means pertained to Can-Am alone and not Mr. Hrynew. Accordingly, there can be no liability for civil conspiracy: see *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at para. 43.

[107] I therefore agree with the result reached by the Court of Appeal that there could be no liability for inducing breach of contract or unlawful means conspiracy: para. 36. It follows that the claims against Mr. Hrynew were rightly dismissed.

D. *What Is the Appropriate Measure of Damages?*

[108] I have concluded that Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal. It is therefore liable for damages calculated on the basis of what Mr. Bhasin's economic position would have been had Can-Am fulfilled that duty. While the trial judge did not assess damages on that basis given her different findings in relation to liability, she made findings that permit this Court to do so.

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[109] The trial judge specifically held that but for Can-Am's dishonesty, Mr. Bhasin could have acted so as to "retain the value in his agency": paras. 258-59. In reaching this conclusion, the trial judge was well aware of the difficulties that Mr. Bhasin would have in selling his business given the "almost absolute controls" that Can-Am had on enrollment directors and that it owned the "book of business": para. 402. She also heard evidence and made findings about what the value of the business was, taking these limitations into account. These findings, in my view, permit us to assess damages on the basis that if Can-Am had performed the contract honestly, Mr. Bhasin would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew.

[110] It is clear from the findings of the trial judge and from the record that the value of the business around the time of non-renewal was $87,000. The defendants' expert at trial valued Mr. Bhasin's business as of 2001 (the time of non-renewal) as approximately $87,000. While there is some confusion in the record about the date of evaluation and the relevance of discount rates, I am persuaded that the trial judge found that the business was worth $87,000 at the time that the Agreement expired and that she made this finding fully alive to the difficulties standing in the way of a sale of the business given the contractual arrangements between Can-Am and its enrollment directors: see, e.g., para. 451. In addition, we have had no suggestion in argument that this figure should be reassessed. In fact, the defendants, as appellants before the Court of Appeal, submitted to that court that if damages were payable, they should be assessed at the value of the business at the time of the expiry of the Agreement and

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noted that the trial judge had accepted the evidence of their expert witness, Mr. Bailey, that the value was $87,000.

[111] I conclude therefore that Mr. Bhasin is entitled to damages in the amount of $87,000.

IV. Disposition

[112] I would allow the appeal with respect to Can-Am and dismiss the appeal with respect to Mr. Hrynew. I would vary the trial judge's assessment of damages to $87,000 plus interest. Mr. Bhasin should have his costs throughout as against Can-Am. There should be no costs at any level in favour of or against Mr. Hrynew.

Appeal allowed in part.

Solicitors for the appellant: McCarthy Tétrault, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto.

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Thermo King Corp. v. Provincial Bank of Canada et al.

(1982), 34 O.R. (2d) 369

ONTARIO
COURT OF APPEAL
HOULDEN, BLAIR and WILSON JJ.A.
23RD NOVEMBER 1981

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Banks and banking -- Bank bound to honour cheques to extent of customer's balance.

Banks and banking -- Overdrafts given for value -- Notice required to terminate prevailing course of business.

Debtor and creditor -- No liability under guarantee until written demand for payment.

Debtor and creditor -- No liability under general assignment of book debts unless debt due and owing.

Torts -- Intentional interference with contract -- Bank wrongfully refusing to honour customer's instructions to make draft payable to plaintiff.

The defendant H. Co., and S. Co. which had the same shareholders, were customers of the defendant bank. S. Co. was wound down in 1973 with the agreement of the bank, and H. Co. took over its operations. The bank looked to H. Co. and the shareholders as guarantors for payment of S. Co.'s debts which were approximately $378,000. From 1973 until 1976 the bank permitted H. Co. to operate with an overdraft varying from a few hundred dollars to approximately $30,000.

H. Co. was a franchised dealer of the plaintiff. To the bank's knowledge, when H. Co. obtained orders for refrigeration

units it then ordered the units from the plaintiff. The plaintiff was regularly paid by a draft from the defendant bank during the month following delivery. In 1976 H. Co. obtained three major orders, and ordered the units from the plaintiff. The orders totalled approximately $95,000 U.S. H. Co. then deposited cheques totalling approximately $102,000, including cheques from the three customers for whom the major orders had been placed, in its account in the bank. It asked the bank to issue a draft of $100,000 U.S. to the plaintiff. The bank imposed certain conditions including certification of the largest deposit cheque, and these conditions were met. Had the bank honoured the draft there would have been an overdraft of $13,447. Instead, a receiver appointed by the bank under the H. Co. and S. Co. debentures took possession of H. Co. and of the large deposit in H. Co.'s account at the bank.

The plaintiff sued H. Co. for the purchase price of the three units and joined the bank as co-defendant, alleging inter alia intentional interference with contractual relations between H. Co. and the plaintiff. The trial judge held the bank acted bona fide in its own interests, and hence that its action was justified. The plaintiff appealed.

Held, the appeal should be allowed.

Once H. Co. met the bank's conditions, the bank had no right to refuse to honour its customer's instructions to issue the draft. The evidence suggested the bank was prepared to permit the overdraft provided it was kept within reasonable bounds, and hence the bank was required to give notice before terminating the overdraft. Nor could the bank rely upon its customer's guarantee without making a prior demand on it. Finally, the bank could not rely upon a general assignment of book debts without there being a debt then due to the bank. Without the aforementioned notice or demand, there was no such debt. Therefore, the refusal to honour the draft was wrongful and could not constitute reasonable justification for the tort. Regardless of its motive the bank intentionally and knowingly induced a breach of contract between the plaintiff and H. Co.

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[Foley v. Hill (1848), 2 H.L. Cas. 28, 9 E.R. 1002, consd; Johnston v. Commercial Bank of Scotland (1858), 20 Dunl. (Ct. of Session) 790; Parr's Banking Co. Ltd. v. Yates, [1898] 2 Q.B. 460; D.C. Thomson & Co. Ltd. v. Deakin et al., [1952] Ch. 646, distd; N. Joachimson v. Swiss Bank Corp., [1921] 3 K.B. 110; London Joint Stock Bank, Ltd. v. Macmillan et al., [1918] A.C. 777; Cumming v. Shand (1860), 5 H. & N. 95, 157 E.R. 1114; Fleming v. Bank of New Zealand, [1900] A.C. 577; Bradford Old Bank, Ltd. v. Sutcliffe, [1918] 2 K.B. 833; Bank of British North America v. Standard Bank of Canada (1915), 34 O.L.R. 648, 26 D.L.R. 777; affd 38 O.L.R. 570, 35 D.L.R.. 761, folld; Pullman Trailmobile Canada Ltd. v. Hamilton Transport Refrigeration Ltd. et al. (1979), 23 O.R. (2d) 553, 96 D.L.R. (3d) 322; Ronald Elwyn Lister Ltd. et al. v. Dunlop Canada Ltd. (1979), 27 O.R. (2d) 168, 104 D.L.R. (3d) 702, 32 C.B.R. (N.S.) 4; Lumley v. Gye (1853), 2 E. & B. 216, 118 E.R. 749; Quinn v. Leathem, [1901] A.C. 495; Torquay Hotel Co. Ltd. v. Cousins et al., [1969] 2 Ch. 106; Celona v. Kamloops Centennial (Pacific No. 269) Branch Royal Canadian Legion et al., [1974] 2 W.W.R. 144, refd to]

APPEAL from judgment at trial dismissing an action for intentionally inducing breach of contract.

J. Adams, and D. Fuller, for appellant.

J.H. Francis, Q.C., for respondent, Provincial Bank of Canada.

The judgment of the Court was delivered by

WILSON J.A.:-- The defendant, Hamilton Transport Refrigeration Limited ("Hamilton"), is a franchised dealer of the plaintiff, Thermo King Corporation ("Thermo King"), and was at all material times a customer of the defendant bank. The shareholders of Hamilton were the sole shareholders of a company called Southern Ontario Truck Sales and Services Inc. ("Southern") which was also a customer of the bank and very

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heavily indebted to it. H.B. Morris was the president of both Hamilton and Southern and, when he and the other shareholders of Southern acquired the shares of Hamilton, they borrowed the purchase money from the bank. As security for the loan they gave the bank their personal guarantees of the debts of both companies. In addition each company gave the bank an assignment of its book debts and a debenture in the amount of $100,000. The companies also guaranteed each other's debts.

In the summer of 1973 it was decided, with the concurrence of the bank, that Southern would be wound down and Hamilton would take over its operations which included its franchise from Thermo King. Southern ceased to do business in late 1974 or early 1975 leaving the bank to look henceforth to Hamilton and the personal guarantors for the payment of the debts of both companies. The indebtedness of Southern in June of 1976 when the events giving rise to this litigation took place amounted to $304,869 plus accumulated interest of $73,975.

From the end of 1973 on the bank permitted Hamilton to operate with an overdraft in its current account varying from a few hundred dollars to as high as $30,086 in May, 1976. In cross-examination Mr. Morris admitted that at the end of April, 1976, the bank threatened not to honour Hamilton's cheque that was to be used to purchase a draft for Thermo King but he was able to persuade the bank manager to change his mind. There is also evidence that at the end of May, 1976, the bank refused to pay some $18,000 to Thermo King. However, the evidence also discloses that after these incidents the bank continued to permit Hamilton to operate on an overdraft. The bank was aware of the course of dealing between Hamilton and Thermo King. It knew that refrigeration units were ordered by Hamilton on a pre-sold basis. When Hamilton received orders from its customers, Thermo King sold and delivered the required units to Hamilton on the basis that payment for the units would be made by Hamilton on the 25th of the month next following the month in which delivery of the units was made. Payment was always made by Hamilton to Thermo King by means of a draft from the bank payable to Thermo King in U.S. funds.

The evidence disclosed that in the early part of 1976

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Hamilton's business was showing signs of improvement. In the first four months of that year sales equalled the combined sales of the previous two years.

In March, 1976, Hamilton received orders from three customers and ordered the requisite units from Thermo King. These orders were worth $68,762 U.S., $10,988 U.S. and $14,540 U.S. respectively. Mr. Morris testified that he told Mr. Gibson, the bank manager, about these orders and indeed gave him copies of them. Mr. Gibson acknowledged that he received a copy of the largest order but could not recall being told about the other two. However, he did acknowledge that it was Mr. Morris's practice to discuss all orders with him.

In any event, on June 25, 1976, Mr. Morris attended at the bank to deposit a number of cheques totalling $102,211, including the cheques from three customers for whom he had ordered the units from Thermo King. He asked Mr. Gibson to issue a draft for $100,000 U.S. payable to Thermo King and suggested that the bank might wire the funds to Thermo King. This suggestion was prompted by the fact that payment had to be made to Thermo King by June 25th if Hamilton was to get its dealer discount on the orders. Mr. Gibson checked into the cost of wiring the money and advised Mr. Morris that it would be cheaper for him to fly to Thermo King's offices in Minneapolis. He also said that he would require the largest cheque to be certified before he could issue the draft. Mr. Morris got the cheque certified but was told by Mr. Walker, the assistant bank manager, that there had been a delay in issuing the draft but that it would be available to be picked up on June 28th. On June 28th and June 29th Mr. Gibson advised Mr. Morris he was awaiting head office approval to issue the draft. At approximately 4:30 p.m. on June 29th Mr. Gibson arrived at Hamilton's premises along with Mr. Manton, the receiver manager appointed by the bank under the Hamilton and Southern debentures. Mr. Manton took immediate possession of the premises. Mr. Gibson testified that the prime reason for the bank's action on June 29th was the large deposits made to Hamilton's account on June 25th.

Thermo King sued Hamilton for the price of the units. It

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joined the bank as a co-defendant, claiming against it damages for breach of contract (as third party beneficiary), a declaration that the bank held the Canadian equivalent of the $100,000 U.S. draft in trust for it, damages for deceit, and damages for the bank's interference with Thermo King's contractual relations with Hamilton. The first three causes of action foundered on the trial judge's finding that Mr. Gibson gave no undertaking to Mr. Morris at any time that he would issue the $100,000 U.S. draft. The learned trial judge rejected Mr. Morris's evidence that Mr. Gibson promised to issue the draft if he, Mr. Morris, had the largest cheque certified. This left Thermo King with its action in tort for the bank's alleged interference with the contractual relations between Thermo King and Hamilton.

Addressing this aspect of the case, the learned trial judge said:

> The plaintiff pleads that the bank wrongfully induced Hamilton to breach its contract with the plaintiff and relied on the principle which is set out in Clerk and Tindsell on Torts, 14th ed. (1975), at para. 792 as follows:
>
> > "Knowingly to procure or, as it is sometimes put, to induce a third party to break his contract to the damage of the other contracting party without reasonable justification or excuse is a tort."
>
> On the facts in this case the action of the bank was justified and not wrongful. Hamilton's account was overdrawn, it had assigned its receivables to the bank and had given a guarantee for the indebtedness of Southern. The cheques included in the deposit were apparently covered by the assignment. Even if the assignment did not cover the cheques, the bank acted bona fide and in the honest belief that the cheques fell within its terms. The bank acted not with any intention of inflicting harm on the plaintiff but to protect its legitimate interests. The plaintiff cannot succeed on this ground.

Thermo King appeals on the basis that the learned trial judge

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erred in holding that the bank was "justified" in refusing to follow its customer's instructions to issue the draft to the plaintiff. It points out that it is implicit in the passage from the learned trial judge's reasons quoted above that, but for his finding of "reasonable justification", he would have found the bank liable for the tort. Counsel on the appeal accordingly focussed in on the finding of "reasonable justification".

He broke his submissions down into the following:

(1) A bank must honour its customer's drafts without delay to the extent of the balance standing to the customer's credit;

(2) Where a bank has followed a course of conduct in permitting a customer to operate on a modest overdraft, it must give notice to its customer that it no longer intends to follow this course;

(3) A bank cannot "lawfully" appropriate its customer's funds to itself pursuant to a guarantee of its customer until it has first made a demand under the guarantee;

(4) A guarantor must be given a reasonable opportunity to meet the demand once it has been made;

(5) A bank can only resort to a general assignment of book debts if there is a debt due and owing to the bank at the time of such resort because an assignment of book debts is essentially a security document. The debt in this case would have to be either (a) the overdraft or (b) the guarantee and no notice had been given on either.

For his first proposition counsel for the appellant relied on Foley v. Hill (1848), 2 H.L. Cas. 28, 9 E.R. 1002, and N. Joachimson v. Swiss Bank Corp., [1921] 3 K.B. 110. As Lord Justice Bankes pointed out in the Joachimson case the principle of Foley v. Hill is correctly set forth in the headnote as follows [at p. 118 K.B.]:

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"The relation between a banker and customer who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the bank."

Lord Justice Bankes then went on to point out, however that an obligation was implied in the relation of banker and customer to which no reference was made in Foley v. Hill. Reference was made to it by Lord Haldane in London Joint Stock Bank, Ltd. v. Macmillan et al., [1918] A.C. 777, where he said at p. 814:

> Ever since this House in 1848 decided Foley v. Hill it has been quite clear that the relation between a banker and the customer whose balance he keeps is under ordinary circumstances one simply of debtor and creditor. But in other judgments and notably by a later decision of this House, Scholfield v. Earl of Londesborough, [1896] A.C. 514, it was made equally clear that along with this relation and consistently with it there may subsist a second one ... But the customer of a bank is under a yet more specific duty. The banker contracts to act as his mandatory and is bound to honour his cheques without any delay to the extent of the balance standing to his credit. The customer contracts reciprocally that in drawing his cheques on the banker he will draw them in such a form as will enable the banker to fulfil his obligation, and therefore in a form that is clear and free from ambiguity.

(Emphasis added.)

Counsel submits therefore that when Hamilton instructed the bank to issue the draft for $100,000 U.S. in favour of Thermo King, the bank should have done so. Hamilton had delivered over to the bank cheques from three of its customers totalling $102,211. At that time it therefore had no overdraft. It had a credit balance of $89,949. The overdraft prior to the deposit of the cheques was $11,236. The overdraft which would have been created by the issue of the draft in the amount of $100,000 U.S. i.e. $13,447, would have been well within the

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limits permitted to Hamilton over the prior three years.

In aid of its submission that the bank was obliged to issue the draft, counsel made its second submission, namely that the bank was obliged to give Hamilton notice that it was no longer prepared to carry it in an overdraft position. For this proposition counsel relied on Cumming v. Shand (1860), 5 H.&.N. 95, 157 E.R. 1114, and Johnston v. Commercial Bank of Scotland (1858), 20 Dunl. (Ct. of Session) 790.

In Cumming v. Shand, the plaintiff Cumming, who was in the habit of receiving consignments of cargoes against which bills of exchange were drawn upon him which he accepted, had an arrangement with his bank whereby he delivered to it the bills of exchange with bills of lading annexed to them and the bank paid the bills, debiting him with the amount. The bank then handed the bills of lading over to the plaintiff's broker on receiving the broker's undertaking to pay the amount of the bills out of the proceeds of sale of the goods when sold. Even before the broker reimbursed the bank, the bank was in the habit of allowing the plaintiff to draw on his account although it was then overdrawn. When the market price of a particular consignment of goods took a spectacular drop and the goods had not been sold, the bank, without giving the plaintiff any notice that it was no longer following its earlier practice, refused to honour one of his cheques.

The plaintiff's action against the bank was tried before a jury and the trial judge left it to the jury to determine what the course of dealing between the bank and its customer was. He instructed them, however, that if they came to the conclusion that the course of dealing between them was that the plaintiff was allowed to draw cheques without reference to the sums placed to his debit under the arrangement, then the bank was obliged to give the plaintiff reasonable notice that it was no longer prepared to follow that course. The jury found for the plaintiff and the bank moved for a new trial on the basis of misdirection by the trial judge. The bank argued that it was not bound to honour the plaintiff's cheque because the plaintiff was in a debit position and, even if the bank in the past had been permitting the plaintiff to overdraw his account,

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that was an indulgence which the bank could discontinue at any time.

Pollock C.B. stated at pp. 97-98 H. & N., p. 1116 E.R.:

> I am of opinion that the case was properly left to the jury. No doubt, if a person has been accustomed to accept bills for the accommodation of another, he may refuse to do so any longer; for there is no tenancy of a man's credit which requires any time to put an end to it. But that is not the case where a course of dealing has prevailed, and value has been given for the accommodation. It makes no difference whether the one party is a factor or a banker, if the circumstances are such as to justify the other in drawing though he has not a cash credit, he is entitled to do so until he has notice that the accommodation is discontinued. The question then is, whether there was, between the plaintiff and the Bank, a course of business which could not be put an end to without a reasonable notice. It seems to me that there is no objection to the mode in which the case was left to the jury, and that they have arrived at a proper conclusion.

(Emphasis added.) The other judges agreed with Pollock C.B.

While Pollock C.B. stressed the requirement of value having been given for the accommodation in Cumming v. Shand, this does not appear to present a problem for the appellant in light of the authorities holding that an express or implied undertaking to pay interest is sufficient consideration for an agreement to permit an overdraft: see Fleming v. Bank of New Zealand, [1900] A.C. 577 (P.C.).

In Johnston v. Commercial Bank of Scotland, supra, the plaintiff (pursuer) had an arrangement with the defendant (defender) for a cash credit of 10,000 pounds on the security of some mining lands he owned. The bond evidencing the arrangement was granted by the bank in September of 1840 and obligated the plaintiff to repay all advances when demanded any time after three months from the date of the bond. The credit was operated for some months with no demand being made

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and in May of 1841 the plaintiff's debit to the bank stood at just over 7,000 pounds. In the meantime the plaintiff's brother had died leaving him more mining lands. In February of 1841, prior to the plaintiff's brother's death, the bank had refused to give the plaintiff any further accommodation, giving as its reason that the plaintiff and his brother were signatories to three notes to the bank in the amount of 1,000 pounds each. The bank's position was that the 3,000 pounds owing on these notes was part of the agreed upon cash credit of 10,000 pounds. The plaintiff then took steps to change his bank and make new credit arrangements using his inheritance from his brother's estate as security. While this was in process the defendant refused to honour his cheques and made a demand on one of the three notes which had fallen due, thereby tying up the brother's property. The plaintiff sued for the damages suffered as a result of this sudden withdrawal of credit alleging that, while bankers may be entitled to refuse additional credit to a customer, due notice of such an intention must be given particularly to a trader who has provided security for the arrangement which the bank has agreed is satisfactory.

The Lord Ordinary found no merit in the action. Quoting from his reasons at p. 791:

> Under the bond and disposition in security for the cash-credit, it may be held that the defenders came under a certain duty or obligation in the first instance. They would not apparently have been justified in immediately and arbitrarily refusing to make any advance to the pursuer under the agreement therein narrated, particularly while they remained in possession of his property; and at least they might possibly have been liable for any special damage directly resulting from a sudden and capricious refusal to honour a reasonable draft. But, on the other hand, whether looking to the terms of the bond or to the nature of the transaction, it cannot be said that the defenders came under an absolute obligation in all circumstances, and for any length of time, to continue their advances to the full extent of the specified sum. If, after an interval, they gave reasonable notice of their intention to discontinue the

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credit and call up the amount advanced; and more especially, if, after a variety of transactions, circumstances had arisen which might reasonably affect the defenders' confidence in the pursuer, there seems no doubt that they were fully entitled to close the account, and would not certainly incur any legal responsibility by so doing.

(Emphasis added.)

The plaintiff appealed and his appeal was dismissed. The Lord Justice-Clerk said at p. 793:

This action is raised upon the novel and most extra-ordinary ground, that when a party gets a cash credit with a bank, the bank is bound to go on giving him credit so long as he does not exceed the bounds of his credit, whatever may be their opinion of him or of his business. It was carried so far by the pursuer's counsel as to say that his client has "purchased a credit to the extent of 10,000 pounds by the security he had given over his property," and the Bank was not entitled to stop making advances so long as he kept within that sum. When stating that proposition, it was forgotten that the security was also for the money that had been advanced. When pressed to state his proposition, the pursuer's counsel admitted that it could not be maintained to the extent of throwing on the Bank the burden of shewing that they had good reason for stopping any farther advances, and his propositions were modified to this, that the Bank was not entitled to stop farther advances without due notice. As the case was thus put, it was shortly and conclusively answered by the statements of Mr. Ross, that on the pursuer's own statement the Bank refused, on 17th May, to allow farther credit unless upon farther security. He thus got notice that farther security was considered necessary, and had recourse to Messrs Davidson and Syme to make the necessary arrangements for the transference of his business to another bank. I do not say that there may not be a case for damage where a bank, without any good cause, and capriciously, stops advances without any notice. This, however, is no such case, but the simple case where, perhaps, from better knowledge of the party dealing with them or of his affairs, the Bank

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> thinks it proper to stop short, and hazardous to make farther advances. In such a case, is the Bank not entitled to refuse to carry past due bills to the debit of a cash-credit account? It is the strangest proposition I ever heard, to say that they are not entitled to do so. This action seems to me utterly baseless.

(Emphasis added.)

Lord Murray, who concurred in the judgment, gave very brief reasons at p. 793 as follows:

> I am of the same opinion. I always understood that a bank had power to withdraw their cash-credit when they see good cause for doing so. I think there was due notice of the intention to refuse farther advances before these bills were charged on. I see nothing for the pursuer to complain of.

Lord Cowan, who also wrote concurring reasons, stated that the principles laid down by his colleagues were correct. He then added:

> There may be special cases, as where the party has been led to rely on his draft being honoured, in which there may be just cause of complaint, when they are, without notice, dishonoured, and just ground for a claim of actual loss. But the mere granting of the credit does not infer an obligation on the Bank to advance to its full amount.

The appellant in the instant appeal relies upon the Johnston case for the obiter dicta of the Lord Ordinary and the Lord Justices of Appeal to the effect that, if there has been a history of advances which the customer has come to rely on, a bank may have to give prior notice to a trader of an intention to cut off his credit. In the Johnston case such prior notice was found to have been given and the plaintiff had therefore no cause for complaint.

In Paget's Law of Banking, 8th ed. (1972), at p. 82 the editors discuss when the limitation period starts to run against a bank in a proposed action against its customer on an

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overdraft. They point out that on the authority of Parr's Banking Co. Ltd. v. Yates, [1898] 2 Q.B. 460, the statute starts to run from the date of each advance even if the advances are guaranteed. The reason for this is that no demand is necessary as against the principal debtor. But Parr's case was overruled insofar as a guarantor is concerned by Bradford Old Bank, Ltd. v. Sutcliffe, [1918] 2 K.B. 833, which made it clear that a guarantor only becomes liable once a demand has been made. The reason for the distinction is that a guarantee is a "collateral" security. The editors of Paget then go on to point out, however, that in the case of the principal debtor:

> A course of business might be established by which a banker who was acquiesced for a period in overdrafts to a certain amount would be precluded from withdrawing such accommodation and dishonouring cheques without notice: see Cumming v. Shand (1860), 5 H. & N. 95, but this does not necessarily preclude the operation of the statute.

And at p. 132 of Paget the editors, in discussing the nature of an overdraft, state:

> An overdraft is money lent: "A payment by a bank under an arrangement by which the customer has an overdraft is a lending by the bank to the customer of the money". Per Harman, J., in Re Hone (a bankrupt), Ex parte Trustee v. Kensington Borough Council, [1951] Ch. 85, at p. 89; [1950] 2 All E.R. 716, at p. 719. A banker is not obliged to let his customer overdraw unless he has agreed to do so or such agreement can be inferred from course of business ... Cumming v. Shand (1860), 5 H. & N. 95 ...; borrowing and lending are a matter of contract not necessarily premeditated but, possibly, spontaneous, as where a customer, without previous arrangement, draws a cheque, payment of which overdraws his account. It is generally assumed that temporary advances are repayable on demand and forms of charge over security invariably provide that the advance is so payable, i.e. without notice. How far this militates against the right of the customer not to have his account closed except after a reasonable notice, where the advance is by way of overdraft, is not clear. In any event the bank could insist that the

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> advance should be repaid within a reasonable time and that it should not rise in the meantime; but they could probably not insist on immediate repayment to the extent of ignoring outstanding cheques, for instance, unless the limit of overdraft had already been reached ... Johnston v. Commercial Bank (1858), 20 D. 790 ... There are clearly conflicting interests but, providing the banker is in possession of a document by which the customer agreed to repay on demand, the banker would be entitled to take any action necessary to safeguard his interests, even if it prejudiced those of his borrower.

(Emphasis added.)

In effect, counsel for the appellant submits on the basis of his first two propositions that, having given no notice to Hamilton of its intention to stop permitting Hamilton to operate on an overdraft, the bank was obliged to issue the draft on its customer's instructions without delay. By virtue of the course of dealing between the parties, he submits, Hamilton was entitled to be credited by the bank with the modest amount of overdraft that would have resulted from the issuance of the $100,000 U.S. draft against its then existing credit balance.

It seems to me that there may be merit in this position unless the bank was entitled on June 25, 1976, to appropriate to itself the cheques delivered to it by Hamilton with instructions that they be deposited in its account. Counsel for the appellant's last three propositions are designed to persuade us that the bank was not entitled to do this either under the general assignment of book debts it held from Hamilton or under Hamilton's guarantee of the indebtedness of Southern.

Dealing with the guarantee first, counsel directed our attention to the following language in the first paragraph:

> ... and the liability of the undersigned is to arise first when notice in writing is given to the undersigned requiring payment.

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He directed us also to the fourth paragraph of the guarantee which reads:

> Upon default in payment of any sum owing by the Customer to the Bank at any time, the Bank may treat the whole of the indebtedness hereby secured as due and payable and may forthwith collect from the undersigned the total amount hereby guaranteed and may apply the sum so collected upon the Customer's debt or may place it to the credit of a special account.

(Emphasis added.)

Counsel points out that no demand had been made by the bank in writing when it refused to issue the draft and that, indeed, no demand in writing was made until Mr. Gibson attended with the receiver manager at Hamilton's premises on June 29, 1976. Accordingly, Hamilton's liability under the guarantee did not arise until that time at the earliest. Counsel relies, however, on the decision of Griffiths J. in Pullman Trailmobile Canada Ltd. v. Hamilton Transport Refrigeration Ltd. et al. (1979), 23 O.R. (2d) 553, 96 D.L.R. (3d) 322, and the decision of this Court in Ronald Elwyn Lister Ltd. et al. v. Dunlop Canada Ltd. (1979), 27 O.R. (2d) 168, 104 D.L.R. (3d) 702, 32 C.B.R. (N.S.) 4, for the proposition that the debtor must be given a reasonable time in which to attempt to meet the demand. Counsel submits, moreover, that even if Hamilton's liability arose "forthwith" upon his receipt of the demand in writing under the guarantee, there was no liability under the guarantee when the bank refused to issue the draft on June 25, 1976. Can the bank, he asks, refuse to honour its customer's drafts in anticipation of a liability to itself which has not yet matured? Counsel relies on Bank of British North America v. Standard Bank of Canada (1915), 34 O.L.R. 648, 26 D.L.R. 777; affirmed 38 O.L.R. 570, 35 D.L.R. 761, for the answer that it can not.

In that case a customer of the defendant bank had drawn certain cheques upon it which were endorsed by the payees of the cheques to the plaintiff bank. The cheques went through

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the Toronto clearing house and on presentation to the defendant bank were dishonoured. The plaintiff bank, being admittedly the lawful holder of the cheques, sued the defendant bank to recover the aggregate amount of them less payments made thereon and was held entitled to recover on the basis that there was money standing to the credit of the drawer of the cheques at the time they were presented or that there would have been such money but for the improper acts of the defendant bank. Mr. Justice Middleton affirmed the general principle that a bank must honour its customer's drafts if there are funds available in its account to meet them and went on to say at pp. 653-54 O.L.R.:

> The case is of importance as indicating the possibilities of a situation that must frequently arise, and it is open to question whether legislation is not needed to remedy the evil. When a customer draws a cheque upon his bank, and there are funds to answer it when presented, why should the bank be at liberty to refuse to honour it, retaining the money to meet some demand of its own which has not yet matured, or to pay some other cheque drawn by the customer?
>
> . . . . .
>
> If the contention of the defendant bank in this action is right, a bank, on learning that its customer is in trouble, may refuse to pay any cheques, retaining the balance to the customer's credit to meet all liabilities, direct or indirect, which may thereafter accrue due to it by the customer.

Counsel turned next to the general assignment of book debts and his preliminary submission with respect to it was that it was a security document only. He submitted, in other words, that in order to resort to it the bank would first have to establish a debt presently owing to the bank for which the assignment was security. The debt in the circumstances of this case would have to be either the overdraft or the liability on the guarantee. Counsel submitted that neither could be relied on as constituting a debt presently due and owing to the bank at the time it purported to act on the assignment because no notice had been given to Hamilton on either the overdraft or

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the guarantee as is, he submitted, required by law.

Counsel is undoubtedly correct that the general assignment of book debts is a security document. It is stated to be such on its face. Paragraph (2) reads:

> (2) This assignment and transfer shall be a continuing collateral security to the Bank without impairment or novation of any other existing or future security and shall operate as a general security for all present and future indebtedness and other liability of the assignor to the Bank so long as the assignor shall remain indebted or otherwise liable to the Bank or shall continue to be receiving advances from the Bank: but the assignor shall be entitled upon the discharge of all indebtedness and other liability of the assignor to the Bank to the cancellation hereof.

However, in paras. (8) and (9) of the assignment it is provided:

> (8) It is hereby agreed that all monies received by the assignor in payment of any debts, demands and choses in action which are now due, owing or accruing due, or which may hereafter become due, owing or accruing due to the assignor or in payment of any claims of whatsoever nature or kind which the assignor now has or may hereafter have including claims against the Crown and claims under insurance policies, shall be received and held by the assignor in trust for the Bank.
>
> (9) The Bank shall have the right at any time to appropriate any payment made to any portion of the said indebtedness whether the same be represented by open account, overdraft, or by any bill, note, or other instrument and whether then due or to become due and may from time to time revoke or alter such appropriation and appropriate payments to any other portion of the said indebtedness as in its sole and uncontrolled discretion it may see fit.

(Emphasis added.)

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Do these provisions in the assignment present an insurmountable obstacle for the appellant on this aspect of its argument? The question they seem to pose is whether, regardless of any notice having been given of an intention to terminate the course of dealing on an overdraft or any demand having been made under the guarantee, the bank is nevertheless entitled to appropriate the cheques to the discharge of Hamilton's liability to itself. Do paras. (8) and (9) expressly negate the application of the principles contained in the case law already referred to? Are they a blanket dispensation with the need for prior notice, prior demand, or even for an existing debt which has already matured?

I do not think this can be so. While these provisions appear on their face to constitute the assignor a trustee for the bank of any payments it receives from its customers and to permit the bank to appropriate them at will, whether or not any debt is then due to the bank by the assignor, this seems to be quite incompatible with the nature of the instrument as a collateral security. I have no doubt that in circumstances where no notice or demand with respect to the primary debt is required, immediate recourse may be had to the collateral security. But where as in this case such notice or demand is required, then I believe it follows that the assignment of book debts cannot be resorted to until that has been done. While para. (9) expressly confers to the bank the right to appropriate payments made to the customer "to any part of the said indebtedness ... and whether then due or to become due" I do not think this is intended to permit the bank at any time, whether or not there is any existing indebtedness, to start appropriating payments made to the customer to prospective future debts. I think the prospective language in the assignment is there because it is a "continuing collateral security". In other words, I think the intent of the document is that the security attaches not only to presently existing debts but to debts which may arise in the future i.e. subsequent to the giving of the security.

Assuming then for the moment that counsel's submissions on the law thus far are sound, was the factual basis for their application established at trial? Did Thermo King prove a

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course of dealing between the bank and Hamilton which would trigger a requirement of notice before the bank could terminate the overdraft? The learned trial judge made no finding on this aspect of the case but I believe that the evidence and the exhibits amply support that Hamilton operated with a continuous, fluctuating overdraft from the time it started business in 1973 up until June 25, 1976. Indeed, its overdraft on June 25, 1976, was lower than it had been in several months. The testimony and exhibits also disclose, however, that the bank as an internal matter was concerned about Hamilton's "unauthorized overdraft" and that Mr. Gibson, the bank manager, had been instructed by his superiors in March and again in May of 1976 that "loans to this company are to be placed on a strictly reducing basis unless you have our prior approval". Mr. Gibson was asked at trial whether his bank in March and April of 1976 were reluctant to honour Hamilton's cheques until further deposits were made to its account and he said he thought that this was true. On being asked the reason he stated (transcript p. 277):

Q. And what was the reason for the bank's reluctance?

A. The bank was concerned as to the ultimate recovery of those loans. The account at that time was in overdraft. We didn't want to see the overdraft become too high.

Q. Did Hamilton Transport ever have an authorized line of credit?

A. No.

Q. It operated simply on an overdraft basis?

A. Yes.

(Emphasis added.)

I do not believe that this evidence, assuming it was accepted by the trial judge, can be viewed as notice to Hamilton that it was no longer going to be permitted to function on an overdraft basis. On the contrary, if anything, it suggests that at that

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time the bank was quite prepared to continue the overdraft provided it was kept within reasonable limits.

I have concluded that the bank, having decided after Southern was wound down to look to Hamilton for repayment of Southern's debt, embarked on a course of dealing to accommodate Hamilton in it (the bank's) own long term interests. However, as Mr. Gibson acknowledged, the substantial deposits made to Hamilton's account on June 25, 1976, presented too good an opportunity to be missed and the bank decided at that point to "lower the boom" on Hamilton. I do not believe the bank had the right to do this in the circumstances without any prior notice to Hamilton. Nor do I think it can rely on the guarantee in support of its refusal to issue the draft since no demand was made on it until Mr. Gibson attended with the receiver manager at Hamilton's premises three days later. I think the bank had no basis for refusing to follow its customer's instructions once its requirements of certification of the largest of the deposited cheques was met.

It is submitted by counsel for the appellant that the bank's wrongful act in refusing to issue the draft in its favour when instructed to do so by Hamilton constituted the tort of inducing breach of contract: see Lumley v. Gye (1853), 2 E. & B. 216, 118 E.R. 749; Quinn v. Leathem, [1901] A.C. 495. He submits that the bank not only knew of the contract between Thermo King and Hamilton but knew its precise terms. It knew that by refusing to issue the draft it was making it impossible for Hamilton to perform its obligation under the contract. Counsel submits therefore that it intended to bring about the breach or, at the very least, should be presumed to have so intended from the fact that the breach was to its knowledge the inevitable result of its refusal to issue the draft. Counsel further submitted, given that the essential elements of the tort were established, that the bank's wrongful act cannot constitute "reasonable justification" in law.

In his factum counsel states:

> It is implicit in the reasons of the trial judge that he found that the requisite elements of the tort had been

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proved, but that he held that, "On the facts of this case, the action of the bank was justified and not wrongful."

It is perhaps unfortunate that the learned trial judge did not address himself to the element of intent as an ingredient of the tort but dealt with it rather in the context of "reasonable justification". In that context he found that:

The bank acted not with any intention of inflicting harm on the plaintiff, but to protect its legitimate interests.

Although this is an express finding of intention by the learned trial judge, it seems to me that he put in apposition the intention to inflict harm on the plaintiff and the intention to protect its own interests because he was directing his mind to whether the bank's conduct should be excused in law. The trial judge, it seems to me, was really asking the question: What motivated the bank? What caused it to do what it did? Did it have a legitimate and defensible reason? He found that it did. It was seeking to protect its own legitimate interests. And hence he found it did nothing wrongful.

Having concluded that the learned trial judge erred in finding that the bank did nothing wrongful, the Court must now ask itself: Did the plaintiff succeed in establishing the essential elements of the tort? The bank's wrongful act cannot constitute "reasonable justification", but the plaintiff still has to prove its cause of action. Did the bank intend to cause Hamilton to breach its contract with the plaintiff? It seems to me that it clearly did. That was the only way in which it could retain the funds in Hamilton's account for its own use. I do not think this is a case of presumed intent. In other words, I do not think that the bank's act in refusing to issue the draft should be approached on the basis that, because the breach was the inevitable consequence of the bank's conduct, an intention to cause the breach must be presumed against it. Presumed intent may not be enough: see D.C. Thomson & Co. Ltd. v. Deakin et al., [1952] Ch. 646, per Upjohn J. at p. 663. I approach the matter rather on the basis that the bank's objective of applying the funds towards Hamilton's indebtedness

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to it could only be attained by disabling Hamilton from performing its contract with Thermo King: see Torquay Hotel Co. Ltd. v. Cousins et al., [1969] 2 Ch. 106; Celona v. Kamloops Centennial (Pacific No. 269) Branch Royal Canadian Legion et al., [1974] 2 W.W.R. 144. The bank knew the relationship between Hamilton and Thermo King. It also knew that if the draft was not issued, the contract between Hamilton and Thermo King would be breached. It intended to cause that breach. It may have intended it in order to further its own purposes, but it intended it nonetheless. On the facts of this case I have no difficulty in finding that the bank knowingly induced the breach of contract.

If the bank's action had been lawful as the learned trial judge found, then it would have constituted reasonable justification for its conduct. As it pointed out by the editors of Paget, supra, a banker is entitled to put his own interests ahead of the conflicting interests of his customer or those dealing with his customer but only if he does so in exercise of a legal right. A banker has this right absent any course of dealing giving rise to a requirement of notice. I have concluded, however, that there was such a course of dealing in this case.

I would allow the appeal, set aside paras. (2) and (3) of the judgment and award the plaintiff damages against the bank in the amount fixed by the learned trial judge. I would give the plaintiff its costs both here and in the court below.

Appeal allowed.

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20140627

Docket: A-418-12

Citation: 2014 FCA 170

2014 FCA 170 (CanLII)

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

BURNS BOG CONSERVATION SOCIETY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on May 5, 2014.

Judgment delivered at Ottawa, Ontario, on June 27, 2014.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Burns Bog Conservation Society appeals from the judgment of Russell J. of the Federal Court (the Judge) granting the respondent's motion for summary judgment pursuant to section 215 of the *Federal Courts Rules*, SOR/98-106 (the Rules), and dismissing its action against the respondent.

I. BACKGROUND

[2] The Judge describes in detail the facts in his reasons at paragraphs 2 to 20, reported at 2012 FC 1024. For the purpose of this appeal, it will suffice to highlight the following facts.

[3] Burns Bog, located in British Columbia, is one of the largest raised peat bogs in the world. The appellant is a registered non-profit society dedicated to preserving Burns Bog and raising awareness of its significance (Reasons at paragraph 2).

[4] In 2004, the corporation of Delta, the Greater Vancouver Regional District and the Province of British Columbia (together, the Bog owners) purchased six parcels of Burns Bog for conservation purposes from its private owners. The Federal Government contributed $28 million to the purchase, but did not take title to any part of Burns Bog. The Contribution Agreement requires the Bog owners to ensure that at least five thousand acres of Burns Bog will be managed as protected conservation land (Reasons at paragraph 4).

[5] In March 2004, the Bog owners granted the Federal Government a conservation covenant (the Covenant) over Burns Bog under section 219 of the British Columbia Land Title Act, R.S.B.C. 1996, c. 250. The Covenant restricts the activities that the Bog owners may undertake on Burns Bog. Specifically, the Bog owners' use of the land is subject to the terms and conditions set out in the Covenant. The Covenant is registered as a charge on Burns Bog (Reasons at paragraph 31).

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[6] The Covenant provides at section 9.1 that the obligations it creates are solely contractual:

> The parties agree that this Agreement creates only contractual obligations and obligations arising out of the nature of this Agreement as a Covenant under seal. Without limiting the generality of the foregoing, the parties agree that no tort or fiduciary obligations or liabilities of any kind are created or exist between the parties in respect of this Agreement and nothing in this Agreement creates any duty of care or other duty on any of the parties to anyone else.

[7] The Covenant also includes an "entire agreement" clause:

> 16. None of the parties hereto have made any representation, Covenants, warranties, guarantees, promises or agreements (oral or otherwise) with any other party than those contained in this Agreement or in any other agreement that is reduced to writing and executed by all parties to it. This agreement may only be changed by a written instrument signed by all the parties.

[8] On March 23, 2004, the Bog owners and the Federal Government entered into the Burns Bog Management Agreement (the Management Agreement). The Management Agreement lays out the process by which the parties would develop a long-term management plan, as per the Contribution Agreement. On May 25, 2007, the Bog owners finalized the Burns Bog Ecological Conservancy Area Management Plan (the Management Plan), setting out policy directions and recommended actions to maintain Burns Bog's ecology.

[9] The British Columbia Gateway Program is a project run by the Provincial Government of British Columbia to improve bridge and road infrastructure throughout the greater Vancouver area. It includes a segment of road that runs adjacent to Burns Bog, the South Fraser Perimeter Road (SFPR). On September 3, 2008, the Federal and Provincial Governments entered into an arrangement to fund the SFPR. However, notwithstanding its financial contribution, the Federal Government did not assume any responsibility for the construction or operation of the SFPR.

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[10] The construction of the SFPR required an environmental assessment under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. This assessment was carried out jointly with the Province's own environmental study in accordance with the Canada – British Columbia Agreement for Environmental Assessment Cooperation (2004). The assessment's conclusion was that the SFPR was not likely to cause significant adverse environmental effects if certain mitigation measures were followed, such as the creation of hydrology and air quality work plans. The assessment report, dated June 27, 2008, contains a specific section dealing with Burns Bog (A.B., Vol. II, pages 377-385). It is clear that Environment Canada and the Scientific Advisory Panel were involved in making several recommendations during the assessment, the whole in accordance with section 8.2 of the Management Plan (A.B., Vol. I, page 276).

[11] In 2010, the appellant filed a statement of claim seeking to compel the respondent to protect Burns Bog, claiming that the Federal Government owes the Canadian public a trust, fiduciary, or other legal duty to protect Burns Bog, or that it is bound to protect Burns Bog under a number of federal statutes. The appellant asks the Court for an injunction halting construction of the SFPR until the Federal Government has intervened to ensure that the construction will not impact the ecological integrity of Burns Bog. Apart from damages, general and punitive, the appellant also seeks a declaration that Burns Bog is subject to a public trust and/or equitable relationship with the Federal Government who is required to protect it.

[12] After filing its statement of defence, the respondent brought a motion for summary judgment pursuant to section 215 of the Rules alleging that there was no legal basis for the appellant's claim.

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A. *Federal Court Decision*

[13] In a comprehensive and well-reasoned decision, the Judge addresses the following issues: (i) whether the statement of claim discloses a genuine issue for trial; and (ii) whether summary judgment is appropriate.

[14] The Judge concludes that the matter is appropriate for summary judgment as there are no contested facts which need to be resolved in order to determine whether the appellant's claim has any chance of success (Reasons at paragraph 65).

[15] The Judge also concludes that after reviewing the record, the relevant agreements, and the principles and authorities put forward by the parties, he is convinced that the respondent has made its case for summary judgment (Reasons at paragraph 76). The Judge summarizes his reasoning as follows at paragraph 77:

> 77 Canada does not owe any duty to the Plaintiff, the Bog or the general public respecting the protection of the Bog's ecological integrity. This is because:
>
> a. The Covenant, Management Agreement and Management Plan do not impose upon Canada any positive obligations respecting the protection of the Bog;
>
> b. Canada does not owe any trust obligations respecting the Bog because Canada does not own the Bog. Moreover, there is no basis in law or equity for the imposition of a "public trust" duty in this case;
>
> c. Canada has not undertaken any fiduciary obligations with respect to the Bog; and,
>
> d. None of the statutes cited by the Plaintiff impose upon Canada any obligations with respect to the protection of the Bog.

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[16] Regarding the Covenant, the Judge observes that it does not impose upon the Federal Government any obligation regarding Burns Bog (Reasons at paragraph 78). Moreover, the Covenant applies only to Burns Bog and as such, does not limit the use of land outside of Burns Bog (Reasons at paragraph 80). As such, it cannot be used to give rise to an obligation to ensure that the SFPR is constructed by the Provincial Government in a manner that would help preserve Burns Bog.

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[17] In the Judge's opinion, the Covenant does not create a trust relationship between the Federal Government and Burns Bog, as it does not provide the Federal Government with title to Burns Bog or give it the ability to control Burns Bog, and explicitly stipulates that it does not create any "tort or fiduciary obligations or liabilities of any kind" (Reasons at paragraphs 100-105).

[18] With respect to the Management Agreement, the Judge observes that it is clear that this document was intended to act as a bridge and to provide for the management of Burns Bog while the parties worked toward the development of the long-term Management Plan. This agreement does not contain any provisions that would require the Federal Government to take any steps to protect Burns Bog, with the Government's only commitment in this agreement being to participate in the collaborative planning team to prepare the Management Plan (Reasons at paragraphs 87-88).

[19] As for the Management Plan, the Judge notes that this document is not a contract, but a policy document that identifies various priorities and recommended actions regarding Burns

Bog. This Plan does not oblige the Federal Government in any way to protect Burns Bog (Reasons at paragraphs 90-91, 93).

[20] After noting that the appellant has done little to suggest how a trust or fiduciary obligation with respect to Burns Bog could have arisen on the facts of this case, the Judge notes that an analysis of the basic principles applicable to the creation of such obligations demonstrates that there is nothing to support such obligations in this particular case (Reasons at paragraph 94).

[21] After reviewing the authorities referred to by the parties, including particularly the decision of the Supreme Court of Canada in *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 [*Canfor*], the Judge concludes that no Canadian court has recognized a public trust duty that requires the Federal Government to take positive steps to protect the environment generally or a specific property owned by other parties. In that respect, the Judge notes that the factual situation in the present matter is strikingly different from that before the Supreme Court of Canada in *Canfor* (Reasons at paragraph 112). In his view, the public trust duty aspect of the claim is bound to fail.

[22] The Judge also rejects the argument that there is a fiduciary obligation owed to the Canadian public at large or to Burns Bog itself. The Judge notes in respect of the latter that fiduciary obligations can only be owed to persons or classes of persons, not geographical locations, and therefore it is not possible to owe an obligation toward the land itself. With respect to a duty to the general public including particularly to the appellant, the Judge observes that to succeed, the appellant would have to demonstrate an *ad hoc* fiduciary relationship and that,

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applying the principles set out by the Supreme Court of Canada in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261**,** this claim is also bound to fail (Reasons at paragraphs 113-125).

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[23] Before concluding, the Judge reviews the appellant's allegation that there is a statutory duty to protect Burns Bog, finding that such allegation is also bound to fail because there is no basis for finding any such obligation (Reasons at paragraphs 126-128).

[24] The Judge concludes by stating that while he appreciates the appellant's concerns over the future of Burns Bog, there is nothing before him that substantiates those concerns or that suggests that the Federal Government has a legal obligation, let alone a legal right, to step in and insist that the SFPR project be reviewed again and/or modified (Reasons at paragraphs 69-73, 129-130). He thus allowed the respondent's motion for summary judgment.

II. ISSUES

[25] First, the appellant submits that the Judge erred in law by requiring it to put forward evidence of harm to Burns Bog.

[26] Second, the appellant argues that the Judge erred in law by failing to conclude that the various agreements referred to above provide a legal basis for its action. At the hearing, the appellant made it clear that the Judge referred to the appropriate legal test to determine if there was a genuine issue for trial. What the appellant disputes is how the Judge applied this test.

[27] Whereas in its memorandum the appellant appeared to concentrate on the Judge's treatment of the principles regarding trust and fiduciary obligations, during the hearing the appellant acknowledged that the Judge did not misstate the applicable general principles of law. Rather, the appellant submitted that its action raises novel issues (such as the effect of the Covenant) that require a novel remedy to ensure its performance.

[28] At the hearing, the appellant insisted that the Judge erred by failing to consider that the various agreements referred to above created a *sui generis* legal obligation on the Federal Government to protect Burns Bog. This novel duty would be somewhat akin to the duty alluded to in *Canfor* when the Government owns land. It is in that sense that the Judge would have erred in concluding as he did at paragraphs 101-105 of his Reasons. The appellant also argued that such a duty would be analogous to the concept of the "honour of the Crown" developed in aboriginal law.

[29] In the appellant's view, these novel arguments warrant further investigation. The appellant should thus be allowed to get through the discovery process so that it can better substantiate the concerns raised by Eliza Olson in her affidavit as well as add details with respect to how the agreements at issue came about. It is clear that at this stage, and this was confirmed at the hearing, that what the appellant seeks is a further assessment on the environmental impacts of the SFPR on Burns Bog.

[30] The appellant no longer argues that the respondent has a statutory duty to protect Burns Bog that goes beyond the assessment already performed.

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III. ANALYSIS

[31] Absent an extricable error of law, the decision of the Judge can only be overturned if he made a palpable and overriding error. An error of law is reviewable on the standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[32] As noted earlier, the Judge mentions that the appellant has not put before the Court any evidence to support the concerns expressed by Eliza Olson in her affidavit. He also adds that the appellant did not present evidence of relevance to the issue of whether the respondent owes some contractual, trust, fiduciary or statutory obligation to maintain the ecological integrity of Burns Bog (Reasons at paragraphs 70 and 72).

[33] The appellant argues that "the [J]udge erred in holding that there was no evidence addressing the [r]espondent's factual and legal arguments" (Appellant's Memorandum at paragraph 31). The appellant also argues that the Judge erred in holding that there was no evidence of harm to Burns Bog given that the concerns set out at paragraph 3 of Eliza Olson's affidavit should be sufficient to support its action at this stage (Appellant's Memorandum at paragraph 40).

[34] According to the appellant, the Judge's statements in that respect constitute an error of law because, as it was set out in *MacNeil Estate v. Canada (Department of Indian & Northern Affairs)*, 2004 FCA 50 [*MacNeil*], parties responding to a summary judgment motion do not have

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to prove all of the facts of the case and merely need to show that there is a genuine issue for trial (Appellant's Memorandum at paragraph 35).

[35] Although I agree with the legal principle stated in *MacNeil*, I do not believe that the Judge required that the appellant "prove all of the facts of the case". Moreover, the Judge did not base his decision to grant summary judgment on such "lack of evidence". Rather, the Judge concluded that there was no genuine issue for trial because there was no legal basis in this case to find that the respondent owes a legal duty to protect Burns Bog.

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[36] The Judge had to consider the evidence of Eliza Olson as this was the only evidence put forth in response to the motion before him. His statement that her evidence is limited to her personal beliefs and that there is no real evidence to support such beliefs is an accurate description of this evidence. I agree with the Judge that such beliefs do not assist him in understanding what the respondent's legal responsibility for Burns Bog is (Reasons at paragraph 72).

[37] Moreover, at paragraph 75 of the Reasons, the Judge notes:

> There is an obvious reason for this lack of evidence. The issue of Canada's obligations is almost entirely legal. We have before us all of the relevant agreements and principles required to answer the question of whether there is a genuine case for trial on this matter.

[38] In its memorandum at paragraph 32, the appellant acknowledges that the Judge correctly described the only issue before the Court in paragraph 66 of his Reasons when he states:

> The issue is whether there is a genuine issue for trial over whether the Defendants owe to the Plaintiff any duty with respect to Burns Bog that compels any of the

> Defendants to intervene and ensure that the construction of the SFPR does not impact the ecological integrity of Burns Bog.

[39] Having reviewed the agreements and the principles referred to, the Judge concludes that the respondent does not owe any duty to the appellant, Burns Bog or the general public regarding the protection of Burns Bog's ecological integrity (see paragraph 77 of the Reasons reproduced above at paragraph 15).

[40] This brings me to the second part of the appellant's submissions, namely that the Judge erred by failing to conclude that the various agreements referred to above provide a legal basis for its action.

[41] The appellant is correct when it says that its action should not be struck merely because it relies on novel arguments. That said, novelty alone is not a sufficient answer in and of itself to allow an action to proceed and to refuse to grant summary judgment. Novelty does not address the need to weed out hopeless claims.

[42] As noted by the Supreme Court recently in *Hryniak v. Mauldin*, 2014 SCC 7 at paragraph 34, the summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper and faster alternative to a full trial. Swift judicial resolution of a legal dispute allows individuals to get on with their lives. Proportionality is a recognized principle that can act as a benchmark for access to civil justice. Judges are tasked with recognizing when summary judgment is appropriate in order to avoid wasting resources on a full trial.

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[43] I agree with the Judge that this is a clear case where the appellant's claim must be weeded out because it is bound to fail. I agree with the Judge substantially for the reasons he gave that the appellant has failed to establish the essential elements of a trust or fiduciary relationship.

[44] It is clear that in reaching his conclusion, the Judge carefully considered *Canfor*. He found that at best *Canfor* opens the door to the application of the public trust doctrine developed in the United States in respect of land owned by the Crown (see *Canfor* at paragraphs 74-81). Here, as mentioned, the respondent does not own Burns Bog.

[45] The appellant acknowledged at the hearing before us that the particular public trust or fiduciary duty it is relying on has not yet been recognized anywhere, including the United States. The appellant's position requires extending not only Canadian law but the American doctrine upon which the appellant relies on to a completely different situation.

[46] In the absence of a precedent dealing with the alleged *sui generis* public trust duty, the Judge turned to the basic principles of fiduciary and trust law. Indeed, the Supreme Court of Canada has already set out general principles that should guide the Courts when reviewing cases alleging an *ad hoc* fiduciary duty imposed on governments. It has also set out the general principles applicable to cases where a trust relationship is alleged.

[47] The Judge identified those principles and applied them to the matter before him. I am satisfied that he was not limiting himself to factual situations already encountered in the case law

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and kept an open mind as to what new circumstances these principles could apply to. I find no error in his articulation of the law or in his application of these legal principles to the facts of this case.

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[48] There is no indication that the appellant raised the concept of the "honour of the Crown" before the Judge. It is not referred to in the proceedings. I do not believe that we should entertain that argument. In any event, this analogy is inappropriate.

[49] As to the appellant's argument that for every wrong there must be a legal remedy, I have not been persuaded that it has any application here. The appellant has not challenged in any way, through judicial review or otherwise, the joint environmental study performed to assess the potential impact of the SFPR on Burns Bog.

[50] In my view, there is simply no error that would justify this Court's intervention. In these circumstances, I propose that the appeal be dismissed with costs.

" Johanne Gauthier"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-418-12
STYLE OF CAUSE:	BURNS BOG CONSERVATION SOCIETY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 5, 2014
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	DAWSON J.A. TRUDEL J.A.
DATED:	JUNE 27, 2014

APPEARANCES:

James L. Straith K. Joseph Spears	FOR THE APPELLANT
Sheri Vigneau Oliver Pulleyblank	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Straith Litigation Chambers West Vancouver, British Columbia	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

2014 FCA 170 (CanLII)

Ontario Supreme Court
Murano v. Bank of Montreal,
Date: 1995-04-04

Joe Murano, Hilton Video Ltd., 828555 Ontario Limited, 828556 Ontario Limited, 828557 Ontario Limited and 873047 Ontario Limited

and

Bank of Montreal and Peat, Marwick, Thorne Inc.

1995 CanLII 7410 (ON SC)

Ontario Court of Justice (General Division) [Commercial List] Adams J.

Heard - November 2-4, 7-10, 14-16, 21, 22, 24 and December 1, 2, 1994.

Judgment - April 4, 1995.

A.I. Schein and *M. Muskat,* for plaintiffs (defendants to the counterclaim).

I.V.B. Nordheimer and *R. Cuervo-Lorens,* for defendants (plaintiffs by counterclaim).

B314/93

[1] April 4, 1995. ADAMS J.: – The plaintiffs allege that the Bank of Montreal ("the Bank") destroyed their businesses. It did so, they allege, by failing to give reasonable notice of demands for repayment of loans, by immediately appointing a receiver, Peat Marwick Thorne Inc. ("Peat"), over financially strategic assets and by wrongful "disclosures" to third parties. In their statement of claim the plaintiffs claim approximately $30,000,000 in damages. The Bank responds that the credit facilities extended to the corporate plaintiffs were in the nature of demand loans and that it was justified in requesting their immediate repayment, in simultaneously installing a receiver and in speaking to third parties. Alternatively, the Bank disputes the extent of the business losses claimed. The Bank also counterclaims for the shortfall on its loans in the amount of approximately $200,000.

I. INTRODUCTION

[2] Murano is a 32-year-old, self-educated entrepreneur. The Bank's actions, which are central to this litigation, occurred on March 27, 1991. At that time, Murano owned 100 per cent of 873047 Ontario Limited ("873047") which in turn owned and operated several retail home video rental stores in the Kitchener, Cambridge, and Waterloo areas under the trade name of "Bandito Video". In these proceedings, those stores are described as the Hilton

Division. Murano had also just opened five other stores under the trade name “Top 30” and negotiated leases for a further seven stores to be opened in 1991. There were plans to open more than 70 Top 30 stores over the following four years. As well, in February of 1991, Murano had agreed to purchase the companies which owned and operated Bandito Video’s eight corporate stores and 44 franchised stores. This transaction was to close in April 1991. At the time, Bandito Video was one of the largest video rental chain store operations in Canada.

[3] Murano claims that the Bank’s actions in seizing the Hilton Division destroyed that division and prevented the Bandito Video transaction and the Top 30 trade initiative from being carried out.

[4] Murano owned several commercial properties in Kingston, Ontario, together with various mortgages and notes receivable. He contends that the taking of the Hilton stores by the defendants prevented the servicing of loans secured by his real estate assets and any opportunity of refinancing. Other financial institutions therefore seized all of his real estate and disposed of it at distressed sale prices. It is also alleged the Bank disposed of his mortgage assets and notes receivable in an improvident manner.

[5] The business losses alleged fall in a range between $9,800,000 to $9,900,000. These losses consist of $2,835,000 to $2,570,000 for losses associated with the Bank seizing the Hilton Division stores; $2,315,000 to $1,989,000 for the loss of the Top 30 stores which had been opened or for which leases had been signed; $411,000 in respect of the 1991 projected earnings for additional Top 30 stores planned to be opened that year; $1,438,000 to $1,180,000 for losses arising from the failed acquisition of the Bandito Video corporate and franchised stores; and $2,840,000 for losses associated with the sale of his various commercial properties, mortgages, and notes receivable.

[6] The Bank takes the position that the quantifiable losses suffered by Murano in connection with the disposal of the Hilton Division are in the range of $560,000 to $715,000. The Bank submits that Murano has been unable to quantify all other losses with the requisite certainty and, alternatively, disputes that such losses were foreseeable and caused by its actions. It is the Bank’s position that Murano’s business was a highly leveraged “house of cards” waiting to fall.

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[7] Murano also complains that following the appointment of the receiver, the Bank told other bankers, lenders, business associates and suppliers that it had appointed Peat because of Murano's dishonest conduct arising out of his desperate financial situation. He submits that the financial disclosure was in breach of an implied contractual duty of confidentiality and that the allegation of dishonesty was untrue. It is claimed that resulting rumours of Murano's dishonesty and that his companies were in a precarious financial position spread quickly through the business community making it impossible for him to continue. The plaintiffs' claim the Bank's conduct was "callous, high-handed, and arrogant" and request that punitive damages be awarded.

[8] The Bank, however, denies that it breached any confidence with respect to the business affairs of the plaintiffs. It also denies that it acted in a high-handed, callous and arrogant manner. Rather, the Bank submits that it acted to protect its security as a result of the improper, unwarranted, and illegitimate actions of the plaintiffs in absconding with significant assets subject to the Bank's security. By counterclaim, the Bank claims $207,085 as the difference between the outstanding indebtedness of the plaintiffs at the date of the appointment of the receiver and the realization by Peat on those assets it could locate and sell.

II. FACTS

A. The Businesses

[9] Murano was a successful entrepreneur in the Kingston area prior to his ventures in the home video rental industry. By 1988 he had developed and sold approximately 11 pizza stores for in excess of $1,000,000. He owned six commercial properties as well as an eight acre site on which he planned to develop a hotel and related facilities. He owned one submarine sandwich outlet and was a co-owner of a roadhouse restaurant. His net worth was reported to be in excess of $3,000,000. These business activities brought him into contact with Bob Glenn, another Kingston entrepreneur, who owned the Bandito Video chain. Glenn operated the eight corporate stores through Bandito Video Limited ("BVL") and 44 franchised stores through 548531 Limited. Bandito Video, at the time, was one of the largest video chains in Canada, operating primarily in southern Ontario. Glenn had entered into a separate franchise arrangement through BVL with Robert Hilton in respect of four stores owned and

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operated by Hilton at 1050 King Street, Kitchener; 350 Hespler Road, Cambridge; 450 Erb Street, Waterloo; and 22 Weber Street, Waterloo (i.e. the Hilton Division).

1. *The Hilton Division*

[10] In December of 1989 Murano and Glenn, as equal partners, bought Hilton's four video stores in a share purchase transaction for a purchase price of $1.3 million. Approximately $1,000,000 of this purchase price was financed by way of a ten year promissory note to Hilton. These stores had been in operation since 1986 and had produced annual revenues in the vicinity of $2,000,000 each year. They were profitable stores for Hilton and remained profitable under the management of Glenn and Murano. In 1990 they produced revenue of $1,773,871 and a net income before income taxes of $497,582. On September 25, 1990, Murano bought Glenn's 50 per cent share for $40,000 in cash and an agreement to assume all of Glenn's liabilities in connection with the four stores.

[11] The Hilton stores were financed through the defendant Bank. The two operating companies, Hilton Video Ltd. ("HVL") and 828556 Ontario Limited ("828556"), each had a $60,000 term loan payable on demand and a $100,000 revolving credit facility, also repayable on demand. The Bank had provided the banking for these companies while Hilton owned them and it continued this relationship with Murano and Glenn albeit on the reduced basis just described. These financing and credit facilities were secured by the assets of the businesses pursuant to security agreements. Written guarantees of the indebtedness of the companies dated February 8, 1990 were provided under seal by Murano and the plaintiff, 873047 Ontario Limited.

[12] As of June 1990, the Bank appears to have been satisfied with its relationship with Murano, Glenn and the corporate plaintiffs. The account manager at the time was Brian Hughes. He had been with the Bank since 1972 and was involved in the approval of the new financing arrangement with Murano and Glenn. He was aware that the companies' year-ends had been changed so that both would have December year-end dates and that Ernst & Young had prepared financial statements as of December 1990. He was familiar with prepared projections for 1990 and with 1990 profit and loss statements to date showing a net profit of $180,000.

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[13] Hughes testified that each operating company had a separate bank account and the right to borrow on the unused revolving credit facility for the related company if need be. Hughes left the branch on June 8, 1990. By that time, he had received all of the financial information requested from Murano and his partner. He understood the next scheduled review date was to be in April or May of 1991, i.e. three to four months following the expiration of the new December year-ends of the respective companies.

2. *The Top 30 Division*

[14] Murano had decided by November of 1990 to open at least 70 video rental stores under the name “Top 30”. These stores were to be smaller in scale than a Bandito Video Super Store and, thus, more affordable for prospective franchisees. The name “Top 30” was essentially a marketing device intended to suggest a store emphasis on the most current titles. Murano discussed the initiative with the Bank at the local branch administering the Hilton loans, but was referred to a Kingston branch said to be closer to his place of residence and his traditional operating base. That branch was not interested. The Toronto Dominion Bank (“the TD Bank”), however, was and on December 6, 1990 agreed to provide financing for the first five Top 30 stores in the amount of $850,000.

[15] The Kingston TD Bank manager of commercial credit, John Desmond Allan, conducted the credit checks leading to the approval of Murano’s application. The TD Bank viewed the Top 30 venture as “high risk” but was comfortable with its security arrangements. It estimated Murano’s net worth at the time to be $2.6 million. The first Top 30 store, situated at 180 King Street East, Gananoque, commenced operations in December 1990. It was Murano’s intention to have opened more than 70 additional video rental stores under this name by 1995. By March 27, 1991, four additional stores had been opened in Cambridge, Kingston and Brockville. A fifth store was opened in Richmond Hill as a result of the transfer of the Hilton Bandito Video store previously operated at 22 Weber Street, Waterloo. Murano had negotiated leases for seven other Top 30 stores involving lucrative landlord incentives. These stores were to be located in Kingston, Brockville, Pickering, East York and Gatineau.

3. *The Bandito Video Division*

[16] A “preliminary agreement” for the sale of the Bandito Video Division was negotiated in February 1991. By this agreement, Murano was to purchase from Glenn all of the issued and

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outstanding shares of 548531 and BVL for $1,400,000. The purchase price was to be made up of $266,000 in cash and a 9 per cent note for $1,134,000. This sale was to close in early April 1991. These eight corporate and 44 franchise stores produced revenue of $4,643,000 in 1988, $4,388,000 in 1989 and $4,064,000 in 1990. Earnings (or losses) before taxes in those years were $372,000, a loss of $7,822 and a loss of $92,400, respectively. The cash portion of the purchase price was to be financed by a second mortgage to Edward Bak on Murano's property located at 335-37 Princess Street in Kingston. The first mortgage was in the amount of $650,000 in favour of National Trust. The property had an appraised value as of March 22, 1991 of $1,235,000.

[17] Murano employed Gregory Gray, a certified general accountant, to assist him in planning and administering all these business initiatives.

4. *Other Business Assets*

[18] Murano owned several properties in the Kingston area. In 1991, real estate was feeling the effects of the recession. Values of commercial properties were in substantial decline, particularly vacant buildings because of the difficulty in attracting new tenants. Murano owned the commercial properties at 161 Princess Street, 335-337 Princess Street, 611 and 512 Princess Street, and 511-513 Albert Street. He also owned vacant land on Princess Street for which a hotel project was planned and a property at 180 King Street East in Gananoque.

[19] All these properties were subject to at least one mortgage. 161 Princess Street was given an estimated market value of $400,000 as of March 27, 1991 and was subject to a mortgage in favour of Royal Bank of Canada dated April 28, 1989. It had been appraised at a market value of $650,000 on October 21, 1988. It was not leased. The street addresses of 611 Princess Street and 511-513 Albert Street are considered to be one property. This site was valued at $750,000 as of March 27, 1991 and $1,035,000 as of May 10, 1989. The mortgage balance outstanding as of March 27, 1991 was $738,297. An appraised value of $1,235,000 was given to 335-337 Princess Street on March 22, 1991 and the mortgage balance outstanding in favour of National Trust Company as of March 27, 1991 was $660,114. A Top 30 Video outlet was located at 180 King Street East in the Town of Gananoque at the end of March 1991 and the property was valued at approximately $650,000, It was subject to a mortgage with the National Trust Company with an outstanding balance of $474,130.

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[20] Mortgages and notes receivable in favour of Murano totalled just over $1,000,000 as of March 27, 1991. Included in these items was a mortgage given by 883544 Ontario Limited, a company of former Kingston developer Photis Liappas, which had purchased a Murano property on Elliot Avenue in Kingston in March 1990. Liappas then developed the property supported by a National Trust construction loan in the amount of $2.2 million. Murano took back a mortgage on the property in the amount of $460,000 and agreed to be the anchor tenant when the strip mall was completed. Finally, the eight acres of vacant land on Princess Street held for a hotel project was estimated to have a value of $70,000 on March 27, 1991.

B. The Bigger Picture and Immediate Challenges

[21] All of these business initiatives were interconnected. The real estate assets were used to secure business loans. Profits from the Hilton stores contributed to the service of these loans. Profits and inventory from the Hilton stores also facilitated Murano's Top 30 initiative. The Hilton management team of Rick Leach and Christopher Hagey, together with Robert Hilton acting as a consultant, provided Murano and Gray with the necessary industry expertise. Murano reviewed his "master plan" at a January 22, 1991 meeting of these key people in Kingston.

[22] The video industry was performing well in spite of the recession. This economic downturn had also permitted Murano to negotiate substantial leasehold improvements as additional financial support for his plans. The acquisition of the entire Bandito Video chain in the first week of April 1991 would have made Murano one of the largest retail video rental entrepreneurs in Canada. This purchase would have enhanced his credibility with customers, suppliers and bankers and provided further management expertise and surplus video cassette inventory to support his expansionary plans. David McTurk, who effectively managed the Bandito Video chain, testified that the relationship with Murano was much anticipated to the point where Glenn had been advised by his key staff that they were joining Murano "no matter what".

[23] On the other hand, not only were Murano's business activities highly interrelated, they were highly leveraged. He dealt with several financial institutions and used his real estate base as security in raising the capital he required. Murano's business initiatives were facing serious challenges by March 1991. In early 1991 the industry came under severe pressure from the extensive international television coverage of the Gulf War. This coverage captured

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the attention of the viewing public to the detriment of video rental operators everywhere. Murano was seeking to restructure his Hilton operations to respond to this pressure. At the same time he was expanding in an effort to capitalize on the continued growth and interest in the industry. Thus, he was intending to move the contents of the 22 Weber Street Bandito Video store to a Richmond Hill Top 30 outlet. He was also planning to increase rental prices and decrease Hilton store expenses which, after a year of familiarity, he and his advisors deemed to be excessive.

[24] Robert Hilton was not in disagreement with any of these initiatives. He was, however, pressing Murano for increased security because of the way the Hilton stores were being exploited. His concerns were conveyed to Murano by letters dated March 5, 1991 and March 25. The March 5, 1991 letter also pointed out a decline in revenue, the slow paying of creditors, and the poor morale of staff. Hilton's prime concern, however, was that his security was being impaired by the use of cassettes and revenue from the Hilton operations to start up the Top 30 Video stores. Murano had been assuring him additional security would be provided, but he had not actually done so. Therefore, on March 25, 1991, Hilton's lawyer made a formal demand for additional security, failing which Hilton threatened to exercise his rights. Nevertheless, Hilton saw great potential in the Top 30 initiative to provide a much needed cash flow.

C. The Bank's Demand

[25] In the midst of these expansion plans and economic pressures, the Bank demanded that 828556 and HVL immediately repay all their loans. These demand letters were hand delivered on March 27, 1991 to HVL and the numbered company at the three surviving Hilton store locations. The 22 Weber Street store had been moved to Richmond Hill the preceding weekend. Peat had been appointed receiver on March 26, 1991, and took possession of the stores two hours after the written demands for payment were delivered. Surprisingly, no effort was made to immediately contact Murano. Instead, the Bank notified him by registered letters dated March 27, 1991 addressed to his home in Glenburnie, Ontario, and to several of his business locations in Kingston. The Bank's hand delivered letters, over the signature of its lawyer W. Wayne McKinnon, were commonly worded:

Re: Bank of Montreal

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We act as solicitors for the Bank of Montreal (the "Bank") and have been advised that their records indicate that Hilton Video Ltd. (the "Company") is indebted to the Bank for the total amount of $134,479.58 as of March 26, 1991. The Bank hereby demands payment by the Company of such principal and interest in the aggregate amount of $134,479.58 immediately. Interest shall continue to accrue on the company's indebtedness at the rate or rates applicable thereto until the date of payment in full.

The Bank also hereby demands payment by the Company of such indebtedness pursuant to Ontario Personal Property Security Act Security Agreement dated August 25, 1987, and executed by the Company in favour of the Bank and pursuant to all other security held by the Bank from the Company as security for payment of such indebtedness.

[26] The March 27, 1994 registered letter to Murano read:

Re: Bank of Montreal

The Bank guarantee dated February 8, 1990, of payment of the liabilities of Hilton Video Ltd., Hilton Investments, 828555 Ontario Limited, 828556 Ontario Limited and 828557 Ontario Limited (the "Borrowers") to the Bank of Montreal (the "Bank"). We are enclosing for your information a copy of our letter of today's date addressed to 828556 Ontario Limited and Hilton Video Ltd. demanding payment of its liabilities to the Bank. We wish to inform you that if Hilton Video Ltd., Hilton Investments, 828555 Ontario Limited, 828556 Ontario Limited and 828557 Ontario Limited fails to meet the Bank demand, it is the Bank's intention to require payment from you under your guarantee and thereby demands payment of the total amount of $278,906.06 as at March 26, 1991. Interest shall continue to accrue on the indebtedness at the rate or rates applicable thereto until the date of payment in full.

[27] Both Leach and Hilton immediately advised Peat's personnel of the whereabouts of the inventory and equipment of the Weber Street store. Unfortunately, the defendants made no attempt to retrieve those assets until late in April and after the landlord of the Richmond Hill store had seized them. Murano was not advised of any specific reason for the Bank's peremptory demand and installation of the receiver. Instead, his new account manager, Peter Rowlands, simply referred him to the Bank's lawyers.

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[28] Because he had no idea why the Bank had acted in the manner that it had, Murano could only tell those dealing with him that it was all a mistake which would be quickly sorted out. He then contacted his long-standing Kingston lawyer, Ken Coull. Coull spoke to the Bank's lawyer by telephone on April 2, 1991. McKinnon advised Coull there were four reasons for the Bank's actions. First, Murano had not provided financial information required since early December 1990. Second, Hilton had given notice that a receiver was to be appointed. Third, equipment and movies had been moved from Weber Street to an unknown place. And fourthly, a Bank request for a $100,000 pay-down had not been complied with.

[29] Coull advised McKinnon that because Murano was using money generated by the seized stores in his operations elsewhere, the Bank's action would likely trigger his downfall. McKinnon replied that there would be no harm because no one knew. Coull disagreed and told McKinnon that employees, creditors and landlords knew and that the damage was done. Murano also claimed that all financial information had been provided, that the equipment and movies from Weber Street had been moved to Richmond Hill with the Bank's knowledge, and that he had made the required pay-down.

D. Murano's Fall and the Bank's Disclosures

[30] The seizure of the stores had the impact Coull prophesied. Required payments elsewhere in Murano's business operations depended on the cash flow from the Hilton stores. As cheques were returned NSF, Murano's other banking and lending relationships became aware of the Hilton Division receivership. Bak immediately refused to provide Murano with the funds necessary to close the April Bandito Video transaction with Glenn. Bak testified that he had agreed to provide the financing on the assumption that all of Murano's operations were in place and available to him as a source of financial support. Nevertheless, had the Bank given Murano time to pay, Bak had no objection to some or all of the funds he was to provide being used to satisfy the Bank's demands. However, with the installation of a receiver without notice, Murano's financial viability and the reliability of what he was saying were suspect and Bak backed away.

[31] The TD Bank similarly withdrew its financial support for the Top 30 initiative. This was the direct result of the defendant Bank's actions reinforced by information that it supplied to the TD Bank without Murano's consent. On April 5, 1991, Rowlands advised TD Bank official David Day that Murano had told him on March 20 that the Hilton stores were losing money;

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that there were outstanding payables overdue; and that he had no funds to cover losses. Rowlands further relayed to Day that Murano believed he would have no alternative but to shut his operations down unless the defendant Bank was able to assist him in refinancing both the stores and a new franchise company. Rowlands advised that no financial statements were available and that Murano had closed one of the stores, removing all of the inventory and equipment which had been assigned to the Bank. To the best of Rowlands' knowledge, no new store had been opened in the area.

[32] The TD Bank, not surprisingly, decided to cancel the interim credit facilities for Top 30 Video. Day testified that the Bank did not believe Murano when he said it was all "a big mistake". In Day's view, a bank would not take such serious action without good reason.

[33] The cancellation of the TD Bank's Top 30 support was communicated to Murano by letter written April 9, 1991. The TD Bank also received an unsolicited call from Peter Skebo of the defendant Bank advising that a loan with Murano in Kingston was in default and that equipment was also missing from restaurant premises located there. By letter dated May 22, 1991, the TD Bank made a demand on Murano in respect of all personal accounts with him in the amount of $854,550. But even at that point in time, he was given more than two hours to respond, i.e. until June 1, 1991.

[34] On April 22, 1991, the Canadian Imperial Bank of Commerce ("CIBC") demanded that Murano pay $84,614, $184,746, and $41,621 in respect of outstanding loans. On April 24, the TD Bank demanded a further $93,765. Canada Trust moved, by power of sale, to dispose of his property in Trenton, Ontario. The property at 161 Princess Street in Kingston was sold under power of sale as was the property in Gananoque at 180 King Street. On May 22, 1991 the TD Bank demanded payment of an additional $96,546. Robert Hilton commenced an action against Murano in April 1991, and by April 1992 had judgment against him for over $1,000,000.

[35] Photis Liappas testified that he was advised by a business associate of Murano, Stan Seto, to call Rowlands. Seto told Liappas that Rowlands had told him Murano was a crook. Liappas called Rowlands and, according to Liappas, was told that all of Murano's financials had been falsified and "that basically he was a crook". Liappas thereafter consulted his lawyers and presented Murano with the option of discharging the mortgage Murano held on

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the Elliot Street property or he would sue Murano alleging fraud. Liappas' lawyers put these options in writing by letter dated May 1, 1991.

[36] Craig Eno, an account manager with Canada Trust, confirmed that Canada Trust called the mortgage on the Trenton property. While Canada Trust had had a good relationship with Murano for several years, it became concerned when Rowlands advised that "in acts of desperation" Murano was taking inventory from video stores in Kitchener and restaurant equipment from premises in Kingston.

[37] Stan Seto had carried out construction work for Murano in respect of several of his stores. He called Rowlands about the receivership and claims to have been told that Murano was losing money and could not meet his payables. Seto said he was also told that Murano had moved inventory to an unknown location and that equipment had been taken from a recently closed pizza business in Kingston. Seto testified that Rowlands indicated Murano was desperate and was essentially a thief. As a result, Seto declined to lease Murano premises which he had been intending to develop in Brockville.

[38] McTurk explained Glenn's reaction to the Bank's actions. Glenn is now deceased but McTurk was present when Glenn spoke to Rowlands on a speaker phone and overheard the account manager's explanation to Glenn of the Bank's actions. Rowlands denied that there was any misunderstanding between Murano and the Bank. He told Glenn that Murano's stores were losing money and that inventory had been improperly removed. Rowlands advised this was not the first time Murano had misconducted himself and alleged that Murano had moved pizza-making equipment from certain Kingston premises and sold it without notice. Rowlands told Glenn that the Bank had no intention of removing Peat. When Glenn, in frustration, then asked to speak to Hughes to get to the bottom of the situation, Rowlands told him that Hughes did not work there any more.

[39] Glenn subsequently gave Murano to the end of April to clear up his problems. Thereafter, Glenn became very ill, was hospitalized and died. His son was not able to carry on the Bandito Video network in a manner satisfactory to the franchisees. They commenced lawsuits in 1992 and Bandito Video, as an integrated franchise operation, ceased to exist.

[40] Peter Skebo testified that he could not imagine telling David Day or anyone else that equipment was missing from Papa Pete's in Kingston. I am satisfied, however, that he did. He

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had recorded this information and had so advised Rowlands. He possessed the telephone numbers of several of Murano's lenders. The sheer number of creditors who claimed to have had this information shared with them and the difficulty of obtaining it elsewhere reinforces my conclusion.

[41] Rowlands denied telling anyone that Murano was "a crook". Nevertheless, I find that he spoke indiscriminately to anyone inquiring about Murano's affairs to justify the Bank's immediate installation of a receiver, and he left the clear impression that Murano had acted dishonestly. The evidence of Eno, Seto, Liappas, Day and McTurk concerning conversations with Rowlands is far too detailed and too similar to accept Rowlands' bald denial Indeed, this Bank appears to have no clear limits on what it tells third parties about a customer's economic difficulties as evidenced by Kevin Hehir's willingness to divulge otherwise confidential information if asked. Hehir was said to be responsible for the Murano relationship as of March 27, 1991. In fact, it was he who decided to call the loans and appoint a receiver without notice. While he could not recall to whom he may have spoken, he testified that, if asked, he would have expressed the Bank's belief that security had been unlawfully taken by Murano.

[42] The three Hilton stores were sold by September 27, 1991. Net realizable funds before fees totalled $103,115. These stores had been appraised, according to the receiver, at a value between $125,700 to $211,800. Daniel Girardi, a vice-president of Peat, was responsible for the receivership. Hehir contacted him on March 25 and advised that immediate action would be required. Girardi sought and obtained a full indemnification from the Bank as a condition of accepting the assignment. This is the only receivership without notice, of the more than 100 receiverships, in which he had participated. Similarly, this is the only receivership without notice that Hehir had ever directed, in his previous six years of experience with the Special Accounts Management Unit ("SAMU"). SAMU is a special "workout" unit of the Bank. Girardi took possession of Murano's assets at about 3 p.m. March 27, 1991, and by approximately 3:25 p.m. had contacted both Hilton and Murano by telephone. He had no trouble reaching Murano.

[43] Murano testified that the reactions to the receivership of the TD Bank, Seto, Liappas, and Bak were representative of the reaction of all potential lenders he approached for assistance. From an estimated net worth in excess of $2,000,000 in 1990, Murano today has judgments against him in the amount of $4.76 million. His real estate assets, which had been

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appraised at $3,509,000 and were mortgaged for $1,872,541, realized only $1,753,000 through untimely disposals. Murano claims the resulting losses were caused by the Bank's immediate insertion of the receiver as were the losses on his mortgages and notes receivable. The latter assets had a face value of $1,089,000 but were disposed of for only $24,600. These assets included the $460,000 mortgage given up to Liappas under the threat of a lawsuit.

E. The Previous Banking Relationships

[44] The Bank takes the position it was well within its rights. It relies on the history of its relationship with Murano and his companies including an alleged covert removal of inventory and chattels subject to the Bank's security interest. This position therefore requires a detailed review of the banking relationship and various specific events preceding March 27, 1991.

[45] The Bank had a satisfactory relationship with Murano until at least June 1990 when account manager Brian Hughes left the branch. It had been Hughes' understanding that an annual review of the Murano and Glenn companies would not be again required until April or May 1991 in light of the change in corporate year-ends. Hughes was also aware of the rights of HVL and 828556 to borrow against each other's revolving line of credit.

[46] Hughes left the Bank in early June 1990 and was replaced by Fai Murray. Murano was informed of this change by a letter dated May 31, 1990 advising him that "Brian will be spending a considerable amount of time with Fai prior to his departure to ensure that the change-over has the minimal impact and she is fully familiar with your account". In fact, Murray and Hughes spent little time together and the transfer of Murano's files was entirely perfunctory. Murray was never aware of the change in year-ends of the companies or of the right of these companies to borrow against each other's revolving loan.

[47] By August 16, 1990, she was therefore writing to Murano complaining that Hilton Video Limited had exceeded its lending limits for the third time in the past month and that financial statements for an interim review in May had not been forthcoming. In light of the right of HVL to borrow against 828556's operating line, any excesses were in fact minimal or non-existent and, according to Hughes, the December 31, 1989 Ernst & Young financial statements provided to the Bank were all that had been required prior to his departure in June.

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Nevertheless, by letter dated September 11, 1990, Murray complained again that the annual review for the Murano and Glenn companies was “now past due”.

[48] Some of this confusion may have been a product of Murray’s interest in managing larger accounts coupled with a high turn-over in the Bank’s staff. Indeed, in this latter regard, Murray was writing to Gray by October 18, 1990 to advise him that Rowlands had recently joined the Kitchener main branch and would be handling the companies’ accounts. But also contributing to the misunderstanding was the failure of Murano and Gray to question the erroneous assumptions in Murray’s correspondence.

[49] The October 18th letter specifically told Gray that he should not hesitate to contact Murray or Debbie Tughan who would continue as the Account Support Officer. This letter also repeated that the annual review for the accounts was two months past due and requested Gray’s cooperation in submitting the financial statements and supporting information requested in Murray’s letter of September 11 to maintain the credit facilities then in place. Gray never appears to challenge these assertions even though in the preceding month, in accordance with her letter of August 16, 1990, Murray had gone so far as to refuse to honour several cheques which in her view exceeded the lending limits. Surprisingly, however, there was no complaint by Murano. Thus, the confusion arising from Murray’s failure to become properly briefed by Hughes was compounded by the plaintiffs’ equally vexing failure to speak up.

[50] As matters developed, Rowlands refused to take over the files until Murray had completed “her review” and obtained “the requested information”. This seems to be the reason for the first meeting between Murray, Gray and Murano on November 20, 1990. But communications were not improved even in this face to face meeting, Murano recalled that the meeting was devoted to familiarizing Murray with the detail of his operations and included a request for additional financing to support his plans for the Top 30 expansion. Murray, on the other hand, remembered the meeting as the requested “annual review” but without the necessary financial statements. She, however, conceded that the Top 30 concept may have been discussed and that Murano may have asked for more money from the Bank. Indeed, in her subsequent discussion with Mr. Laird, the Credit Manager, it was concluded that Murano’s lending limits were already generous.

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[51] The next event appears to be a letter from the Bank dated December 17, 1990 which, to Murano's claimed surprise, laid down very strict terms for a continuation of the banking relationship. This letter, captioned "Without Prejudice", was over the signature of Murray and read:

> We have completed our annual review of your accounts and your request for increased financing. Based on the high leverage and debt servicing shortfall, after provision for video purchases and the general decline in financial trends and industry risk, we are only prepared to extend continued assistance on the basis of the following terms:
>
> 1) Operating loans in both companies limited to $25,000. with $75,000. termed out over a 4 year repayment plan.
>
> 2) Increase limited to $25,000. to Hilton Video Limited on a term basis, with total term repayments for both companies to total $6,000. per month principal, and liquidation by December 31st, 1994.
>
> 3) Increase of $25,000. to be secured by an additional guarantee from Joe Murano, supported by –
>
> a) letter of undertaking (joint with spouse) re: family homes at Glenburnie R.R. #1 and Humberside Dr.
>
> b) letter of undertaking agreeing to inject funds in the event of a servicing deficit from personal funds.
>
> 4) Reconfirmation of guarantees of Feb/08/90 for $320,000. from J. Murano and R. Glenn.
>
> 5) Property searches, at your cost, on all property holdings listed on Schedule B of Joe Murano's personal statement dated Sept/24/90 to confirm title registration and encumbrances.
>
> 6) Satisfactory Bank reports from all financial institutions with which Mr. Murano has personal dealings.
>
> *N.B.* - Please arrange for Royal Trust, Canada Trust and National Trust to remit directly to the Bank as per the attached Bank formats.
>
> 7) Monthly in house profit and loss statements to be provided by the 25th of the following month.

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N.B. – October and November statements are now outstanding.

8) Certified copy of fire insurance policy with Bank of Montreal as loss payee.

N.B. – Only FAX confirmation received from your agent.

9) Confirmation of Mr. Murano's income. (1989 tax return).

Please provide a response by December 31st as to your agreement with the above arrangements and we will proceed with the increased loan.

Should the above not be satisfactory to you, we will have no other alternative but to request that you seek alternative arrangements to liquidate all loans by January 31st, 1991.

[52] By a conciliatory letter dated January 30, 1991, Gray sent a "counteroffer" which read:

We have reviewed your letter dated December 17, 1990. We have considered your terms, and at this time would prefer to remain with your institution. I hope we can achieve this goal in the spirit of cooperation.

At this time we would ask if you would consider the following proposal:

1) Operating loans in both companies limited to $75,000 with 425,000 termed out over a 2 year repayment plan.

2) Reconfirmation of guarantees of Feb/08/90 for $320,000 from J. Murano and R. Glenn.

3) Satisfactory Bank reports from Toronto Dominion, Canada Trust and National Trust.

4) Monthly in house profit and loss statements to be provided by the 25th of the following month.

5) Certified copy of fire insurance policy with the Bank of Montreal as loss payee.

6) Confirmation of Mr. Murano's 1989 income when tax return completed.

7) Presentation of $100,000 to the Bank of Montreal March 1, 1991 to be applied to our account at your discretion.

Please feel free to call me should any questions or concerns arise.

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[53] On February 6, 1991, Murray conveyed the Bank's acceptance of this proposal subject to certain qualifications. Her letter stated:

> We are in receipt of your letter of January 30th, proposing alternative credit facilities and repayment term.
>
> Provided we are in receipt of $100,000. by March 1st, 1991 for permanent partial repayment of loans, we are generally receptive to your proposal subject additionally to:
>
> 1) Satisfactory review of your financial statements for the 4th Quarter of 1990 plus a *full year* accountant prepared statement for Hilton Video Limited and 828556 Ontario Limited as at December 31st, 1990.
>
> 2) Term loan will be subject to satisfactory annual review.
>
> 3) Verification of Mr. Murano's properties by way of property searches at your cost.
>
> N.B. We are agreeable to your arranging same through your solicitor in Kingston for direct dispatch to us.
>
> 4) 1989 tax return for J. Murano.
>
> It is imperative that the outstanding financial information be forwarded to us at an early date to finalize this long outstanding matter.

[54] Murano and Gray, in these proceedings, took the position that the $100,000 commitment was essentially honoured by payments of February 4 and February 6, 1991 totalling $91,224. These moneys were actually paid into operating accounts before or just as Murray's letter of February 6th was received. This being so, it is difficult to see how these moneys constituted a *permanent* partial repayment of loans, particularly when no one advised the Bank that these payments were to be attributed to the $100,000 repayment commitment.

[55] On the other hand, Murray's letter of February 6th did not specify how the $100,000 was to be paid other than to stipulate that it had to be made by March 1, 1991. Moreover, when March 1 came and went, no one in the bank advised Murano of the Bank's position. Instead, matters remained unchanged until Rowlands called to arrange a meeting for March 20, 1991 apparently pursuant to Murray's letter of October 18, 1990 promising that Rowlands would be introducing himself in the near future. Murano and Gray were not advised this meeting was to discuss their failure to honour the commitments set out in Murray's letter of

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February 6, 1991. Indeed, Murano appears to have seen the March 20, 1991 meeting as an opportunity to seek the Bank's approval of a reorganization plan for the Hilton stores.

1. *Meeting of March 20, 1991 and the Move*

[56] The meeting was at the Bank's King Street branch in Kitchener. It was attended by Murano, Gray and B.J. Trebor, a retail consultant to Murano. The recollections of Murano and Gray of this meeting are said to have been recorded in the following note made by Gray shortly after the meeting:

MINUTES

Bank of Montreal Meeting

DATE: Mar. 20/91

LOCATION: Bank of Montreal

King St. Kitchener

PARTICIPANTS: Peter Roland (sic) – Bank of Montreal

Joe Murano – Bandito Video

B.J. Trebor – Bandito Video

Gregory Gray C.G.A. – Bandito Video

– Introduced ourselves to Peter Roland and described our individual job functions and how it related to Hilton Video.

– Reviewed the general structure of Hilton Video and Hilton Investments to Peter Roland who had just recently been assigned to our account. We discussed Joe Murano's and Bob Glenn's initial involvement in Hilton Video and their partnership history to date.

– Discussed our video operations both past, present and future, indicating that we were in good standing with the bank in terms of payment obligations.

– We discussed the bank's letter dated Feb. 6/91 and indicated to Peter that we had prior to Feb. 28/91 injected the $100,000 into the operations.

– Introduced the financial restructuring proposal and reviewed the details with Peter.

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– We discussed in detail the first stage of our proposal which provided for the transfer of the Bandito Video Weber St., Waterloo assets to a new more profitable location, Richmond Hill.

Joe Murano at this point requested that Peter complete the appropriate documentation to ensure that the assets remained security of the bank regardless of the location change.

We also indicated to Peter that the asset move would take place in a couple of days at which time he gave no indication that it should not occur.

– B.J. Trebor detailed a plan to renegotiate the existing leases, which included downsizing the Kitchener location with a partial sublease.

– Peter indicated that he would work with us on the proposal. He requested the following data as “bullits for his gun” when reviewing the file with his superiors.

– Personal tax return of Joe Murano

– Updated financial statements

– Personal financial statement on Joe with supporting real estate appraisals.

– Purchase/Sale agreement between Murano and Glenn

– Copies of store leases.

Peter gave the accountant Greg Gray a two week time period to report and indicated that he would require one week to review the data.

– The meeting ajourned on a very positive note as Joe remarked that he felt very positive based on Peter Roland’s attitude and reception of our proposal.

[57] Rowlands’ note to his file conveys a decidedly less optimistic outlook:

Typescript of Rowland’s (sic) Notes

March 20/91 1:50 p.m.

ATTENDANCE: Joe Murano – owner

1 Greg Gray – comptroller

2. Brad Trebor – consultant

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1) Opened discussion reviewing letters issued since November and latest offer to reduce loans by $100M on March 1/91.

Floor open for discussion.

2) Principal & consultant advise companies are in a very desperate situation financially and are unable to meet their commitment to reduce Bank advances. They offer counter proposal for reorganization and sale of stores. They ask for immediate response from Bank. – we do not commit to anything.

3) Gray presented current payables information. Copy in file. It looks very bad – they don't know if they can even meet their payroll for Friday, March 22/91.

We advise they won't get any assistance from us by way of o/d ext.

Gov't receivables due and they can't pay same. If 3rd party demand is issued they are effectively finished.

Joe reconfirms he doesn't have any money to put in and won't inject any money under current circumstances.

More discussion on reorganization.

We expressed our concerns with such an offer. As it is presented it wouldn't be acceptable to us. We don't have previously requested information and communication from their side has not been acceptable to us – and has been poor at best.

Consultant advised it would be in everyone's interest to reorganize the businesses as they won't survive as is. A new Marketing strategy [?] is needed. More discussion on reorganization.

…

Clients ask for quick reply as time is money, they need to start closing stores as soon as possible.

We reaffirm we can't make a decision on their offer today. Our reaction is going to be "tough" and every effort to get that information to us should be made as quickly as possible.

We advise we will further discuss the situation with local account management and advise as to our position on the offer.

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[signature]

March 20/91

P.J. Rowlands

P.S. Also advised clients account would have to be classed as a higher risk and separately reported. $300 fee to do same would have to be paid. - due to financial position and lack of information.

[58] Both Murano and Gray testified that they left this meeting thinking that Rowlands had approved a move of the inventory and chattels of the Weber Street store to the Richmond Hill Top 30 location. Indeed, Murano went directly from this meeting to his local staff and authorized them to commence the closing of the Weber Street store. There was no attempt to conceal from the Bank either the store closing or the whereabouts of the transferred inventory and chattels. For example, on March 22, 1991, employee Stacey Strome, who had known of a likely move since March 10, 1991, attended the Bank's branch in the same plaza in which her store was located to close out the account. She also advised the head teller where the store was going. The previous Wednesday and Thursday the store had been closed and a sign placed in the window indicating the closure was for the purpose of taking inventory. This deception was to ensure that customers brought movies back while the contents of the store were being readied for transfer to Richmond Hill. On the evening of Friday, March 22, 1991, two new signs were posted which advised the store was being moved to Richmond Hill and that coupons could be redeemed at the Kitchener and Beechwood stores. The sign also thanked customers for their patronage. The move took several days and was not completed until March 27, 1991.

[59] The Hilton stores had been profitable for several years. However, 1991 was proving to be a serious challenge. The Gulf War, the recession, an increased debt load, and Murano's use of the cash flow and inventory to support the expansion of the Top 30 stores placed these stores under significant financial constraints. Resulting difficulties were reflected in a document that Gray presented to Rowlands at the March 20, 1991 meeting. This document indicated the stores were losing money for the first time and projected continuing losses through at least to June 1991 unless the proposed strong measures were taken. These measures indicated moving three of the four stores to locations where lease inducements were available. Rowlands recalled the situation being described to him as "desperate". He

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was told “the bleeding had to be stopped” and that it was not clear the next month’s rent and payroll could be met. He also recalled Murano saying that he was not in a position to put more money into the operations.

[60] Rowlands’ claims to have advised Murano and his colleagues that he would need more information and that any move would require additional security to be provided. He requested cash flow statements, copies of new leases and he estimated that two weeks would be required to assess the situation. Rowlands testified that he understood “everything” would be held in abeyance for the two weeks. He acknowledged Murano stressed the desperation of the situation and that he needed to start closing stores, but he denied authorizing the Weber Street store relocation. Rather, Rowlands recalled saying he would take the information to his supervisors to assess whether the Bank was willing to finance a change to the business and that he would get back to Murano in a “couple of days” if the credit people were interested. He also recalled Murano stating that the $100,000 reduction in the Bank’s advances would not be made. In essence, he saw Murano’s position as “a proposal” to move some of the Bank’s security into a new company called Top 30.

[61] I am satisfied that Murano volunteered to sign whatever paperwork the Bank required to facilitate the change in store locations but it is difficult to comprehend the plaintiffs’ optimistic interpretation of the meeting. Murano and Gray were meeting with Rowlands for the first time and understood that they had to provide further information within the following two week period. How is this understanding to be reconciled with a belief that the Weber Street store move had been approved? Nevertheless, Rowlands at no time expressly told Murano not to move the store. Nor did Murano undertake to refrain from doing so. The established pattern of misunderstanding and lack of clarity between these parties therefore continued.

2. *Bank’s Reaction to the Meeting*

[62] It is clear, however, that the content of the meeting alarmed the Bank. Rowlands’ previously reproduced report to his supervisor Ed Allinott provoked a special loan review meeting for the next day. Allinott considered the situation to involve an increased risk sufficient to call this meeting of the Credit Review Committee. As a result of the meeting, it was no longer clear the Bank would continue to support the business. The Credit Review Committee decided to send the security documentation to the Bank’s lawyers to ensure that the security was in good standing. It also decided to transfer responsibility for the file to the

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SAMU because the business was now a higher than normal risk. Rowlands therefore contacted Hehir, a special accounts manager of that unit, on March 21.

[63] Obviously, the Credit Review Committee did not find Murano's proposal acceptable. But no one "within a few days" advised Murano of this fact as Rowlands had promised. Rather, by the evening of March 21, the plaintiffs files had been shipped off to Hehir by courier and the branch appears to have concluded that it was now Hehir's responsibility to deal with Murano, a customer he had never met. In my view, this peremptory action is explained by notes made of the Credit Review meeting suggesting an intention to move against the plaintiffs by calling their loans. These notes refer to obtaining both a lawyer's advice concerning the calling of the loans and a receiver's advice on appointing it to manage the business. Similarly, the March 21, 1991 lending transaction summaries prepared by Rowlands following the Credit Review meeting reveal no intention that Hehir would work with Murano. Unfortunately, the summaries did contain all of Murray's misunderstandings concerning the timing of annual reviews, the operation of the two revolving lines of credit, slow payments, NSF cheques, and that the loan of HVL was one month in arrears. Most of this information was either exaggerated or inaccurate.

[64] These documents, in my view, make clear that the decision not to advise Murano about the conclusions of the Credit Review Committee was based on the Bank's concern that any such knowledge might result in "movement of inventory, et cetera, to protect personal investment in company". There is also a specific reference to obtaining a lawyer's advice on "what is reasonable notice based on past correspondence since Dec/90", the very argument put before this Court to justify two hours' notice. In the result, while the summaries record that the proposed reorganization of the companies was unacceptable to the Bank, the customer was not advised of this conclusion and, instead, confidential preparations were made by the Bank to install a receiver with as little notice as the past correspondence with the customer would allow.

[65] The explanation for the Bank's stealth seems to be an unquestioned lack of trust combined with the Bank's self-interest. Rowlands, Allinott and the others at the Credit Review Committee meeting did not trust Murano, a person with whom none of them had worked. This unanimous assessment appears to have been the product of Murray's papering of the Bank's files. They were therefore influenced by his apparent failure to provide the financial

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statements she had requested; by her earlier dishonouring of three or four cheques in ignorance of the right of each company to borrow against the revolving line of credit available to the other; and by her view that Murano had breached his $100,000 pay-down commitment. These failures are insufficient grounds for acting without reasonable notice. In any event, the Bank was not concerned enough at the time to give notice of these failings to Murano, nor warn him that their relationship was at an end if they were not remedied. The Bank was primarily concerned it *not* "tip off" Murano.

[66] The events of March 25, 1991 require review against this background.

3. *Bank's Reaction to the Move*

[67] On Monday, March 25, 1991, Rowlands "discovered" that the Weber Street store was empty and advised Allinott. Allinott directed him to tell Hehir. Disturbingly, he also instructed him not to contact Murano until Hehir had time to appraise the situation. Indeed, Murano was not to be spoken to even after Allinott had confirmed that all the remaining stores were in operation. This was so notwithstanding that Rowlands and Allinott both knew Murano had previously proposed to move the store and, as Rowlands agreed on cross-examination, there was therefore no issue in his mind of Murano "back-dooring" the inventory or engaging in a "midnight run". I am satisfied that, in the absence of this direction from Allinott, Rowlands would have called Murano to inquire into the situation. Allinott's conduct is more perplexing. On the one hand, he believed Murano had gone ahead with his reorganization without Bank approval. On the other, he also claimed to be concerned that "everything else" in which the Bank had security would be moved. Yet he knew the remaining stores were still in operation and he made no effort to direct Murano to return the inventory. Finally, it was his view that Hehir now had responsibility for the accounts.

[68] Hehir, however, had never met Murano and agreed that none of the information in the lending transaction summaries contained in the files transferred to him would have justified the appointment of a receiver without notice. Thus, the appointment of the receiver without notice on Hehir's instructions turned on the information he received on March 25 that 22 Weber Street was now closed and empty. Unfortunately, however, Rowlands and Allinott did not tell him that since March 20th the Bank had been aware of Murano's plans to move the store to Richmond Hill. Hehir acknowledged that such information would have been highly relevant to his decision-making. But he insisted he would have acted as he did had he

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concluded Murano moved the inventory without Rowlands' concurrence. When asked what he would have done in the face of a potential misunderstanding between Rowlands and Murano, Hehir said that he would have questioned Rowlands to determine how surprised or upset he was over Murano's actions. Apparently, Hehir's decision would have hinged on that assessment. Why his assessment would not have included speaking to Murano was not explained. Nor did he explain why a receivership would be imposed before asking Murano to return the security. Moreover, much of this testimony was entirely hypothetical because Hehir acted without the knowledge of everything that Allinott and Rowlands knew.

[69] Hehir's objectivity was further compromised by Dan Hunt's serious but unfounded accusation that Murano had moved chattels in Kingston without the Bank's permission or knowledge. Hehir also admitted that he had been thinking about simultaneously calling the loans and appointing a receiver from the moment he assumed responsibility despite agreeing there was nothing in the files to justify such drastic action. One suspects this predisposition was the product of discussions with those colleagues who transferred responsibility for the accounts to him because he too had developed "a lack of trust" in Murano even before learning of the store's move. In short, there was never an intention to help Murano "work out" his problems and, thus, there was no need to speak to him. Hehir did not know where Murano lived and did not consider faxing a demand to him or otherwise speaking to him before he acted. On the basis of the information in the file, he simply concluded that Murano could not repay the Bank no matter what.

[70] If the movement of the inventory was truly the triggering event for the Bank's actions, it is strange that, on appointing Peat, Hehir made no specific reference to this property. Peat knew within minutes of its attendance at the three surviving stores where the inventory and chattels for 22 Weber Street were located. Yet Murano was not told to return those assets immediately as a condition of terminating the receivership, notwithstanding that on the appointment of the receiver no loan was in default and nothing in the lending transaction summaries for the two corporations justified the action the Bank had taken. A letter was written by lawyers on April 2, 1991 which sought a variety of information and included a request for the return of the Weber Street assets. However, this request was only for the purpose of Peat conducting the receivership. At no time was Murano told that the return of those assets would terminate the receivership.

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[71] The receivership took on a Kafkaesque character. When Murano learned on March 27th that a receiver had taken over the Hilton stores, he called Rowlands. Rowlands, conforming with Allinott's instructions to the letter, told him to call the Bank's lawyers. The Bank's lawyers raised all sorts of issues in addition to the inventory, issues which Hehir admitted were insufficient justification for acting without notice. No one told him the receivership was only about having moved the inventory of one store without permission.

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III. THE ISSUE OF REASONABLE NOTICE

A. The Law

[72] The law is clear that a bank must give a debtor reasonable notice that it is demanding the repayment of a loan whether or not it is payable "on demand". See *Ronald Elwin Lister Ltd. v. Dunlop Canada Ltd.,* [1982] 1 S.C.R. 726. What period of time constitutes reasonable notice is a question of fact to be determined on the circumstances of each case. See *Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal* (1983), 49 C.B.R. (N.S.) 1 (Ont. C.A.). Matters to be assessed in making this determination include (1) the amount of the loan in question; (2) the risk to the creditor of losing money or security; (3) the length of the relationship between the debtor and the creditor; (4) the character and reputation of the debtor; (5) the potential ability of the debtor to raise the money required in a relatively short period; (6) the circumstances surrounding the demand for payment; and (7) any other relevant factor that may exist. See *Mister Broadloom Corp.,* supra, at p. 7.

[73] It has been held that the time to be given a debtor to raise money will generally be of very short duration. This principle recognizes that as time passes, a debtor's financial plight will usually worsen to the detriment of a creditor. Accordingly, it is no answer to say the debtor needs more time. Obviously, the more bleak the debtor's financial condition, the more time will be needed to find replacement credit facilities. But the reciprocal of giving time to a debtor is the potential aggravation of a creditor's losses. Moreover, if a debtor would be clearly unable to raise funds, even if given time, the indulgence may constitute nothing more than an empty formalism to the prejudice of creditors. These principles, however, are based on the assumption that a demand for payment will usually be made when a debtor is in default. Where this is so, reasonable notice will usually involve notice of "a few days". See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (C.A.) at p. 235.

[74] The *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, has now been amended, S.C. 1992, c. 27, s. 87, to require the giving often days' notice. Compare *Kavcar Investments Ltd.,* supra, at p. 236 with the *Bankruptcy and Insolvency Act* s. 244(2). But even previous to this amendment, it was clear that notice of 40 to 50 minutes or, by extension, two hours was not reasonable "unless there plainly were no resources available to meet the debt or unless it were certain that the debtors would abscond with their assets". See *Mister Broadloom Corp.,* supra, at p. 9. Further, courts have been careful to distinguish between exaggerated claims of financial necessity made by a company's principal officer in negotiations with a bank to obtain additional financing and representations that might reasonably be construed by a bank as a waiver of notice. Thus, an executive's statement that he had no intention of putting additional personal funds into a venture has been held not to relieve a bank from giving reasonable notice of its demands for repayment. The precipitous appointment of a receiver therefore constituted a trespass and conversion. In this respect, Estey J. in *Ronald Elwin Lister Ltd. v. Dunlop Canada Ltd.,* [1982] 1 S.C.R. 726, at pp. 747-748 stated:

> Mr. Lister said before the seizure that he did not intend to advance further money to the venture and that if any such money were required, Dunlop should provide it. This is something quite different from a waiver of a right to reasonable notice. This was something said by one party to another in a failing venture, incidental to continuing bargaining or negotiating for some means to save the undertaking and their respective investments in it. If Dunlop relied on this statement in seizing the assets without notice, as they did, they were, in my view, quite wrong. The Listers remained entitled to reasonable notice. The majority of the Court of Appeal concluded that the appellants were required either on these facts or generally to ask for time to pay. No authority was cited for the proposition and none was advanced in this Court. Here the Listers allowed the receiver to enter into possession and to proceed to liquidate Mr. Lister's assets and those of the Company on behalf of Dunlop. This technical or mechanical acquiescence in no way eliminated, by waiver, acquiescence or otherwise, the appellants' entitlement to reasonable notice. In the result, therefore, Dunlop and its agents, its employees and the receiver were guilty of trespass and conversion.

[75] The failure to give reasonable notice constitutes a breach of an implied contract between bank and customer and the related seizure of assets by a receiver constitutes both trespass and a conversion. See *McLachlan v. Canadian Imperial Bank of Commerce* (1989),

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35 B.C.L.R. (2d) 100 (C.A.), at p. 105. Very short notice, particularly notice of less than one day, is prima facie unreasonable and, in such circumstances, justification lies with the creditor. See *Kavcar Investments Ltd,,* supra, at p. 238. In this respect, Madam Justice McKinlay stated:

> However, any very short notice period – certainly one of less than a day – is *prima facie* unreasonable, and in such a case it would be up to the creditor to show why, in the particular circumstances, the period allowed was reasonable. It is important for creditors to keep in mind that while the creditor of a dishonest debtor may well have evidence of that dishonesty available to him, to obtain evidence of a debtor's inability to raise funds is a much more difficult matter. Even a technically insolvent debtor may have funds available through related individuals or corporations. If a creditor demands payment and gives his debtor no time or a very short time to pay, relying on the debtor's inability to raise funds, he takes the risk that he will be unable later to prove that inability.

[76] Finally, there is judicial recognition that Canada's banks occupy a privileged position in the economy and shoulder correlative duties in respect of their customers. The policy underlying this perspective was captured by McDonald J. in *Royal Bank v. W. Got & Associates Electric Ltd.,* [1994] 5 W.W.R. 337 (Alta. Q.B.), at p. 396, para. 148 in writing:

> Canada's major chartered banks occupy a privileged position. It is not easy for a new bank to obtain a charter and to attain an established position in the marketplace. The major chartered banks are a vital source of financing for Canada's businesses. The small group of major chartered banks enjoy prestige, respect and respect in the commercial community and among depositors (whose deposits form the source of the banks' lending capacity). This respect is engendered not only by their large and firm capital base which gives reassurance of stability, but also by their integrity and good faith in their dealings with borrowers and depositors alike. The major chartered banks are not a collectivity of retailers responsible only to their shareholders for the maximization of profits. They are looked to by the citizenry as honest, trustworthy, law-abiding leaders of the business community. The citizenry expects the ethics of the chartered banks to be above reproach and above what might be the dictates of "the bottom line". Any shocking failure on the part of any of these banks to meet those expectations may be expected not only to harm those directly affected by such conduct,

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but to cause cynicism and distrust on the part of present or potential borrowers, depositors and shareholders. Bad faith and law-breaking by a major chartered bank cannot but damage the fabric of Canada's banking system and hence the country's potential for prosperity and economic well-being.

B. Reasonable Notice Applied

[77] I find the Bank did not give the plaintiffs reasonable notice. There was no justification for the precipitous manner in which the Bank proceeded and I doubt the Bank ever intended to provide adequate or reasonable notice. This is suggested by the content of the lending transaction summaries and by the way the Bank conducted itself prior to learning about the closing of the Weber Street store. A creditor's interest in acting as quickly as possible will almost always be present and so may concerns over mobile inventory. Fears inherent in almost all lending situations, however, are not grounds for acting as the Bank did. More is required. To act without notice, exceptional circumstances must exist which, by definition, transcend what is inherent. The Bank, therefore, had to be at least reasonably certain that Murano was absconding. He clearly was not and the Bank could not have reasonably concluded otherwise.

[78] The Bank, through Allinott and Rowlands, was aware that Murano planned to transfer the store on Weber Street to Richmond Hill. The other stores were continuing in operation on March 25 to Allinott's knowledge. Murano had, on March 20, agreed to execute any documentation necessary to protect the Bank's security in order to facilitate the proposed move. The move was conducted in broad daylight over several days. No attempt was made to conceal the transfer of operations. The situation, then, could not have been reasonably characterized as that of an absconding debtor, particularly when no one at the Bank thought to call Murano and inquire. Murano was not intending to prejudice the Bank by defeating its security interest. While he wanted to move the store, Murano was also willing, to the Bank's knowledge, to execute a new general security agreement.

[79] Hehir acknowledged that information of this sort could have affected his assessment of the situation. Rowlands and Allinott failed to properly inform him, although Rowlands, to his credit, would have telephoned Murano had he been in charge of the situation. Thus, the Bank official closest to the situation, and the one who should have been the most upset had he believed Murano acted unilaterally, was the only person willing to give him an opportunity to

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explain. In the circumstances, that is what should have been done and it is what any reasonable creditor would have done who was genuinely concerned with the whereabouts of its security. Murano was managing a business that had patronized this bank for over five years. The business had been profitable in Murano's hands for over a year. In my view, the closure of 22 Weber Street became a convenient pretext for implementing a plan Hehir and his colleagues had been considering since March 20, 1991 when Murano alarmed the Bank by outlining the challenges he faced. The Bank's plan was to take action as quickly as it could to protect its loans. This was to be done by giving very little notice to the debtor. In doing so, the Bank breached its contractual relationship with Murano and the corporate plaintiffs. Both the Bank and Peat committed trespass and conversion in seizing the Hilton stores on March 27, 1991 and in all their actions thereafter.

[80] The possibility of a misunderstanding between Rowlands and Murano demanded that the Bank first contact Murano and obtain his explanation for the immediate store closure. Even if one was to assume that Murano intentionally took advantage of Rowlands' failure to specifically instruct him not to move the inventory, his conduct would not justify the immediate imposition of a receivership in the circumstances. On the evidence before the Court, the Bank could not reasonably have concluded that Murano intended to abscond with the contents of the store based on the facts then known to it. Rowlands and Allinott knew that Murano intended to move the store. Murano had volunteered to execute an amended general security agreement to protect the Bank's interest. The remaining stores were in operation. And Murano's companies were not in default under any loan obligation.

[81] In those circumstances, it was highly unlikely that Murano would have refused to return the inventory and assets had the Bank threatened the immediate imposition of a receivership. It was also highly unlikely that he would have refused to execute documentation required to protect the Bank's interests in the assets either pending their return or as a condition of them staying in Richmond Hill. Because the Bank's action was so unreasonable, one can only conclude its reliance on the store closing was a pretext for the implementing of an earlier conceived strategy of moving against Murano with little or no notice.

[82] It was argued by the Bank that even had it given reasonable notice, Murano could not have raised sufficient funds to pay the Bank. I do not agree. Not only has the Bank failed to meet the onus which it shoulders to establish this fact, but regardless of onus, I am satisfied

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Murano could have repaid the funds. Bak would have provided adequate moneys in a matter of days had no receiver been in place. Alternatively, Murano could have looked to the cash flow coming from the Hilton stores or to further mortgaging of his other assets. Murano was, if anything, a tenacious entrepreneur who I believe would have successfully responded had he not been disabled by the immediate imposition of a receivership with all the attendant innuendo. The amount of the loans outstanding was not particularly large relative to Murano's net worth and the sources of funds available to him in the absence of the Bank's precipitous conduct.

[83] Murano's companies were not insolvent, distinguishing these facts from those of *Kavcar Investments* where the hopeless nature of a financial situation was held to dictate a "reasonable notice" of very short duration. His representations to Rowlands on March 20, 1991 must be seen in the context of the previous profitable year and what Murano was trying to achieve in that meeting. While I am satisfied he described the situation as desperate, the fact is that no loan had gone unpaid. In fact, he had made arrangements with tax officials and his other major creditors. Hilton testified that, notwithstanding his complaints, he was generally satisfied with the direction Murano was heading. Murano had a detailed plan to deal with both the challenges and the opportunities he saw ahead.

[84] This was not a situation where the loan limits imposed by the Bank were being exceeded on a daily basis to bring it within the short notice rationale of *Kavcar.* In my view, therefore, Murano was entitled, at least, to the equivalent of the notice now required by the *Bankruptcy and Insolvency Act.* Indeed, he should have been given until the end of April to respond. Interestingly, the TD Bank, as late as May 22, 1991, gave Murano until the end of that month to repay the funds it was demanding before engaging in self-help. Objectively speaking, Murano's situation on March 27, 1991 was nowhere near as precarious as it was in May 1991. Given more time, for example the full month of April 1991, Murano could have disposed of certain assets such as Papa Pete's and possibly his best real estate to meet the Bank's demands. Accordingly, no matter how the circumstances are viewed, Murano's situation was far from hopeless. I therefore find it more likely than not that adequate funds to meet the Bank's demands would have been available to Murano within both a few days and by the end of April, with little or no additional risk to the Bank.

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[85] The Bank, to justify its actions, attempted to paint a picture of Murano as a person who could not be trusted. Even accepting that Murano was not the ideal customer, nothing in the evidence justified the immediate imposition of a receivership and the resulting destruction of his businesses. There had been a few NSF cheques in late summer. He had also failed to honour the substance of his $100,000 loan repayment commitment to the Bank by March 1, 1991. Murano's position that payments totalling approximately $90,000 made into operating accounts were in fulfilment of this permanent loan reduction commitment is not reasonable. Murano may also have intentionally taken advantage of Rowlands' failure to be explicit at their meeting. The decision of Gray to take detailed notes of the March 20, 1991 meeting is curiously at odds with his failure to document previous understandings with the Bank. Moreover, the specific reference in those notes to Rowlands' failure to tell them not to move strikes me as contrived. All of this conduct would certainly have justified a termination of the banking relationship. Indeed, no justification was necessary because these were demand loans. But none of this justified a termination of the relationship without notice and a simultaneous imposition of a receivership. The Bank was not entitled to punish Murano for these failings.

[86] The Bank is also not able to justify its conduct by pointing to the fact that Hehir, who knew little of Murano's circumstances, had control of the file by March 27, 1991. This may be a possible bureaucratic explanation for the Bank's failure to deal with Murano in a professional and businesslike way. It does not, however, obviate the legal obligation to give Murano and his corporate entities reasonable notice of a demand for repayment.

[87] Finally, the Bank's earlier letters dated August 16, 1990 and December 17, 1990 do not support the action taken. An earlier warning without an unequivocal demand is simply insufficient. See *263121 Ontario Ltd. v. Toronto Dominion Bank* (September 27, 1984), Doc. 5520/81 (Ont. H.C.), summarized at 27 A.C.W.S. (2d) 381, judgment of Saunders J. at p. 25. In this respect, Saunders J. stated:

> It was submitted that long before May 4, it had been made clear to Holec that unless he was able to inject new capital into Alpha, the bank support would be withdrawn. The letter of April 10, which I find that he received and discussed, imposed a deadline of April 30. He could reasonably expect some bank action to be imminent. However, I do not consider that those circumstances satisfied the requirement that he be given

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reasonable time to comply. *There had been continuous ongoing discussions with the bank but there was no definite unequivocal demand until May 4th.* (Emphasis added)

IV. THE ISSUE OF DISCLOSURE

[88] The Bank's disclosure to third parties of Murano's financial circumstances and alleged dishonesty was also improper. It is an implied term of the contract between a banker and its customer that the banker will not divulge to third parties, without the consent of the customer, either the state of the customer's account, or any transactions with the Bank, or any information relating to the customer acquired through the keeping of an account. See *Tournier v. National Provincial & Union Bank of England,* [1924] 1 K.B. 461 (C.A.). While this duty is not an unqualified one, the disclosure in this case was not reasonably necessary for the protection of the Bank's own interest or for the protection of the public. In my view, there was no need for Rowlands, Skebo and Hehir to say anything beyond the fact that the Bank had installed a receiver. As it turned out, much of the information the Bank disclosed was erroneous and wrongly created the widespread impression that Murano had been so dishonest in his dealings with the Bank that the immediate imposition of a receivership was required. Atkin L.J. in *Tournier v. National Provincial & Union Bank of England,* supra, at pp. 485-486 described the extent of this obligation of secrecy and the exceptions to it in these terms:

> The first question is: To what information does the obligation of secrecy extend? It clearly goes beyond the state of the account, that is, whether there is a debit or a credit balance, and the amount of the balance. It must extend at least to all of the transactions that go through the account, and to the securities, if any, given in respect of the account; and in respect of such matters it must, I think, extend beyond the period when the account is closed, or ceases to be an active account. It seems to me inconceivable that either party would contemplate that once the customer had closed his account the bank was to be at liberty to divulge as it pleased the particular transactions which it had conducted for the customer while he was such. I further think the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers – for example, with a view to assisting the bank in conducting the customer's business, or in coming to decisions as to its treatment of its

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customers… But I think it safe to say that the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank have the right to disclose such information when, and to the extent to which it is reasonably necessary for the protection of the bank's interests, either as against their customer or as against third parties in respect of the transactions of the bank for or with their customer, or for protecting the bank, or persons interested or the public, against fraud or crime. I have already stated the obligation as an obligation not to disclose without the customer's consent. It is an implied term, and may therefore, be varied by express agreement. In any case, the consent may be expressed or implied, and to the extent to which it is given, the bank will be justified in acting… I do not desire to express any final opinion on the practice of bankers to give one another information as to the affairs of their respective customers, except to say it appears to me that if it is justified it must be upon the basis of an implied consent of the customer.

[89] The Privy Council in *Robertson v. C.I.B.C.,* [1994] 1 W.L.R. 1493, at p. 1498 recently endorsed as a "statement of principle" the following passage from Bankes L.J. in *Tournier,* supra, at p. 473, on the exceptions to the duty of confidentiality:

> On principle I think that the qualifications can be classified under four heads: (*a*) where disclosure is under compulsion by law; (*b*) where there is a duty to the public to disclose; (*c*) where the interests of the bank require disclosure; (*d*) where the disclosure is made by the express or implied consent of the customer.

[90] In Canada, Goodman J.A., citing *Tournier,* supra, stated in *Standard Investments Ltd. v. C.I.B.C* (1985), 52 O.R. (2d) 473 (C.A.), at p. 503:

> As pointed out by the trial judge that aspect of confidentiality, *viz.,* that a bank will not disclose confidential information received from its customer to others without the customer's consent, is a legal obligation imposed by law which arises independently of the establishment of a fiduciary relationship. It is an implied term of the contract between a bank and its customer that it will not do so.

[91] *Tournier* was also adopted in *Canadian Imperial Bank of Commerce v. Sayani* (1993), 83 B.C.L.R. (2d) 167 (C.A.), at pp. 172-173.

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[92] None of the exceptions outlined in these cases find application to the facts of this case. The allegations of dishonesty were without foundation. Furthermore, there is no basis to imply a term in this banking relationship that would sanction the disputed disclosures made by Rowlands and others. Banking efficacy does not seem dependent on such a right. Given the extent of staff turnover experienced by the Bank, the accuracy of information in a customer's file is not fail-safe. This reality in itself should have encouraged caution in responding to the inquiries of third parties. In my view, there was no justification for the Bank to do anything other than confirm it had called its loans and imposed a receivership.

[93] This Bank not only fundamentally breached its contractual relationship with Murano, it also attempted to petition him into bankruptcy in September of 1991. Morin J., however, wisely refused the petition on the basis that there were good grounds to believe the plaintiffs had cause of action against the Bank for failing to give reasonable notice of its repayment demands. These grounds having materialized in success, the damages claimed by the plaintiffs for breach of contract and in respect of the established torts of trespass and conversion require consideration.

V. THE ISSUE OF BUSINESS LOSSES

A. Expert Evaluation

[94] It is the position of the plaintiffs that the actions of the defendants triggered the following chain of events:

- On April 22, 1991 the Canadian Imperial Bank of Commerce demanded repayment of its loans to two related companies, 855505 Ontario Ltd. (operating as a Bandito Video store) and 548996 Ontario Ltd. (operating as Paulos' Pizzeria) totalling approximately $170,000. In addition, the CIBC demanded repayment of a personal line of credit to Murano of approximately $42,000;
- On or about April 25, 1991 Canada Trust demanded repayment of a $300,000 mortgage on a property located in Trenton, Ontario;
- On the same date, the Toronto Dominion Bank ("TD Bank") demanded repayment of its loan of $94,000 to a related company, 548290 Ontario Ltd. (operating as Miami Subs) and refused to honour cheques over $500 relating to the Top 30 Division operating in Eastern Ontario;

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• In that same month Robert Hilton demanded repayment of his $1,000,000 loan and commenced an action;

• On May 17, 1991 National Trust demanded repayment of $875,000 pursuant to mortgages on properties at 161 Princess Street and 180 King Street East, Kingston, Ontario;

• On May 22, 1991, the TD Bank demanded repayment of a $97,000 loan to a related company, 855519 Ontario Ltd. (operating as a Top 30 Division location);

• On May 27, 1991 the TD Bank demanded repayment of $855,000 loan in respect of 611 Princess Street and 512 Albert Street.

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[95] The plaintiffs' expert, Richard Wise, a business valuator and litigation accountant, estimated that the damages suffered by the plaintiffs fall within a range of $9,800,000 to $9,900,000 over the proceeds of the liquidation of the Hilton Division. The defendants' expert, Joel Adelstein of Coopers and Lybrand, estimated the plaintiffs' losses lie somewhere between $560,715 and $715,223.

[96] Despite this stark difference in expert opinion, Wise and Adelstein agreed on the condition of the Canadian economy in general and the video retail industry in particular at the relevant times.

1. *The Economic Background*

[97] The economy was in the midst of a recession on March 27, 1991. After seven years of significant advances, growth ended abruptly in the spring of 1990, posting an estimated increase for the year of merely 0.8 per cent. Gross domestic product during the fourth quarter of 1990 had fallen 4 per cent below the level recorded during the same period in 1989 (measured in real terms). This downward trend was forecasted to continue by nearly 2 per cent in 1991, constituting the worst two year performance for decades. The inflation rate, which was 7.5 per cent during the three months immediately preceding March 27, 1991, had increased in comparison to the 5 per cent level it had attained in 1989. One contributing factor to this increase in prices was the invasion of Kuwait by Iraq.

[98] After being a major source of economic growth from 1985, consumer spending was expected to be severely curtailed in 1991. High consumer debt, low levels of consumer confidence, high interest rates, substantial decline in employment and the introduction of the

GST were expected to cause households to cut spending sharply in 1991. Consumer spending was estimated to rise by 0.3 per cent in 1991 and then by 3.1 per cent in 1992. In the first quarter of 1991 the Ontario economy was also deep in recession. Poor performance of the U.S. economy was a major factor behind shrinking export results affecting many of Ontario's key manufacturing and resource industries. The collapse of the real estate market due to overbuilding in the 1980s was another major reason for Ontario's economic hardships.

[99] In contrast, the video retail industry had operated within a relatively buoyant environment and enjoyed significant growth prior to March 27, 1991. Growing at estimates of 15 per cent a year prior to the recession, the industry continued to grow during 1990 at 8 per cent despite the recession. As consumers tightened their belts, renting a video cassette for home viewing became the entertainment of choice for many families. The video rental market was estimated to be growing at a rate of 15 per cent annually in Canada with revenues of approximately $1 billion. In the United States, home video was a $10.3 billion industry by 1990 and had been growing at a rate of approximately $1 billion per year. The large growth in the market was the result of the increased affordability and quality of video cassette recorders (VCRs). By 1990, for example, 72.2 per cent of U.S. households with a television owned a VCR. By 1990, video revenues were forecasted to almost double those of theatre revenues.

[100] In the 1980s and early 1990s, video outlets were opening up at virtually every street corner as entrepreneurs attempted to tap into this new growth market. For example, U.S. video specialty stores grew from 2,500 in 1980 to a peak of approximately 30,000 in 1988. However, as in many other retail sectors, giant retail chains came into prominence and many single store operations could no longer compete on title selection, copies available and location. Thus, by the end of 1990, these operations were either forced out of business or acquired by one of the major operators. In 1990, however, the largest ten video companies in Canada, which included Bandito Video, still held only 15 per cent of the total market with Jumbo Video holding 5.8 per cent and Rogers and Major Video holding approximately 3 per cent each. Convenience stores, as a group, held a 10 per cent -12 per cent share.

[101] An important factor contributing to a retail video outlet's success is the relationship it has with a video distributor. The choice of distributor is vital to an operator's pricing strategy and the availability of titles to be stocked. A good distributor will advise on prevalent industry and consumer demand trends and will supply video retailers with studio displays and other

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point-of-sale materials to assist in marketing new video releases. Another important facet of video retailing is, of course, site selection. The most popular locations include regional shopping districts, neighbourhood strip plazas, and super malls.

[102] While a chain store operation inevitably involves greater complexities in terms of management, it also enables the business unit to realize “synergies” in advertising, promotion and relationships with suppliers. Not only do chain stores benefit from the ability to negotiate volume discounts, some large video retail chains have been able to by-pass the distributor and deal directly with the manufacturers. Multi-store organizations are also more convenient for the customer and result in increased gross revenues, as well as surplus tapes which can be circulated through the various stores. That is, older, or “used” titles can be used to open new stores or recycled through the network of stores in order to keep the libraries of individual outlets looking “fresh”.

[103] Another potentially lucrative feature of the industry is its amenability to franchising. A “franchise” permits the franchisee to use the franchiser’s intellectual property (e.g., business methods, trademarks, corporate identity, marketing tools, et cetera) for a specific period of time. In return, the franchisee must adhere to certain standards and pay for the use of the property through royalties and/or other management fees. Franchising was a key component of Murano’s business strategy, particularly with respect to the planned Top 30 stores.

[104] In Canada, VCR penetration of all domestic households had climbed from less than 25 per cent in 1982 to 63 per cent in 1990, and by 1995, was estimated to increase another 12 per cent. In 1990, an industry study showed that there were 5.7 million VCR households in Canada responsible for 350,000,000 annual tape rentals constituting 62 rentals per VCR household annually. Video tape “sell through” expenditures per VCR households in Canada reached an average of 5.7 videos annually at an average purchase price of $20.64. Sell throughs are typically “B” grade feature films or older “A” films, or special interest tapes (i.e. fitness, travel, sports, et cetera). The broad growth trend was expected to be in the direction of sell through titles. While, in 1990, annual rentals in the Canadian video market totalled $1.1 billion and sell throughs accounted for $130,000,000, these latter revenues were expected to increase dramatically in the future given the great success of popular videos such as “Batman”, “Indiana Jones”, and others.

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[105] Revenue from rentals, however, has continued to be the bulk of the income generated by video stores. Each rental is known in the industry as a “turn”. A store’s objective is to rent a cassette as many turns as possible in as short a period as possible. Hence, a title which costs a retailer $50 and is rented at $2.30 per night will require nearly 22 turns to recoup the initial investment. The goal of the store is to continue renting a title after it has reached this point. This challenge is complicated by the weekend and seasonal nature of video rentals. Video rentals peak during summer months whereas video sell throughs peak during the Christmas holiday period in Canada. Every video retailer must also decide whether to utilize its limited purchasing funds to offer diversity of titles or depth (stocking multiple copies of new releases which have performed well in first-run movie theatres).

[106] The video retail industry was hit hard in the first quarter of 1991. As noted previously, this fall-off in patronage was primarily due to televised coverage of the Gulf War. Small stores were the hardest hit with rental volume falling by nearly one-third in January and February. Average super stores’ rental business fell by 12 to 13 per cent in these months. But a relatively strong March limited the damage. A lacklustre lineup of second quarter film titles, however, caused rentals to decline 7 per cent for the second quarter of 1991. Nevertheless, it was likely that, as in 1990, super stores (those with over 5,000 tapes) and chain stores would continue to see increased revenues, spurred by acquisitions and related reorganizations. In other words, the retail video markets in both Canada and the United States were buoyant in 1991 notwithstanding the presence of a general economic recession. In fact, recession related fears encouraged consumers to down-scale entertainment expenditures by renting video cassettes as a substitute for going out to the cinema or theatre. Moreover, while the first two quarters of 1991 were difficult for all video cassette rental stores, the adverse impact of CNN reporting of the Gulf War was a temporary phenomenon.

[107] It is against this background that the business valuation experts for the plaintiffs and the defendants separately evaluated the impact of the defendants’ conduct. In doing so, they each broke the plaintiffs’ activities or planned activities into three “divisions” – the Hilton Division, the Top 30 Division, and the Bandito Video Division.

2. *The Plaintiffs’ Expert*

i. The Hilton Division

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[108] The Hilton Division commenced operations on July 26, 1985 as a one video cassette rental location situated at 1050 King Street, Kitchener, under the direction of Robert Hilton. By the end of 1990, the Hilton Division had four quite profitable stores. Glenn and Murano acquired all four video stores from Hilton in December of 1989 and their profitability continued through 1990. The four locations were the 1050 King Street Kitchener location; 350 Hespler Road, Cambridge; 450 Erb Street, Waterloo; and 22 Weber Street, also in Waterloo. The store at 22 Weber Street, of course, had its inventory moved to Highway 7 in Richmond Hill (one of the stores planned for the Top 30 Division) due to its weak performance, leaving three stores in the Hilton Division operating under the Bandito Video name.

a. Discounted Cash Flow Methodology

[109] In valuing existing stores, Wise & Partners used the income approach and, in doing so, applied a discounted cash flow method. While an income approach was employed for the projected stores of the Top 30 Division, a capitalized earnings method was applied to reflect the less certain results of “planned” stores.

[110] Business valuations are based on one of two major approaches. One is dependent on asset values and the other primarily on income, earnings or cash flows. The earnings approach is appropriate in most “going-concern” situations as the worth of a company is generally a function of its ability to earn income and provide an appropriate rate of return on investment. Asset values, however, can sometimes constitute the prime determinant of corporate worth depending on the nature of the operations such as those of a real estate holding company or where the outlook for a particular business is so uncertain that past and future earnings are not reliable guides.

[111] Included in the income approach in determining going-concern value are the methods of capitalized earnings and discounted cash flow. The capitalized earnings method generally establishes fair market value by capitalizing an estimate of a company’s expected maintainable level of future after tax earnings. The “future after tax earnings” are defined as the net earnings from normal operations which can reasonably be expected to be maintainable in the future. The maintainability of net earnings is heavily influenced by the earnings history of a company subject to adjustments to reported and forecasted earnings for unusual or non-recurring items. The appropriate capitalization rate or earnings multiple (the inverse of the capitalization rate) to apply to the level of after tax earnings is dependent upon

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a number of factors such as the nature and history of the company's business, the size of the company, the historic and prospective earnings, underlying asset coverage in so far as it affects risk, general economic and industry conditions, and the rates of return available on alternative investment opportunities.

[112] In the cash flow method, operating cash flows (derived from the elimination of non-cash items such as depreciation and amortization) are substituted for earnings from operations and then further refined into "discretionary" cash flow. This methodology also assumes a minimum level of recurring or annual capital reinvestment to sustain operations at existing levels referred to as "sustaining capital reinvestment". Because a notional purchaser in the marketplace is generally concerned with the cash in-flows and out-flows of a business, the cash flow method can often be more reliable than the earnings method, particularly when there are substantial non-cash expenses such as depreciation, amortization and deferred income taxes. And in situations where future capital investments are required and the specific timing of the cash in-flows and cash out-flows is particularly significant, a "discounted cash flow" methodology may often be most appropriate.

[113] The discounted cash flow method emphasises projected future cash flows which are discounted by a rate of return that is a function of a number of internal and external factors. These factors include (1) the nature and history of the business; (2) the state of the economy and the industry; (3) the balance sheet and financial condition of the company; (4) management quality, experience and continuity; (5) the trend and growth potential of earnings or cash flows; (6) competition and ease of entry into the marketplace; (7) the customer and supplier bases; (8) the degree of risk in achieving the projected earnings; (9) the liquidity of the investment; (10) dividend - paying capacity; and (11) whether goodwill or other intangible value exists.

[114] In employing this method, it is crucial to establish the reliability of the projections of each of the years in the forecast period. The methodology then discounts all expected cash flow in each of the future years, using a desired rate of return or discount rate. This discount rate should have regard to the various risks attached to, and the opportunity cost of, acquiring the assets. The residual or terminal value of the business assets is also included in the calculation on the assumption that assets purchased would ultimately be disposed of. Thus, the end year discretionary cash flow in the projection is capitalized and discounted to provide

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a present value. The total of the present value of the cash flow, the residual present value and the value of the tax shield on the undepreciated capital cost pools are judged to constitute the fair market value of the business.

b. Methodology Applied

[115] The plaintiffs' expert accepted management's financial projections for the forecast period of January 1, 1991 to December 31, 1994 in applying the discounted cash flow method to the Hilton Division. These projections were influenced by a variety of assumptions. First, that there would be additional synergistic benefits by way of volume rebates and economies of scale to be obtained in association with the Top 30 Division and the about to be acquired Bandito Video Division. Second, that revenues would increase by 12 per cent in the years 1991 to 1993 and would then level off to an annual increase of 4 per cent thereafter. The 12 per cent increase was a function of anticipated industry growth and an increase in the price of the per tape rental fee. Operating expenses were affected by the assumption that because the Hilton Division operated only three video stores no head office was required.

[116] Notwithstanding Murano's projected losses at his meeting with Rowlands on March 20, 1991, management's estimate for 1991 for the purposes of proving damages projected total revenue of $1,779,499 and earnings before taxes of $455,539. With four stores in operation in 1990, revenues were $1,773,871 and net income before taxes was $497,582. However, to reflect the degree of uncertainty inherent in the annual cash flow projections during the forecast period, risk factors were applied to the projected operating cash flows ranging from 5 per cent for the year ending December 31, 1991 to 20 per cent for the year ending December 31, 1994. These risk factors were said to be a function of: (1) the consistently profitable level of operations within the Hilton Division; (2) the fact that no major expansion was planned for the Hilton Division; (3) the existing competition in the marketplace; and (4) management's experience in operating video retail outlets. After adding back depreciation to pre-tax earnings to obtain projected cash flow, federal and provincial income taxes at a combined rate of 22.84 per cent on the first $200,000 and 44.34 per cent thereafter were deducted. The sustaining capital reinvestment was estimated to be 20 per cent of gross revenues less revenue from sell throughs and volume rebates where again estimates were made. The tax shield benefit was then deducted to arrive at the sustaining capital reinvestment net of tax shield in each of the years 1991 to 1994.

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[117] After arriving at the discretionary cash flow for each year in the forecast period, a present value factor or discount factor was applied. In light of the internal and external factors previously reviewed, the appropriate discount rate to be applied to Hilton Division's discretionary cash flow was judged to be in the range of 13 per cent to 15 per cent. This created a present value range for the forecast period between $1,170,000 and $1,214,000. To this range of values was added the fair market value of Hilton Division at December 31, 1994, by applying a capitalization rate (multiple) to the discretionary cash flow of that year in the range of 16.67 per cent to 18.18 per cent (multiples of 5.5 and 6.0), yielding a value range of $2,213,800 to $2,415,000. Discounting this residual value range at 13 per cent to 15 per cent back to March 27, 1991, produced a residual value range as of that date of $1,310,000 to $1,527,000. The present value of the tax shield on the undepreciated capital cost was estimated to lie in the range of $227,000 to $231,000.

[118] The loss of fair market value of Hilton Division immediately before Peat took possession was therefore determined to be $2,835,000 and $2,570,000. This range was the aggregate of (a) the present value of the annual discretionary cash flow during the forecast period ($1,170,000 to $1,214,000); (b) the residual value of the Hilton Division at the end of the forecast period ($1,310,000 to $1,527,000); and (c) the present value of the tax shield on the undepreciated capital cost ($227,000 to $231,000); less (d) the after tax amount due the business from outstanding shareholder loans ($137,389).

ii Top 30 Division

[119] As noted previously, the Top 30 Division was segregated into two groups for the purpose of determining value. They were (1) the opened and leased locations known as "existing stores" and (2) the projected future locations known as "projected stores". The existing stores were comprised of "opened" and "unopened" stores. As of March 27, 1991, Top 30 had five opened stores and had signed leases for seven additional stores which had yet to be opened. These 12 locations were treated as existing stores. The first store, situated at 180 King Street East in Gananoque, commenced operations in December 1990. The other four stores, none of which had been open for more than approximately one month before March 27, 1991, included 383 Elgin Street, Cambridge, Ontario; Highway 7, Richmond Hill, Toronto, Ontario; 335 Princess Street, Kingston, Ontario; and 680 Williams Street, Brockville. Leases had been signed but stores were not yet opened at 68 Elliot Avenue, Kingston,

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Ontario; 235 Gore Street, Kingston, Ontario; 122 Princess Street, Kingston, Ontario; 2379 Parkdale, Brockville, Ontario; 1515 Kingston Road, Pickering, Ontario; 2 Overlea Boulevard, East York; and Village Greger, Gatineau, Quebec. In addition to these 12 “existing stores”, Top 30 Division had plans to expand through the region of southern Ontario by opening more than 70 additional stores within the four years subsequent to March 27, 1991.

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a. Existing Stores

1. Opened Stores

[120] The plaintiffs’ expert accepted the projections of management for the Top 30 Division existing stores during the forecast period. It was assumed that six of them would be “type A” stores having projected annual revenues averaging $600,000 and six would be “type B” stores having projected annual revenues averaging $300,000. Revenues were adjusted to allow for the staggered opening dates in 1991 and for a two month delay for start-up. For the years 1992 to 1994, revenues were increased by 4 per cent representing the approximate historical rate of inflation. To the seven unopened stores, Wise applied a risk factor of 20 per cent against gross revenues to represent the risk that these stores may not have opened on a timely basis. Due to the limited actual experience with these stores, operating expenses were estimated based on the size of the operations and the experience of management in the industry.

[121] Wise employed the discounted cash flow method as described, relying on the rationale that, as start up operations, operating results were not indicative of future operations. On the other hand, he applied the capitalized earnings method to the projected stores because he thought “it would be speculative at the damage date to include value attributable to such [planned] growth”. In fact, Wise capitalized only the 1991 projected earnings (assuming 40-45 stores would have been opened in that year) because he considered the projections for 1992 to 1994 to be too speculative as of March 27, 1991.

[122] The same methodology was employed to the existing stores as to the Hilton Division. However, to recognize the degree of uncertainty inherent in projecting annual cash flows during the forecast period for these operations, risk factors were applied to the projected cash flows over and above the risk factors that were applied to the gross revenues of the unopened stores ranging from 5 per cent for the year ending December 31, 1991 to 12.5 per cent for the

years ending December 31, 1994. Wise emphasized that management was experienced in operating video retail outlets and the video rental industry continued to be buoyant throughout the recession. He adopted the same sustaining capital reinvestment rate taken with respect to the Hilton Division, i.e. 20 per cent of gross revenues in a given year, representing the replacement of prerecorded movies on video cassette as new releases enter the market. The same discount rate of 13-15 per cent was applied to the existing stores' discretionary cash flows, producing a present value range of $1,194,000 to $1,144,000. The capitalization rate for calculating the residual value of these existing stores and to be applied to the discretionary cash flow as at December 31, 1994 was estimated to be in the range of 20-22.2 per cent or multiples of 4.5 and 5.0. Applying this discount rate to the residual value of existing stores at December 31, 1994, a present value range was arrived at as of March 27, 1991 of $1,615,000 to $1,361,000.

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2. Unopened Stores

[123] The capital investments required to open the unopened stores were estimated to be $2,615,550. The landlord inducements, based on the leases negotiated, were totalled at $850,000, leaving a net capital investment before tax shield of $1,765,550. This amount was discounted using the discount rate of 13 per cent and 15 per cent to arrive at a discounted required capital investment before tax shield in the range of $1,639,000 to $1,655,000. However, the present value of the tax shield, based on the assumption that a purchaser would continue to claim capital cost allowance on the balance of its undepreciated capital cost pools, was estimated to lie in a range of $1,141,000 to $1,176,000. When that range was deducted from the required capital investment range, net of landlord inducements, the present value of the net capital investment required was estimated to be between $494,000 to $516,000.

[124] These deductions then yielded a fair market value range for the existing stores of the Top 30 Division of $2,315,000 to $1,989,000 with a mid-point of $2,152,000.

b. Projected Stores

[125] An estimated $1,784,600 was determined to be the cash flow for the projected stores. "Normalize depreciation" of $1,309,434 was deducted from that figure as was income taxes at a combined rate of 22.84 per cent on the first $200,000 and 44.34 per cent thereafter. A risk

factor of 25 per cent was applied to after tax earnings to arrive at indicated after tax earnings of $198,358. The 25 per cent factor was intended to take into account the risk associated with not fully achieving the projected results, not opening the projected stores as scheduled and the uncertainty in the marketplace. After considering the internal and external factors previously outlined, the 25 per cent risk factor previously applied, and the fact that the stores that would generate these earnings were not opened as of March 27, 1991, Wise applied a multiple to the projected stores' indicated earnings of 2 per cent or a 50 per cent capitalization rate. A multiple of 2 per cent applied to the indicated earnings of $198,358 produced a fair market value for the projected stores of Top 30 Division as at January 1, 1991 of $397,000 and as at March 27, 1991 of $411,000.

iii. Bandito Video Division

[126] The Bandito Video Division consisted of 44 franchised stores and eight corporate or flagship stores. Almost all the franchises were administered through 548531 Ontario Inc. ("548531") which had been incorporated on June 5, 1985. A second company, Bandito Video Ltd. ("Bandito Video"), owned and operated the eight corporate stores and administered the Hilton Division franchise stores. In February 1991 a preliminary agreement was negotiated between Murano and Robert Glenn, the owner of BVL and 548531. Pursuant to this agreement, Murano was to purchase all of the issued and outstanding shares of these two corporations for $1,400,000. The purchase price was to consist of a cash payment of $266,000 and a 9 per cent note for $1,134,000. The transaction, however, was aborted when the Bank's actions deterred Bak from providing the necessary financing, and Murano could find no alternative funding source.

[127] In this valuation, Wise made the assumption that the transaction would be closed in early April 1991 as planned. There were plans at the time to open additional stores and subsequently amalgamate this Division with the Top 30 and Hilton Divisions to reap additional economies of scale including those related to centralized operations and favourable lease terms. However, as of March 27, 1991, management had not decided whether to continue operating under the "Bandito" trade name.

[128] The 1988 gross revenues of 548531 totalled $4,643,099 and after expenses produced earnings before taxes of $372,197. In 1989 gross revenues were $4,388,541 in 1989 with a loss of $822 before taxes. In 1990, gross revenues were $4,064,700 with a loss before taxes

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of $92,400. Against that operating experience, the plaintiffs projected an upswing in revenues for 1991 of $4,820,400 and $5,886,716 by 1994 with earnings before taxes of $375,075 and $859,243 respectively. Wise concluded these projections were reasonable. This assessment appears to be based on the assumption that the plaintiffs would obtain additional “synergistic benefits” (such as volume rebates and other economies of scale) upon acquisition.

[129] The decline in sales in 1990 was seen as a “temporary set back” due to downward pressure on price as the video rental industry was consolidating. Revenues from the corporate stores were increased by 9 per cent per annum from the depressed levels in 1990 for 1991 and 1992. Revenues from franchise operations (e.g., royalties, franchise fees and start-up fees) were increased at levels of 46 per cent and 21 per cent for 1991 and 1992 respectively. This additional revenue was to come from the opening of 12 new franchises planned for 1991 and 1992. It was assumed revenues would increase thereafter by an annual inflation factor of 4 per cent. In projecting the cash flow of the Bandito Division, Wise again added back depreciation and management bonuses and income taxes were deducted at the combined rate notwithstanding that the Hilton Division, the Top 30 Division, and the Bandito Division would be related.

[130] Risk factors ranging from 5 per cent for the year ending December 31, 1991 to 20 per cent for the year ending December 31, 1994 were applied to the projected cash flows to recognize the uncertainty of these projections. Sustaining capital reinvestment was estimated to be 20 per cent of gross revenues annually less the value of sell throughs and volume rebates. The discount rates applied to the resulting annual discretionary cash flows for the forecast period were set from 13 per cent to 15 per cent. This created a present value range for the period of $1,223,000 to $1,179,000. Using the methodology previously outlined to calculate residual value for the 1994 discretionary cash flow of $390,183, capitalization rates in the range of 16.67 per cent to 18.18 per cent (multiples of 5.5 and 6.0) were applied to arrive at a present value range as of March 27, 1991 of $1,480,000 and $1,270,000. The present value of the tax shield was estimated to fall within a range of $135,000 to $131,000. This provided a fair market value range for Bandito Division of $1,438,000 to $1,180,000. When the projected original investment or purchase price of $1,400,000 was deducted, the fair market value of the Bandito Video Division fell within a value range of $1,438,000 to $1,180,000 with a mid-point of $1,309,000.

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iv. Other Losses

[131] In quantifying the damages suffered by Murano related to real estate, Wise accepted the estimated market values of properties rendered by various appraisers on various appraisal dates. He also accepted that the financial institutions in question disposed of these properties at distressed sale prices. The appraised market values of these properties totalled $2,990,000 and mortgages totalled $1,879,541 at March 27, 1991. The financial institutions realized $1,753,000 upon disposal or $1,237,000 less than the appraised value. Murano incurred additional expenses (legal and mortgage fees) and interest costs when a financial institution demanded repayment of a mortgage on his personal residence. Murano claims the resulting $17,000 he incurred to obtain a new mortgage. Damages are also claimed for the difference between the face value of mortgages and notes receivable totalling $1,089,000 and the proceeds of $24,600 upon their forced disposition giving rise to a claim of $1,064,000 as at March 27, 1991. All of these “other losses” amount to $2,318,000.

3. *The Defendants’ Expert*

[132] Adelstein, the defendants’ expert, provided “a loss estimate” (in contrast to an opinion). He concluded the loss range for the Hilton Division was between $560,715 to $715,223. However, he was unable to quantify any losses incurred by Murano in respect of the Top 30 Division or in connection with the failed Bandito Division transaction with Glenn.

i. The Hilton Division

[133] Adelstein employed the income approach and the capitalized earnings method with respect to the Hilton Division. He, however, found that the projections prepared by management for all divisions appeared unduly optimistic in light of their historic operating results. He was also very concerned about the completeness and reliability of the existing internal financial statements prepared by Gray for the Hilton corporate entities for their 1990 fiscal year ends. Adelstein therefore adopted the more historical oriented capitalized earnings approach. However, statements prepared for the Hilton Division for 1990 by B. Savage, an independent chartered accountant, were filed at trial and with results very close to those obtained by Gray.

[134] The defendants’ estimate of Murano’s loss was calculated net the amount owed by Murano to Hilton Division entities (i.e. $274,777 in shareholder loans). Adelstein was also

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satisfied that the non-cash expenses reasonably represented the sustaining capital reinvestment necessary to maintain the level of operations. Depreciation was based upon a rate of 25 per cent of recorded sales in contrast to Wise's 20 per cent of gross rental income less sell-throughs and volume rebates. Adelstein based his approach on that adopted by Blockbuster Entertainment Corporation, a major U.S. based public chain, and the policies used in Trebor's report. Wise based his 20 per cent on the approach of Canada's largest chain, Jumbo Video.

[135] Adelstein's estimate for the operating results of the Hilton Division with four locations was capped at $1,975,613 and then adjusted downward by 20 per cent to $1,580,490 to reflect the loss of 22 Weber Street. Expenses were similarly adjusted. Taxes were deducted on a straight 44.34 per cent on the assumption that a potential purchaser would have fully utilized its small business limit for income tax purposes in respect of its existing operations. This produced a maintainable earnings after taxes of $152,072. The capitalization rate adopted was 15-18 per cent resulting in multiples of 6.5 to 5.5 times earnings. This calculation produced a value range of $835,000 to $990,000. This range was thought to be comparable to the purchase price of $1.18 million dollars paid by Murano and Glenn on December 31, 1989. Those terms and conditions of payment reflected an actual cost, as of that date, of approximately $1.05 million. Adelstein further pointed out that Murano acquired Glenn's 50 per cent share effective October 29, 1990, for an effective price of slightly less than $450,000 and implying a total value for the Division on a pro rata basis of slightly less than $900,000. Wise, on the other hand, contended that the purchase price paid to Glenn by Murano probably reflected a discount for a non-controlling interest and the fact that Glenn was ill and wanted out of the video industry. Glenn's motivation, Wise suggested, was confirmed by his subsequent sale of Bandito Video Division to Murano.

ii. The Top 30 Division

[136] Adelstein concluded reliable information was entirely lacking with respect to the Top 30 Division. He emphasized that the five stores had been opened for only one to two months and that management's estimates were too optimistic. Accordingly, in his opinion, there was insufficient certainty to use the earnings/cash flow approach to value this division. Not only was the division in a start up mode, it was also operating under a different marketing concept

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adding further risk to these operations. Adelstein therefore decided that an asset based valuation was the most reasonable approach to quantifying the value of this division.

[137] Using an asset based methodology, Murano's equity position would be arrived at by deducting liabilities from the assets of the division. The assets would consist of costs incurred by Murano to open the existing stores as well as those incurred in respect of unopened stores with leases. From this amount would be deducted inducements provided to Murano by landlords, as well as bank financing and other liabilities incurred but not paid as of the loss date. The net result would represent the book value of Murano's investment in the Top 30 Division. Adelstein, however, concluded that there was insufficient information and documentation available to him to support any claim of net personal investment by Murano in the Top 30 Division.

iii. The Bandito Video Division

[138] The defendants' expert defined the loss to Murano arising out of the Bandito Video Division as that represented by the excess of the fair market value of this division over the price that Murano had agreed to pay to acquire it from Glenn. Costs incurred by Murano in connection with this failed transaction would also be recoverable. Murano was to pay the sum of $1.4 million by way of $266,000 in cash and the balance in monthly instalments over a ten year period at an interest rate of 9 per cent. Evidence of this transaction included an unsigned copy of the purchase agreement dated February 1991 and the oral testimony of Murano and McTurk. Adelstein took the approach that in order for Murano to have sustained a loss, it was necessary to establish that the price he and Glenn had negotiated one month prior to the loss date was less than the fair market value of the division at the loss date. While the defendants' expert lacked financial documentation for 1990, he was of the opinion that the operating results and the financial position of the division one and a half to two years prior to the loss date did not imply a value in excess of the proposed transaction value between Murano and Glenn in 1991. Management's forecasts were considered unreliable.

iv. Other Losses

[139] On behalf of the defendants, counsel submitted that the other losses claimed were not foreseeable and, in any event, were not caused by the defendants. indeed, this position was taken with respect to all losses claimed beyond those directly associated with the Hilton

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Division. It was submitted that the Bank had no knowledge of how the Top 30 Division was being financed or of the linkages between the various aspects of Murano's businesses.

B. Law Relating to Damages for Business Loss

1. *Compensatory Damages*

[140] There is a constellation of principles which guide courts in making damage assessments. These determinations are sometimes difficult because the enterprise is one of predicting what would have happened had there been no wrongdoing. There is also the need to design remedial outcomes to encourage parties to interact. Too lopsided a result in any one direction may deter socially and economically productive activity. Remedial principles must therefore be sensitive to this required calculus.

[141] The first general principle is, subject to certain narrow exceptions, damages are to be compensatory for losses sustained in both contract and tort. Contract involves a system of remedies for breach that is based on strict liability, not on fault. Breaching parties are not "punished" for their conduct but rather are required to compensate for losses caused. Because society wishes to encourage parties to enter into contracts, it has been judged that excessive societal protection through a system of penalties would be counter-productive. As Professor Farnsworth, in "Legal Remedies for Breach of Contract" (1970), 70 Colum. L. Rev. 1145, at p. 1147, has stated:

> Our system, then, is not directed at compulsion of promisors to prevent breach; rather, it is aimed at relief to promisees to redress breach. It is not much concerned with the question suggested by Frost's line: How can men be made to keep their promises? It is instead preoccupied with a different question: How can men be encouraged to deal with those who make promises? Perhaps it is more seemly for a system of free enterprise to promote the use of contract by encouraging promisees to rely on the promises of others, rather than by compelling promisors to perform their promises out of fear that the law will punish their breaches. In any event, this at least adds to the celebrated freedom to make contracts, a considerable freedom to break them as well.

[142] A similar approach has been taken in tort where the plaintiff is to be put in the position it would have been in had the wrong not occurred: *BG Checo International Ltd. v. British Columbia Hydro & Power Authority,* [1993] 1 S.C.R. 12, at p. 37. Thus, the general principle in

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both contract and tort “that the injured party should receive compensation in a sum which, so far as money can do, will put him in the same position as he would have been in if the contract had been performed or the tort had not been committed”. See *Butler v. Egg and Egg Pulp Marketing Board* (1966), 114 C.L.R. 185 (H.C. Australia), at p. 191. It can be seen at once, however, that this approach has some problems associated with it. For example, it requires a hypothesis of the position in which the injured party would have found itself had both parties performed or if the conduct complained of had not occurred. This raises the intertwined remedial issues of causation, foreseeability and certainty.

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i. Causation

[143] Fundamentally the impugned conduct must have caused or contributed to the cause of the loss complained of. In *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* (1991), 120 A.R. 241 (C.A.), at p. 258, Fraser J.A., dealing with circumstances similar to those in the proceeding at hand, stated:

> The fallacy in the Bank’s argument to this effect is the premise on which it is based. The Bank assumes that an injured party may recover something more than nominal damages only if the creditor’s tortious conduct was the *sole* cause of the debtor’s losses. But that is not necessary. It is enough the debtor prove that the creditor’s conduct caused *some* of the losses either by contributing to or exacerbating the debtor’s losses. While the debtor must show a causal connection between the creditor’s tortious acts and the losses suffered, this can be accomplished by establishing that the tortious acts were “either ‘the’ cause… or ‘a’ cause” of the losses sustained: Fridman, *The Law of Torts in Canada,* supra, at 323. Liability for damages can arise either way.

[144] The general common law approach to causation was summarized by McHugh J. in *Commonwealth v. Amann Aviation Pty. Ltd.* (1991), 174 C.L.R. 65 (H.C. Australia), at p. 175:

> In *Smith, Hogg and Co. v. Black Sea and Baltic General Insurance Co.* [[1940] A.C. 997], Lord Wright pointed out [at pp. 1003-1004] that: “There is always a combination of co-operating causes, out of which the law, employing its empirical or common sense view of causation, will select the one or more which it finds material for its special purpose of deciding the particular case.” Since the purpose of the inquiry involved in the causation issue is to fix legal responsibility “and not to find ultimate explanations, the

factor chosen by the common law is that which common sense fixes upon as relevant to responsibility in a particular case." [*The National Insurance Co. of New Zealand Ltd. v. Espagne* (1961), 105 C.L.R. 569, per Windeyer J. at p 592.] But, as Taylor J. pointed out in *The Commonwealth v. Butler* [(1958) 102 C.L.R. 465, at pp 476-477]: "the cause of an event is not established in the legal sense by showing, without more, that in the absence of a proved set of circumstances the event would or may not have happened, or, that a proved set of circumstances, in the widest sense, contributed to the happening of the event".

[145] See also: *March v. E. & M.H. Stramare Pty. Ltd.* (1991), 171 C.L.R. 506, per Mason C.J., at pp. 509 et seq.; *Henjo Investment v. Collons Marrickville* (1989), 89 A.L.R. 539 (F.C. Australia (Gen. Div.)), per Davies J., at pp. 544-546.

ii. Foreseeability

[146] However, an assessment of loss based only on causation contains the risk of saddling a wrongdoer with unexpected costs. Thus, even where the losses claimed can be said to have been caused by the conduct complained of, the law in both contract and tort has developed the additional limiting requirement that the losses must also have been foreseeable. Sometimes it is said that damages are excluded because they are too remote. This is simply another way of stating that they were not foreseeable: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.,* [1991] 3 S.C.R. 3, at p. 17.

[147] This need for losses to have been foreseeable or not too remote arises out of the concern that full compensation might impose a crushing and undesirable burden. As Hart and Honoré in *Causation in the Law* (1959), at p. 281 pointed out:

> The need for limitation is especially clear in regard to compensation for a loss of economic stipulated opportunities, since the provision of opportunities for gain may have a snowball effect: opportunities breed further opportunities.

[148] Under contract law, the limitation imposed is that the damages be foreseeable. As Scarman L.J. stated in *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co.,* [1978] 1 All E.R. 525 (C.A.), at p. 541, the Court should approach the question of loss of profits by posing this question:

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> Given the situation of the parties at the time of contract, was the loss of profit, or market, a serious possibility, something that would have been in their minds had they contemplated breach?

[149] Or as Asquith L.J. in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.,* [1949] 1 All E.R. 997 (C.A.), at p. 1003 stated:

> It is enough… if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger." For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy.

[150] While contract may be concerned to ensure some equitable relationship between the benefit of the bargain and the liabilities to be assumed, the fact that particular features of the damages sustained may not have been reasonably foreseen does not mean that the losses cannot be recovered. It has not been necessary to prove a breaching party had it within its contemplation that the precise losses which in fact occurred were likely to be sustained in the event of a breach. See *Canlin Ltd. v. Thiokol Fibres Canada Ltd.* (1983), 22 B.L.R. 193 (Ont. C.A.), at p. 199. It is sufficient if the losses are of a type or a kind which could flow from the breach or conduct. It is in these senses then that losses in contract can be said to have been reasonably foreseen. See *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co.,* supra.

[151] The same can be said of tort where the foresight requirement also attaches only to the type of injury not to its degree: *Hughes v. Lord Advocate,* [1963] 1 All E.R. 706 (H.L.), at p. 711. According to L. Rainaldi, ed., *Remedies in Tort* (1987), at pp. 4-25:

> In an action for conversion, the normal measure of damages is the value of the chattel at the date of conversion, *together with an consequential damage flowing from the conversion,* provided that it is not too remote to be recovered in law. (Emphasis added.)

[152] Still the law has traditionally distinguished between damages in tort and in contract and set forth general rules for their assessment depending on the cause of action. For instance, in contract, foreseeability is assessed at the time the contract is formed not when it is breached. See *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145. In tort, foreseeability is judged at the time the tort is committed.

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[153] The justification for the contractual approach lies in the consensual nature of contract. Parties to contracts voluntarily assume risk in return for negotiated consideration. Risk is therefore judged by the parties at the outset of their relationship. To assess the foreseeability of loss at some later point in time, such as the date of breach, carries with it the potential for changing the risks voluntarily assumed, i.e. the bargain.

[154] The importance of other more formal remedial distinctions between contract and tort is in decline, particularly where overlapping tort and contract causes of action exist. As Deane J. wrote in *Commonwealth v. Amann Aviation Pty. Ltd.,* supra, at p. 116:

> The general principle governing the assessment of compensatory damages in both contract and tort is that the plaintiff should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss or injury sustained by reason of the defendant's wrongful conduct. The application of that general principle ordinarily involves a comparison, sometimes implicit, between a hypothetical and an actual state of affairs: what relevantly represents the position in which the plaintiff would have been if the wrongful act (i.e. the repudiation or breach of contract or the tort) had not occurred and what relevantly represents the position in which the plaintiff is or will be after the occurrence of the wrongful act. While the general principle is the same in both contract and tort, the rules governing its application in the two areas may differ in some circumstances. Those differences are largely the result of historical considerations in that they reflect distinctions between causes of action rather than reasoned development or exegesis of the law. They are of diminishing significance for most purposes (note, for example, the gradual assimilation of the tests of "within the contemplation of the parties" (in contract) and "reasonably foreseeable" (in tort). [Footnotes omitted.]

[155] Similar Australian cases on this point were adopted by Jones J.A. in *Rose v. Mitton* (1994), 111 D.L.R. (4th) 217 (N.S. C.A.), at pp. 221-229.

[156] The Canadian case law is moving in a similar direction. Estey J. in *Baud Corp., N.V. v. Brook,* (sub nom. *Asamera Oil Corporation Ltd v. Sea Oil & General Corporation)* [1979] 1 S.C.R. 633, at p. 673 held that the same principles of remoteness apply in both contract and tort:

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> We therefore approach the matter of the proper appraisal of the damages assessable in the peculiar circumstances of this case on the following basis: that the same principles of remoteness will apply to the claims made whether they sound in tort or contract subject only to special knowledge, understanding or relationship of the contracting, parties or to any terms express or implied of the contractual agreement relating to damages recoverable on breach.

[157] Most recently, the Supreme Court of Canada in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority,* supra, at p. 40 has noted a tendency to give similar damages in tort and in contract. La Forest and McLachlin JJ. for the majority stated at p. 42:

> We note that in this respect the test for remoteness in contract may be of no practical difference from the test of reasonable foreseeability applicable in tort: see *Asamera Oil Corporation v. Sea Oil & General Corp.,* [1979] 1 S.C.R. 633, at p. 673, and *B.D.C. Ltd. v. Hofstrand Farms Ltd.,* [1986] 1 S.C.R. 228, at pp. 243-44.

[158] More generally, on the question of damages where there is joint liability in tort and contract, the majority held at p. 38:

> In situations of concurrent liability in tort and contract… it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though, of course, particular circumstances or policy may dictate such a course.

[159] There is a similar convergence of the rules of assessing damages for breach of contract and for breach of an equitable duty: *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377, at p. 444. It can therefore be said that there is a general move towards uniform and principled rules in assessing damages that are more affected by the particularities of the case than by legal formalism. See also: *Bitton v. Jakovljevic* (1990), 75 O.R. (2d) 143 (H.C.), at p. 158-159, cited in *Rice v. Rawluk* (1992), 8 O.R. (3d) 696 (Gen. Div.), at pp. 716-717.

[160] Despite this convergence, however, a distinction is still drawn between tort and contract cases concerning the time at which foreseeability is to be judged. The distinction made that damages in contract must be foreseeable at the date of formation and not later when the wrong is committed (as is the case in tort) is generally a sound one. Contract, as previously pointed out, is a consensual relationship where risk assessment by the parties

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takes place at the time of formation. Thus, the focus on foreseeability at this point in time cannot usually be seen as the product of legal formalism.

[161] But this case severely tests the reasonableness of this ancient rule because of the "at will" nature of the contractual relationships. Where a party can demand full payment of a loan at will, that party can assess daily whether to break off its contractual relationship. In the case of a demand loan, it can do so without breaching its contract provided it gives reasonable notice. In that particular context, it seems strange to be thrown back to the original date of contract for the purposes of foreseeability. In fact, confining loss assessment to the formation of a long standing "at will" banking relationship seems artificial and may be inconsistent with the general trend of authority harmonizing rules in tort and contract. Indeed, in this case, judging the foreseeability of loss in light of the Bank's knowledge closer to the date of breach is not likely to upset contractual intentions given the expectations of the parties at the date of contract formation that the plaintiffs' changing conditions would be closely monitored.

iii. *Certainty*

[162] Another key limiting principle is the requirement that a plaintiff prove its damages on a reasonable preponderance of credible evidence. See *100 Main Street Ltd v. W.B. Sullivan Construction Ltd* (1978), 88 D.L.R. (3d) 1 (C.A.), at p. 22. In *Ratcliffe v. Evans,* [1892] 2 Q.B. 524 (C.A.), at pp. 532-533 Bolan L.J. stated:

> As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest of pedantry.

[163] 5 However, the inherent difficulty in piecing together what might have happened had there been no breach or tort committed will not relieve a court of its duty to assess damages. As Deane J. stated in *Commonwealth v. Amann Aviation Pty. Ltd.,* supra, at p. 125:

> As was pointed out by Dixon and McTiernan JJ. in *Fink v. Fink,* [(1946), 74 C.L.R. 127 (H.C. of A.)] at p. 143: "Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provided for breach of contract, an award of damages." There are, however, extreme cases in which curial procedures are simply inadequate to determine whether there was

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any real or significant chance that an alleged benefit would actually have been obtained but for the repudiation or breach of contract or to assess the intrinsic worth of a particular suggested "benefit". The profit which one experienced commercial person may see as lying at the end of some commercial undertaking might be seen as an inevitable and disastrous loss by another.

[164] Because of the uncertainty surrounding nascent commercial ventures and damages associated with their failure, some American jurisdictions have a "new business rule" limiting recovery in such situations. The rationale for this rule is set out in *Corning (City) v. Iowa Nebraska Light & Power Co.,* 282 N.W. 791 (Iowa S.C. 1938), at p. 796:

> Expected profits from a new commercial enterprise [are] too remote and speculative to warrant judgement for their loss because there are no available data of past business from which the fact of anticipated profits could have been established.

[165] However, the rule is not an absolute one. In cases, such as the one at hand, where expert evidence is tendered and the entrepreneur has a track-record, it may be possible to assess damages with the required certainty: *Harsha v. State Savings Bank,* 346 N.W. 2d 791 (Iowa S.C. 1984), at pp. 798-799.

[166] The applicable American case-law further holds that plaintiff need not prove damages with metaphysical certainty. As the Court of Appeals of South Carolina held in *S.C. Fed. Savings Bank v. Thorton-Crosby,* 399 S.E. 2d 8 (1990), at p. 11:

> When a plaintiff seeks special damages for breach of contract, he must plead and prove both the fact of damage and the amount of damage with a reasonable degree of certainty.
>
> …
>
> If the fact of damage is established, the law does not require the amount of damage to be proven with mathematical certainty; damages may be recovered if there is evidence upon which a reasonable assessment of the loss can be made. The estimation of damages, however, cannot be based on conjecture or speculation; it must pass the realm of opinion not founded on the facts and must rest on evidence from which a reasonable accurate conclusion regarding the amount of loss can be logically and

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rationally drawn. There must be a certain standard or fixed method by which the loss may be estimated with a fair degree of accuracy. [Citations omitted.]

[167] In requiring this proof, the law does not leave the plaintiff without assistance. Where an initial finding of liability has been made, it is often stated that every reasonable presumption must be made in favour of a plaintiff because the defendant has produced the circumstances complained of: omnia praesumuntur contra spoliatorem. See *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1992), [1993] 1 W.W.R. 596 (B.C. C.A.), at p. 607; *Kohler v. Thorold Natural Gas Co.* (1916), 52 S.C.R. 514, at pp. 530-531; *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 12 O.R. (3d) 675 (C.A.) and *National Trust Co. v. Saks,* [1994] O.J. No. 2488 (Gen. Div.), at para. 108-109, summarized 51 A.C.W.S. (3d) 539. The Supreme Court of Canada, in this respect, has appreciated that what might hypothetically have happened had there been no misconduct need not be reduced to mathematical accuracy. For justice to be done, a judge must, under many circumstances, do simply the best he or she can without fear that the decision will be set aside on the argument that the outcome is a matter of guess work. See *Wood v. Grand Valley Railway Co.* (1915), 51 S.C.R. 283, at p. 289. In the Appellate Division of the Supreme Court of Ontario in that same case at (1913), 30 O.L.R. 44, at pp. 49-50 Meredith C.J.O. stated:

> There are, no doubt, cases in which it is impossible to say that there is any loss assessable as damages resulting from the breach of a contract, but the Courts have gone a long way in holding that difficulty in ascertaining the amount of the loss is no reason for not giving substantial damages, and perhaps the furthest they have gone in that direction is *Chaplin v. Hicks,* [1911] 2 K.B. 786. In that case the plaintiff, owing, as was found by the jury, to a breach by the defendant of his contract, had lost the chance of being selected by him out of fifty young ladies as one of twelve to whom, if selected, he had promised to give engagements as actresses for a stated period and at stated wages, and the action was brought to recover damages for the breach of the contract, and the damages were assessed by the jury at 100 [pounds]. The defendant contended that the damages were too remote and that they were unassessable. The first contention was rejected by the Court as not arguable, and with regard to the second it was held that “where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to

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> estimate; it is not necessary that there should be an absolute measure of damages in each case:" per Fletcher Moulton, L.J., at p. 795.

[168] This approach to the required certainty in the context of assessing loss based on business valuations manifests itself in the observation that loss assessment is an exercise in "judgment" and that adherence to a mathematical formula cannot usurp the exercise of such judgment. See *Cyprus Anvil Mining Corp. v. Dickson* (1986), 33 D.L.R. (4th) 641, at pp. 652-654 and, more generally, Ken Cooper, "Assessing Possibilities in Damage Awards – The Loss of a Chance or Chance of a Loss" (1973), 37 Sask. L. Rev. 193 and S.M. Waddams, *The Law of Damages* (2d ed. 1993), c. 13. Accordingly, no methodology which might provide guidance in determining value should be rejected. As Lambert J.A. stated in *Cyprus Anvil Mining Corp. v. Dickson,* supra, at p. 653:

> Each formula that might prove useful should be worked out, using evidence, mathematics, assessment, judgment, or whatever is required. But when all that has been done, the judge is still left only with a mixture of raw material and processed material on which he must exercise his judgment to determine fair value.

[169] Justice Lambert went on to hold that each methodology should be given weight in proportion to its reliability (at p. 654). Thus, the discounted net cash flow approach must be viewed with care because minor variations and assumptions about discount rates can become magnified through the calculation into a gross distortion of the fair value (p. 657). While the capitalization of earnings and discounted cash flow methods are generally accepted methods for valuing a business which has a commercial value as a going-concern, which method is to be given more weight or is more appropriate must be decided in light of the facts of a given case unless both parties at trial have embraced one methodology as appropriate.

[170] In assessing the reliability of projected future profits, a record of past earnings will obviously increase the certainty of such a prediction. However, a lack of evidence of past earnings does not automatically preclude a new business from recovering for lost profits. Rather, a new business must be allowed to prove lost profits to a reasonable level of certainty by expert testimony, by evidence of actual profits of similar businesses, by evidence of proven managerial experience and expertise, and by evidence of subsequent earnings if such evidence is available. Nevertheless, damages should not be awarded for lost profits which are entirely speculative and uncertain. See *Edwards v. Container Craft Carton and Paper Supply*

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Co., 327 P. 2d 622 (Calif. Dist. Ct. App. 1958) and *Cooke Associates Inc. v. Warnick,* 664 P. 2d 1161 (Utah Sup. Ct. 1983). But once a defendant has been shown to have caused a loss, liability should not be escaped because the amount of the loss cannot be proven with precision. Consequently, the reasonable level of certainty required to establish "the amount" of the loss is generally lower than that required to establish "the fact or cause of" a loss. See *Cooke Associates v. Warnick,* supra, at p. 1166 and *Bradshaw Construction Ltd. v. Bank of Nova Scotia,* supra, at p. 28.

2. *Punitive Damages*

[171] The plaintiffs have also claimed exemplary damages. This punitive remedy has been awarded in similar circumstances but only where the conduct of the creditor and receiver merit censure. For example, in *Ronald Elwin Lister Ltd. v. Dunlop Canada Ltd.,* supra, at p. 749 the fact that the receiver entered into possession with an armed guard and the protracted delay by the creditor in replying to the demand for the return of certain assets clearly not available to the creditor were held to be a sufficient basis for the exercise of the trial judge's discretion to award exemplary damages. Similarly, in *McLachlan v. Canadian Imperial Bank of Commerce,* supra, at p. 110, exemplary damages were upheld where a bank authorized an entry and seizure of certain assets when it was known that the security did not justify the seizing of the particular assets in question and where the receiver rejected an offer of the debtor to pay off the operating loan in full and did so without referring this offer to the bank. The British Columbia Court of Appeal concluded that such circumstances were sufficient "to support a finding of the degree of high-handedness that is necessary before an award of exemplary damages can be made".

[172] In *Royal Bank of Canada v. W. Got and Associates Electric Ltd.,* supra, at pp. 385-397 McDonald J. awarded exemplary damages in the sum of $100,000 where the bank concealed its intention to apply ex parte for an order appointing a receiver and where, in bringing those ex parte proceedings, the bank filed an intentionally misleading affidavit upon which the order was granted. In awarding exemplary relief against the bank, McDonald J. described the privileged position of Canadian banks as previously reproduced and then concluded [at pp. 396-397]:

> Obtaining such an order… which seriously affronts the administration of justice and thus offends "the ordinary standards of morality or decent conduct in the community in such

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marked degree that censure by way of damages is, in the opinion of the Court, warranted" (those being the words of Clement J.A. in the *Paragon* and *Can-Alta* cases).

I assess exemplary damages in the sum of $100,000. This is a substantial award, intended to emphasize two points: First, that the court will not condone a clear violation of the rule of law that requires a debentureholder to give reasonable notice of its requirement that the debtor pay its debt, and second, that the court will not condone an abuse of its process for commercial advantage. The amount of the award also reflects that, as no crime has been committed, no other form of punishment is available. Finally, the amount of award takes into account the grave and irrevocable consequences of the Bank's conduct to the business of its client.

[173] However, in *Royal Bank v. Roland Home Improvements Ltd.* (August 14, 1992), Doc. 13119/86 (Ont. Gen. Div.), [1992] O.J. no. 1684, summarized 35 A.C.W.S. (3d) 18, Keenan J. refused to award punitive damages where a bank had wrongfully proceeded without notice to dishonour the cheques of a customer with devastating and immediate adverse affects on the customer's business. The customer's action sounded only in contract and substantial compensatory relief had been awarded. Keenan J., however, denied both punitive and aggravated damages in stating, at pp. 24-27 of the original:

In their counter-claim, the defendant advance a claim for "punitive, exemplary, and aggravated damages". Punitive and exemplary damages are the same thing. They are awarded in an appropriate case to punish the offending party for reprehensible conduct. It is a form of civil fine ordered by the Court and is payable to the other party rather than to the State. An award of punitive damages is in addition to the award of damages which compensates the aggrieved party for the loss suffered. Aggravated damages, on the other hand, are damages which form part of the compensation of the injured party. They recognize intangible additional injury such as distress and humiliation suffered because of the manner in which the wrong was committed. The distinction was pointed out in the majority judgment of the Supreme Court of Canada in the *Vorvis v. CIBC (*1989), 58 D.L.R. (4th) 193, at p. 202:

"Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be

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employed in circumstances where the conduct giving the cause for complaint is of such a nature that it merits punishment."

After reviewing the authorities on the subject, McIntyre J. concluded at p. 204:

"…while aggravated damages may be awarded in actions for breach of contract in appropriate cases this is not a case where they should be given…"

At p. 205:

"I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here."

In the case at bar I find no evidence that the action of the Bank in breach of its agreement to honour cheques caused any additional aggravated damage to RHIL or the Filzmaiers. There remains the question of punitive damages and whether this is a case which calls for such award. To the Bank it would represent a penalty additional to the damages consequences of its breach. To the Filzmaier interests it would represent overcompensation. The majority in *Vorvis v. CIBC* held that punitive damages were available only when; (1) the conduct constituting the breach of contract is also a tort for which punitive damages are recoverable; (2) the conduct is deserving of punishment because it is harsh, vindictive, reprehensible and malicious, or so extreme that by any reasonable standard it is deserving of full condemnation and punishment. See pp. 207 and 208.

In *Vorvis* the conduct complained of was held to be not in itself an actionable wrong and would not in itself attract an award of damages and an entitlement to punitive damages. In the case at bar, the Bank's action in dishonouring cheques was a breach of their contractual agreement to do so. There was no other action by any of the Bank's agents accompanying the breach which could be considered to be in itself an actionable wrong. Failure to warn Roland Filzmaier or to give him an opportunity to respond did not violate any other rights or breach any other duty. Neither did the tough "hard ball" stance taken by the Bank Manager after the damage was done constitute or form a part of another actionable wrong done by the Bank to the Filzmaier interest.

Reliance has been placed on the case of *Eli v. Royal Bank of Canada* (1985) 24 D.L.R. (4th) 127 in support of the claim for punitive damages. That was a British Columbia case

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in which the trial judge held that the Bank had wrongfully dishonoured cheques written by a customer on behalf of an Indian bank. The Bank was also guilty of conversion of the Band's funds. The trial judge held that there was indeed a cause of action for the conversion which was done as a high-handed self-help remedy. In making an award of punitive damages (at p. 138), the Court set out a number of factors which it considered. Those factors included both the breach of contract in dishonouring the cheques and those facts which relate to the unlawful conversion of the funds by the Bank. The reasons do not appear to make a distinction, but the award can be justified on the basis that it was punishment to the bank because the breach of contract was accompanied by another actionable wrong.

As the breach of contract in the case at bar was not accompanied by or committed in a manner that gave rise to another actionable wrong, there can be no recovery of punitive damages.

[174] While Keenan J.'s damage award was varied on appeal, his consideration of punitive damages was specifically endorsed: 74 O.A.C. 250, at p. 255. This long excerpt from his reasons and the authorities reviewed therein reveal a judicial reluctance to award exemplary damages except in exceptional circumstances. This reluctance stems from the nature of exemplary damages. Monetary penalties or "fines" are usually the province of the criminal law. Civil proceedings lack many of the important protections of the criminal law including quite different onuses. There are also few guidelines for either juries or judges in determining the extent of exemplary damages or quantum. With such little guidance, there is the risk that decision-making will be highly personalized, unpredictable and more in the nature of "palm tree justice". See *Cassell & Co. Ltd. v. Broome,* [1972] A.C. 1027 (H.L.). There is also the concern that the potential for excessive exemplary damage awards may deter parties from entering into contracts.

[175] However, where a defendant deliberately and recklessly exposes a plaintiff to a risk without justification, particularly in a personal injury context, the inability of compensatory relief to respond to the shocking consequences of the defendant's unjustified actions often cry out for a supporting exemplary award. See S.M. Waddams, *The Law of Damages* (2d ed. 1993), at para. 11.210. And while exemplary damages are not normally awarded for breach of contract, there may be situations demanding the deterrence associated with such relief, particularly where overlapping tort and contract claims exist. Court created and court

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administered remedies must be continuously updated and refined to preserve the integrity of the substantive rights they are intended to enforce. See *Flame Bar-B-Q Lid. v. Hoar* (1979), 106 D.L.R. (3d) 438 (N.B. C.A.). In this respect, Professor Waddams, supra, at para. 11.260 has written:

> Refusal of exemplary damages is, it is submitted, appropriate in most commercial cases. Where, however, the plaintiff does have a personal interest in performance of the sort the Court would protect by a decree of specific performance or by an injunction to restrain the breach, a case can be made for deterring interference with such interests. In many such cases as, for example, wrongful eviction or harassment of a tenant, the defendant will usually, though not necessarily, be guilty of a tort as well as a breach of contract and there is no doubt that exemplary damages can be given for the tort. It is increasingly held that concurrent liability in contract and tort exists in many cases formally treated as purely contractual. This development will, it seems, have the effect of enlarging the scope of exemplary damages. Thus, if a professional person deliberately gives bad advice to a client, or breaks a confidence for the purpose of causing the client damage or embarrassment, or making a profit, exemplary damages would seem to be quite appropriate… There is no general objection to joining actions in contract and tort, providing the joinder is fair to the defendant. In such a case there would seem to be no objection to exemplary damages.

[176] Where exemplary damages may be appropriately awarded, a court will have regard to all of the circumstances including “the size of the defendant’s bank balance” in fashioning the extent of damages thought to be fully appropriate. See H. McGregor, *McGregor on Damages* (15th ed., 1988), at p. 269, para. 427. See also Waddams, supra, at paras. 11.280-11.390. So too the conduct of a plaintiff in provoking otherwise harsh or oppressive actions by a defendant is relevant and may reduce or extinguish an award of exemplary damages. See Waddams, supra, para. 11.450.

[177] We now turn to an application of this remedial framework to the facts at hand.

C. Remedial Law Applied

[178] Both experts adopted generally appropriate methodologies with respect to the Hilton Division. See *Cyprus Anvil Mining Corp.,* supra, at p. 667. But both experts, in my view,

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adopted assumptions that were either too conservative or too liberal. For example, Wise's adoption of the plaintiffs' profit projections unduly minimized Murano's own quite daunting projections made to Rowlands at the meeting of March 20; the closure of 22 Weber Street; and the fact that Murano was actually contemplating the move of a second store out of the Kitchener/Waterloo area to Pickering. In the circumstances, the projected 12 per cent annual increases for the years 1991 to 1993 strike me as overly optimistic, particularly in light of the revenue experience in 1989 in comparison to previous years. Similarly, Wise's failure to attribute any head office costs to administer the Hilton Division stores when those stores were really the most concrete manifestation of Murano's foothold in the video rental industry was unfair. Unaccounted for, as well, were the concerns expressed by Robert Hilton in his letter to Murano of March 5, 1991. In my opinion, Murano faced challenges that were not adequately reflected in either management's projections or Wise's application of risk factors of 5-20 per cent over the projected period.

[179] On the other hand, Adelstein's emphasis on 1990 and the purchase price which Murano and Glenn paid Hilton for the four stores does not adequately accommodate the before tax earnings experience of Murano and Glenn in 1990 of almost one-half million dollars and the buoyant nature of the video rental industry generally. Nor do his assumptions adequately accommodate the economies of scale and additional expertise that would have been obtained by combining the Hilton Division stores with the Top 30 and Bandito Video Divisions.

[180] While the Bank's counsel argued that Murano's businesses were so highly leveraged they were bound to collapse, Murano was an experienced and aggressive entrepreneur who had more than survived up until March 27th, 1991. He had obviously made up for any lack of formal business training by both actual business experience and his considerable energy. Earlier, at considerable profit, he had disposed of businesses he had grown. The Hilton stores had been managed very profitably through 1990 and despite his presentation to Rowlands, which I think was exaggerated to produce a specific result, he had successfully juggled all his financial commitments. See *Bradshaw Construction Ltd. v. Bank of Nova Scotia,* supra, at pp. 613-615. Adelstein's analysis does not accord every reasonable presumption to the innocent party in any of these respects. I also find his approach to tax rates and reinvestment rates unjustified when examined against how Murano was likely to approach these issues and in light of the Jumbo Video experience. As Keenan J. stated in *Roland Home Improvements,*

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supra, at p. 8, it is not enough to say that a company with a history of losses or a previous year of difficulty will continue in that pattern. Regard must be had to a company's potential for future profit and an assessment made, no matter how difficult, of the loss of that potential.

[181] Clearly, 1991 was going to be a difficult year for Murano and his associates. But they had a reasonable plan for dealing with those problems. There was capable management in place and this expertise was growing almost by the minute. Murano had the benefit of advice from Gray and Hilton and he was on the cusp of acquiring the assistance of McTurk and the others managing the Bandito Video Division. When Murano told Rowlands he did not intend to put more money into the business, he was bargaining with the Bank in order to garner greater support. It was not an admission that insolvency was around the corner. I also accept the appropriateness of the reinvestment rate applied by Wise.

[182] Admittedly, Glenn and Murano had paid $1.4 million dollars for the four stores in 1989 and Murano had purchased Glenn's share in October of 1990 for one-half the earlier purchase price. But balanced against these transactions are the 1990 operating results, the planned acquisition of the Bandito Video Division, the buoyant nature of the industry, particularly for chains, and Murano's obvious energy and determination. In my opinion, the plaintiffs' loss on the Hilton Division should therefore be assessed at 75 per cent of the mid-point of the value range estimated by Wise or.75 times $2,702,500 or $2,026,875 less the amount owed the Bank (i.e. $207,000) and the indebtedness of Murano by way of shareholder loans from HVL and 828556 in the amounts of $127,990 and $146,787 respectively. See *Ronald Elwyn Lister Ltd v. Dayton Tire Canada Ltd.* (1985), 52 O.R. (2d) 88, at pp. 103, 116. I would round the resulting value of the Hilton business and therefore Murano's losses in this regard to $1,550,000.

[183] Turning to the Top 30 Division, I am satisfied this new venture was not too uncertain to sustain a damage award. Murano had substantial experience and an existing base in the video rental industry. The Top 30 "concept" was only different in name and in the size of stores. Moreover, this latter feature was designed to make franchises more available and therefore attractive to prospective buyers. Murano's operating experience was sufficient to permit an inference of probable success and profitability with this new venture. Robert Hilton, even in his letter to Murano of March 5th, 1991, considered the concept a good one. I also accept that discounted cash flow methodology can appropriately be applied only to the

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existing store in contrast to the capitalized earnings method which Wise applied to the projected stores.

[184] But, in the circumstances, I am not satisfied with the 5 per cent -12.5 per cent risk factors applied to the existing stores over the projected period even with the additional 20 per cent risk factor applied to the seven unopened stores. I also have concern with the way in which taxes were calculated using the small business rate for the first $200,000 where that rate had already been utilized in connection with the Hilton Division. Having regard to all of the evidence before me, I would estimate the loss on the existing stores for the Top 30 Division at 50 per cent of the mid-point value estimated by Wise or.50 times $2,152,000 or $1,076,000 rounded to $1,000,000.

[185] I do not accept Wise's estimate of the loss on the projected stores of $411,000. As stated earlier, in assessing damages, every reasonable presumption must be made in favour of the plaintiffs. On the evidence, however, I am of the view that the claim in this respect is too speculative even having regard to the 25 per cent risk factor which was applied, the limitation of the claim to 1991, and the 50 per cent capitalization rate or the multiple of two used in the methodology.

[186] With respect to the Bandito Video Division, I note that this was one of the largest video chains in Canada at the time. While the trend line in its revenues and profits prior to the proposed sale was in a downward direction, it is clear that Glenn was seriously ill and that his son was not capable of preserving the business. In contrast, Murano had great energy and ambition which the management personnel in Glenn's business appreciated. Indeed, they had made a decision to go with him no matter what. The industry data, as I have previously reviewed, indicated an upward trend in revenues particularly for these larger operations.

[187] The agreed purchase price, on the other hand, is a factor which restrains the plaintiffs' claims. Further, there appears to have been no other buyer to step in which is another restraining influence on the claimed losses associated with the failed transaction. See *Cyprus Anvil Mining Corp.,* supra, at p. 655. Nevertheless, Glenn's illness and the fact that only Murano was available to take the business off his hands suggests a significant bargaining advantage in Murano's favour. As well, Murano intended to integrate Bandito Video with the more readily franchised Top 30 concept, potentially adding value and contributing a new dynamism to Bandito Video. Moreover, Bandito Video was one of the largest franchised video

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rental businesses in Canada and the video rental chains had the strongest prospects for surviving and thriving through the 1990s. In this respect, it is not irrelevant that, on the closing of the transaction, Murano would be bringing together two proven management teams under his aggressive leadership. The defendants' expert paid little or no regard to the potential of these developments.

[188] Having considered all these factors, I am of the view that management's revenue projections were overly optimistic and that the risk factors of 5 per cent to 20 per cent applied by Wise were inadequate in the circumstances. Accordingly, I assess the plaintiffs' losses on the Bandito Video Division at 75 per cent of the mid-point of the range of fair market value of the Bandito Video Division estimated by Wise or at $981,750 which I round to $1,000,000.

[189] Before turning to the issues of causation and foreseeability with respect to these losses, the losses associated with Murano's real estate and real estate related assets need consideration. I am not satisfied with the reliability of the fair market value estimates as of the loss date for the real estate in question. The market was a difficult one for commercial properties and particularly properties experiencing vacancies. Not all of the back-up documentation constituted formal appraisals and even where opinions were expressed as appraisals, extensive local market comparisons and revenue projections were not given. Murano had heavily mortgaged these properties and, thus, his asset base was highly leveraged at the very time his operations in the video industry were being challenged. Murano's claim is for losses arising from the forced sale of these properties. I think it more likely than not he would have been required to sell several of these properties to meet those challenges. Having regard to all of the circumstances, however, I am prepared to assess his loss on real estate as the difference between the total mortgage balance outstanding of $1,872,541 and the gross disposal price of $1,753,000 or $119,541 rounded to $120,000. To this I would add a further $100,000 to assess the total extent of loss due to untimely disposition of real estate assets at $220,000. Losses on mortgages, notes receivable and inducements were not established with the requisite certainty or causality. Generally the evidence ranged from skimpy to non-existent. The capitulation to Liappas was not, in my view, reasonable. Accordingly, I find that no losses along these lines were adequately established.

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[190] Business losses established are therefore (Hilton Division) $1,550,000, (Top 30 Division) $1,000,000, (Bandito Video Division) $1,000,000, and (real estate) $220,000 which total $3,770,000.

[191] In considering the issues of causation and foreseeability with respect to these losses, regard must be had to commercial reality and particularly the impact on a debtor of a receivership. The imposition of a receivership is viewed as a fundamental warning to others. For this reason it is much harder for a debtor to raise money once a receiver is in place. Quite reasonably, lenders are simply reluctant to lend money under such circumstances. See *Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal,* supra, at p. 7. Indeed, this is the reality which fuels the policy requiring "extraordinary circumstances to justify an entry after such a short period following the demand". See *McLachlan v. Canadian Imperial Bank of Commerce,* supra, at p. 108. The imposition of a receivership is understood to entail immediate and devastating consequences for a business.

[192] Against this commercial reality, there is nothing unreasonable in the conclusion that the defendants' unilateral actions without notice or any prior discussion inflicted a blow to the plaintiffs from which they were unable to recover. The defendants' actions therefore can reasonably be said to have caused the losses sustained by the plaintiffs. The established damages flow as a direct result of the misconduct alleged, misconduct which constitutes both a breach of contract and the commission of the torts of trespass and conversion. See *Ronald Elwyn Lister Ltd. v. Dayton Tire Canada Ltd.,* supra, at p. 107.

[193] With regard to the foreseeability of the damages, I am satisfied that those business losses were reasonably foreseeable at the time of contracting. The Bank sought and obtained comprehensive information from Murano and Glenn about their business activities before deciding to contract with them. The Bank was aware that Murano was an active entrepreneur with several other ventures. At all times, the Bank would be alive to the devastating impact a receivership has on a debtor's ongoing financial credibility. At all times, the Bank would also know that the adverse impact of a receivership would be magnified if it became known that the debtor could not be trusted and was generally in a desperate financial situation. In *Monarch S.S. Co. v. A.B. Karlshamns Oljefarbriker,* [1949] 1 All E.R. 1 (H.L.), Lord Wright stated at p. 14:

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> [T]he question in a case like the present must always be what responsible business men must be taken to have contemplated as the natural or probable result if the contract was broken. As reasonable business men each must be taken to understand the ordinary practices and exigencies of the other's trade or business. That need not generally be the subject of special discussion or communication. […] The same is true in many cases of complicated consequences flowing from an unanticipated breach of contract, but the damages are not treated either as special or remote if they flow from the normal business position of the parties which the court assumes must be reasonably known to them.

[194] Under this test, it was reasonably foreseeable at the time the parties contracted that these kind of breaches could destroy Murano's business and produce losses of the order established. From what the Bank knew about Murano at the time they entered into dealings with him, I am satisfied that neither the existence of loss nor the extent of loss was unforeseeable. As well, since the plaintiffs have made joint claims in tort and contract, the difference in the timing at which foreseeability is to be assessed in tort and contract claim is not material.

[195] The Bank's knowledge only improved as the relationship developed. The torts of trespass and conversion were committed in the face of such knowledge and carried out notwithstanding Coull's prediction to McKinnon that the receivership would cause Murano's downfall. Indeed, the Bank attempted to cause Murano's bankruptcy and Hehir, at the time he acted, did not believe that Murano would be able to obtain sufficient funds to repay the Bank. The Bank was aware that Murano had expansion plans. He had raised his Top 30 initiative with Murray in November and with Rowlands in mid-March. As a result of Glenn's anxious telephone call concerning the receivership, the Bank was specifically aware of the impending Bandito Video transaction. The Bank was also aware that Murano was active with several other financial institutions and businesses such as TD Bank, Canada Trust, National Trust, Papa Pete's, Miami Subs, and of the use of his various commercial properties to secure loans. Accordingly, I find the losses established to be reasonably foreseeable in both contract and tort and caused by the defendants' wrongful actions.

[196] I might add that in an "at will" banking relationship of this type I see no unfairness in also assessing foreseeability in contract near the date of breach. The Bank sought and

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received regular updates on Murano's situation. Such monitoring was expected by the parties on contracting. The Bank could have extricated itself at any time by giving reasonable notice.

[197] This leaves the plaintiffs' claim for exemplary damages. The Bank was aware that Murano was not "back-dooring" or absconding with the inventory at 22 Weber Street. Rather, it used the Weber Street Store situation as pretext for moving without notice against a customer believed to be in financial difficulty. The Bank went on, through its officers and agents, to suggest to anyone who inquired that Murano's financial situation was desperate and that his conduct had been, in their view, dishonest. Indeed, it attempted to bankrupt him. This is high-handed and callous conduct on the part of a financial institution occupying a privileged position in Canadian society. Exemplary damages would normally be called for.

[198] On the other hand, Murano's actions leading up to the meeting with Rowlands on March 20, 1991 and his conduct during and after that meeting are not free of criticism. While Murano and his counsel had an answer at trial for every one of the alleged failings reported in the Bank's records, these explanations were never shared with the Bank. If corporate year-ends had been changed, why not tell Murray that? If Hughes had completed the most recent year-end review and nothing more was required until April or May of 1991, why did Murano not bring this to Murray's attention. I also find as suspect Murano's claim to have honoured his $100,000 commitment to the Bank by paying funds into an operating account. Similarly, his belief that Peter Rowlands approved the move from Weber Street to Richmond Hill was, at a minimum, unreasonable. While none of this conduct justified the Bank's actions, it extinguishes what would otherwise have been a substantial award of exemplary damages in the plaintiffs' favour. See *Moase Produce Ltd. v. Royal Bank* (1987), 64 C.B.R. (N.S.) 191 (P.E.I. S.C.), at p. 199.

[199] The defendants are therefore jointly and severally liable to the plaintiffs in the amount of $3,770,000.

VI. THE GUARANTEES

[200] For obvious reasons, counsel were preoccupied with all the preceding issues and related law. There was therefore little time and argument devoted to the effect of the Bank's actions on guarantees given it by some of the plaintiffs. I am, however, satisfied that its

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actions so materially affected the sureties' risks that they are entitled to a full discharge. See *Bauer v. Bank of Montreal* (1980), 110 D.L.R. (3d) 424 (S.C.C.).

VII. CONCLUSION

[201] The defendants are directed to pay to the plaintiffs damages in the amount of $3,770,000. Under the *Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 128, the plaintiffs may claim prejudgment interest. I may be spoken to on this matter and on the issue of costs.

Action allowed; counterclaim dismissed.

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Attorney General of Canada *Appellant*

v.

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch and Elsie Gladue, on their own behalf and on behalf of all descendants of the Papaschase Indian Band No. 136 *Respondents*

and

Her Majesty The Queen in Right of Alberta *Respondent*

and

Assembly of First Nations and Federation of Saskatchewan Indian Nations *Interveners*

Indexed as: Canada (Attorney General) *v.* Lameman

Neutral citation: 2008 SCC 14.

File No.: 31871.

2008: February 22; 2008: April 3.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Limitation of actions — Action by aboriginal people — Discovery of cause of action — Action brought against Crown based on breach of fiduciary duty, fraudulent and malicious behaviour and treaty breach — Whether claims statute-barred — Limitation of Actions Act, R.S.A. 1980, c. L-15, s. 4.

In 1877, the Papaschase Indians were allotted a reserve in what is now southeast Edmonton. In 1886, Chief Papaschase and other members of his Band surrendered their treaty rights and rights connected with the Reserve in exchange for a cash payment. Three men and their families, found to be the remaining members of the Band, entered into an agreement with the government in 1889 to surrender their interest in the Reserve

Procureur général du Canada *Appelant*

c.

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch et Elsie Gladue, en leur nom et au nom de tous les descendants de la bande indienne Papaschase nº 136 *Intimés*

et

Sa Majesté la Reine du chef de l'Alberta *Intimée*

et

Assemblée des Premières Nations et Fédération des Nations indiennes de la Saskatchewan *Intervenantes*

Répertorié : Canada (Procureur général) *c.* Lameman

Référence neutre : 2008 CSC 14.

Nº du greffe : 31871.

2008 : 22 février; 2008 : 3 avril.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella et Rothstein.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Prescription — Action intentée par des Autochtones — Découverte des causes d'action — Action contre la Couronne pour manquement à une obligation fiduciaire, actes frauduleux et malveillants, et manquements à un traité — Les demandes sont-elles prescrites? — Limitation of Actions Act, R.S.A. 1980, ch. L-15, art. 4.

En 1877, une réserve a été attribuée aux Indiens Papaschase à l'endroit où se trouve aujourd'hui le sud-est d'Edmonton. En 1886, le chef Papaschase et d'autres membres de la bande ont renoncé à leurs droits issus d'un traité et relatifs à la réserve en contrepartie d'un paiement en espèces. Par une entente conclue avec le gouvernement en 1889, les membres restants de la bande qui ont été retracés — trois hommes et leur famille

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with a view to its sale or lease, on the condition that the proceeds be held in trust and paid to Band members and their descendants. In 2001, the plaintiffs, claiming to be descendants of Chief Papaschase and other Papaschase Band members, commenced an action against the Crown for breach of fiduciary duty, fraudulent and malicious behaviour, and treaty breach. The Crown applied for summary dismissal of the claims. The chambers judge granted the application. He found that (1) most of the claims in the action failed to show a genuine issue for trial; (2) the plaintiffs did not have standing to bring the action; and (3) the claims were barred by the Alberta *Limitation of Actions Act*, with the exception of the claim for an accounting of any proceeds of sale of the Reserve the Crown might still have in its possession. The Court of Appeal set aside the decision, holding that all or most of the issues raised were genuine, triable issues, including the standing and limitations issues.

Held: The appeal should be allowed.

The chambers judge's order should be restored. A defendant who seeks summary dismissal must prove that there is "no genuine issue of material fact requiring trial". In this case, there is no "genuine issue" for trial. Assuming that the claims disclosed triable issues and that standing could be established, the claims, except the claim for an accounting, are barred by the *Limitation of Actions Act*. The claim relating to the accounting of any proceeds received from the sale of the Reserve is a continuing claim and not caught by the Act. The evidence filed by the government established that the causes of action now raised would have been clear in the 1970s to the plaintiffs, exercising due diligence. The plaintiffs filed no material in response to this evidence. The only available inference on the state of the evidence is that the causes of action became discoverable within the meaning of the *Limitation of Actions Act* in the 1970s and that the claims are now statute-barred. Accordingly, the plaintiffs' action should be dismissed, with the exception of the claim for an accounting, provided that the Crown is still in possession of the funds received from the sale of the reserve lands and that a plaintiff demonstrate that he or she has standing to bring this claim. [1] [11-12] [17-18]

respective —, ont cédé leur intérêt dans la réserve en vue de sa location ou de sa vente, à la condition que le produit de l'opération soit détenu en fiducie et versé aux membres de la bande et à leurs descendants. En 2001, les demandeurs, se disant les descendants du chef Papaschase et d'autres membres de la bande Papaschase, ont intenté une action contre la Couronne pour manquements à une obligation fiduciaire, actes frauduleux et malveillants, et manquements à un traité. La Couronne a présenté une requête en jugement sommaire pour faire rejeter les demandes. Le juge en chambre a accueilli la requête. Il a conclu que (1) la plupart des allégations ne suscitaient pas de véritables questions justifiant un procès; (2) les demandeurs n'avait pas qualité pour intenter l'action; (3) les demandes étaient prescrites par application de la *Limitation of Actions Act* de l'Alberta, sauf pour la reddition de compte relative aux sommes provenant du produit de la vente que la Couronne pouvait avoir encore en sa possession. La Cour d'appel a infirmé cette décision, statuant que la totalité ou la plupart des questions soulevées étaient de véritables questions donnant matière à procès, notamment en ce qui concernait la qualité des demandeurs et la prescription.

Arrêt : Le pourvoi est accueilli.

L'ordonnance du juge en chambre doit être rétablie. Pour faire rejeter sommairement l'action, le défendeur doit démontrer « qu'il n'y a aucune véritable question de fait importante qui requiert la tenue d'un procès ». En l'espèce, il n'existe pas de « véritable question » à débattre. À supposer que la déclaration soulève des questions donnant matière à procès et qu'il soit possible d'établir la qualité des demandeurs, les demandes sont prescrites par application de la *Limitation of Actions Act*, sauf en ce qui concerne la reddition de compte. La demande de reddition de compte relative au produit de la vente de la réserve est une demande de nature continue non visée par cette loi. Il ressort de la preuve déposée par le gouvernement que, dans les années 1970, les demandeurs auraient pu constater, à l'évidence, l'existence des causes d'action maintenant invoquées s'ils avaient fait preuve de diligence raisonnable. Les demandeurs n'ont présenté aucun élément en réponse à cette preuve. Dans l'état de la preuve, la seule inférence possible est que la découverte des causes d'action, au sens de la *Limitation of Actions Act*, est devenue possible dans les années 1970, et que les demandes sont maintenant prescrites. Par conséquent, l'action des demandeurs devrait être rejetée, sauf pour la reddition de compte, à la condition que la Couronne ait toujours en sa possession les fonds provenant de la vente des terres de réserve et qu'un demandeur démontre avoir qualité pour réclamer cette reddition de compte. [1] [11-12] [17-18]

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Cases Cited

Referred to: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547; *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44; *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147.

Statutes and Regulations Cited

Limitation of Actions Act, R.S.A. 1980, c. L-15, s. 4.
Limitations Act, S.A. 1996, c. L-15.1, s. 13.

APPEAL from a judgment of the Alberta Court of Appeal (Côté and Paperny JJ.A. and Sulyma J. (*ad hoc*)) (2006), 66 Alta. L.R. (4th) 243, 404 A.R. 349, [2007] 2 W.W.R. 440, [2007] 2 C.N.L.R. 283, [2006] A.J. No. 1603 (QL), 2006 CarswellAlta 1686, 2006 ABCA 392, reversing in part a decision by Slatter J. (2004), 43 Alta. L.R. (4th) 41, 365 A.R. 1, [2005] 8 W.W.R. 442, [2004] 4 C.N.L.R. 110, [2004] A.J. No. 999 (QL), 2004 CarswellAlta 1170, 2004 ABQB 655, summarily dismissing the plaintiffs' claims against the Crown. Appeal allowed.

Mark R. Kindrachuk, *Q.C.*, and *Michele E. Annich*, for the appellant.

Eugene Meehan, *Q.C.*, *Ronald S. Maurice* and *Marie-France Major*, for the respondents Lameman et al.

Written submissions only by *Donald N. Kruk* and *Angela Edgington*, for the respondent Her Majesty the Queen in Right of Alberta.

Bryan P. Schwartz and *Chief Wilton Littlechild*, *Q.C.*, for the intervener the Assembly of First Nations.

Written submissions only by *Michelle J. Ouellette*, *Q.C.*, for the intervener the Federation of Saskatchewan Indian Nations.

Jurisprudence

Arrêts mentionnés : *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423; *1061590 Ontario Ltd. c. Ontario Jockey Club* (1995), 21 O.R. (3d) 547; *Tucson Properties Ltd. c. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44; *Murphy Oil Co. c. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, conf. par (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69; *Transamerica Life Insurance Co. of Canada c. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423; *Goudie c. Ottawa (Ville)*, [2003] 1 R.C.S. 141, 2003 CSC 14; *Bande indienne Wewaykum c. Canada*, [2002] 4 R.C.S. 245, 2002 CSC 79; *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147.

Lois et règlements cités

Limitation of Actions Act, R.S.A. 1980, ch. L-15, art. 4.
Limitations Act, S.A. 1996, ch. L-15.1, art. 13.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Côté et Paperny et la juge Sulyma (*ad hoc*)) (2006), 66 Alta. L.R. (4th) 243, 404 A.R. 349, [2007] 2 W.W.R. 440, [2007] 2 C.N.L.R. 283, [2006] A.J. No. 1603 (QL), 2006 CarswellAlta 1686, 2006 ABCA 392, infirmant en partie une décision du juge Slatter (2004), 43 Alta. L.R. (4th) 41, 365 A.R. 1, [2005] 8 W.W.R. 442, [2004] 4 C.N.L.R. 110, [2004] A.J. No. 999 (QL), 2004 CarswellAlta 1170, 2004 ABQB 655, qui avait rejeté sommairement les demandes des demandeurs contre la Couronne. Pourvoi accueilli.

Mark R. Kindrachuk, *c.r.*, et *Michele E. Annich*, pour l'appelant.

Eugene Meehan, *c.r.*, *Ronald S. Maurice* et *Marie-France Major*, pour les intimés Lameman et autres.

Argumentation écrite seulement par *Donald N. Kruk* et *Angela Edgington*, pour l'intimée Sa Majesté la Reine du chef de l'Alberta.

Bryan P. Schwartz et *Chief Wilton Littlechild*, *c.r.*, pour l'intervenante l'Assemblée des Premières Nations.

Argumentation écrite seulement par *Michelle J. Ouellette*, *c.r.*, pour l'intervenante la Fédération des Nations indiennes de la Saskatchewan.

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The following is the judgment delivered by

[1] THE COURT — We are all of the view that the appeal should be allowed and the order of the chambers judge restored. It follows that the plaintiffs' action should be dismissed, with the exception of claims relating to accounting for funds received from the sale of the reserve lands, provided that the appellant is still in possession of such funds and that a plaintiff demonstrate that he or she has standing to bring this claim.

[2] The plaintiffs bring this action on their own behalf and on behalf of all descendants of the Papaschase Indian Band No. 136. The facts are shrouded in the mists of time and some details are disputed, but the broad picture is the following.

[3] In 1877, the Papaschase Indians adhered to Treaty No. 6 and were allotted a reserve in what is now southeast Edmonton. In 1886, Chief Papaschase and a number of other members of his Band — the Band's core leadership group — "took scrip". This meant that in exchange for a cash payment they surrendered their treaty rights and rights connected with the Reserve. These members left the Reserve. A few years later in 1889, the people whom government officials found to be remaining members of the Band — three men and their families — entered into an agreement to surrender their interest in the Reserve to the government with a view to its sale or lease, on condition that the proceeds be held in trust and paid to Band members and their descendants. It appears that these people ended up joining the Enoch Band. Over the years, the government paid monies from the sale of the Papaschase Reserve to the members of the Enoch Band, in accordance with an agreement signed in 1894 between the government and the two surviving Band members who had agreed to the Reserve's surrender.

[4] In 2001, the plaintiffs, claiming to be descendants of Chief Papaschase and other Papaschase Band members, commenced an action against the Crown. Their claim alleged that the government

Version française du jugement rendu par

[1] LA COUR — Nous sommes tous d'avis que le pourvoi devrait être accueilli et l'ordonnance du juge en chambre rétablie. L'action des demandeurs devrait par conséquent être rejetée, sauf pour la reddition de compte à l'égard des fonds provenant de la vente des terres de réserve, à la condition que l'appelant ait toujours ces fonds en sa possession et qu'un demandeur démontre avoir qualité pour réclamer cette reddition de compte.

[2] Les demandeurs intentent l'action en leur propre nom et au nom de tous les descendants de la bande indienne Papaschase nº 136. Les faits se perdent dans la nuit des temps et certains détails sont litigieux, mais en voici néanmoins un aperçu général.

[3] En 1877, les Indiens Papaschase ont adhéré au Traité nº 6 et on leur a attribué une réserve, là où se trouve aujourd'hui le sud-est d'Edmonton. En 1886, le chef Papaschase et d'autres membres de la bande — le groupe à la tête de la bande — ont « accepté un certificat ». C'est-à-dire que, en contrepartie d'un paiement en espèces, ils ont renoncé à leurs droits issus du traité et relatifs à la réserve. Ces membres de la bande ont quitté la réserve. Quelques années plus tard, en 1889, les membres restants de la bande que les représentants du gouvernement ont pu retracer — trois hommes et leur famille respective — ont accepté de céder au gouvernement leur intérêt dans la réserve en vue de sa location ou de sa vente, à condition que le produit de l'opération soit détenu en fiducie et versé aux membres de la bande et à leurs descendants. Ces personnes se seraient finalement jointes à la bande Enoch. Au fil des ans, le gouvernement a versé aux membres de la bande Enoch des sommes provenant de la vente de la réserve Papaschase, suivant une entente signée en 1894 entre le gouvernement et les deux membres survivants de la bande qui avaient consenti à la cession de la réserve.

[4] En 2001, les demandeurs, se disant les descendants du chef Papaschase et d'autres membres de la bande Papaschase, ont intenté une action contre la Couronne. Ils reprochaient au gouvernement

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had wrongfully allowed Papaschase Band members to take scrip without properly advising them of the consequences; that the government had wrongfully pressured the Band to surrender the Reserve under the influence of the Edmonton settlement's lobbying; and that the government had thereby caused the dissolution of the Band. The claim also alleged that the government did not follow the rules to obtain a legal surrender of the Reserve; that the government had not sold the Reserve land for market value; and that the government had mismanaged the sale proceeds, in particular by distributing them to the Enoch Band. Finally, the claim alleged that the government had breached its treaty obligations by not granting the Band all the land to which it was entitled under the Treaty; and by failing to provide the Band with farming implements, and food in times of famine. These allegations, it was said, gave rise to causes of action for breach of fiduciary duty, fraudulent and malicious behaviour, and treaty breach.

[5] The government brought a motion for summary judgment, asking that the claim be dismissed on the ground that the allegations in the statement of claim raised no genuine issue for trial. The main issues on the motion were: (1) whether the facts alleged disclosed triable issues; (2) whether the plaintiffs had standing to raise these issues; and (3) whether the claims were barred by statutes of limitations or the equitable doctrines of laches and acquiescence.

[6] The chambers judge, Slatter J., found that most of the claims lacked the factual basis necessary to qualify as genuine issues for trial: (2004), 43 Alta. L.R. (4th) 41, 2004 ABQB 655. However, he held that the statement of claim disclosed three triable issues: (1) whether the Reserve granted to the Papaschase Band was the proper size; (2) whether the government had properly disposed of the proceeds of the sale of the Reserve; and (3) whether the Crown had breached the Band's treaty rights to food.

d'avoir illicitement laissé des membres de la bande Papaschase accepter un certificat sans les informer adéquatement des conséquences; d'avoir illicitement fait pression sur la bande pour qu'elle cède la réserve, sous l'influence des pressions exercées par les colons d'Edmonton; et d'avoir ainsi causé la dissolution de la bande. Les demandeurs reprochaient en outre au gouvernement de ne pas avoir suivi les règles lors de la cession de la réserve; de ne pas avoir vendu les terres de réserve à leur valeur marchande; et de ne pas avoir correctement géré le produit de la vente, notamment en le distribuant à la bande Enoch. Ils soutenaient enfin que le gouvernement avait manqué à ses obligations énoncées dans le traité en n'octroyant pas à la bande la totalité des terres auxquelles le traité lui donnait droit et en ne lui procurant pas du matériel agricole et une aide alimentaire en période de famine. Selon les demandeurs, ces allégations donnaient naissance à des causes d'action pour manquement à une obligation fiduciaire, actes frauduleux et malveillants, et manquements à un traité.

[5] Le gouvernement a présenté une requête en jugement sommaire, par laquelle il demandait le rejet de l'action au motif que les allégations contenues dans la déclaration ne suscitaient aucune véritable question justifiant un procès. Les principales questions soulevées par la requête étaient celles de savoir : (1) si les faits allégués révélaient l'existence de questions donnant matière à procès; (2) si les demandeurs avaient qualité pour soulever ces questions; (3) si la prescription ou les doctrines en equity de l'acquiescement et du manque de diligence étaient opposables à l'action.

[6] Le juge en chambre Slatter a estimé la plupart des allégations dépourvues du fondement factuel nécessaire pour pouvoir être considérées comme de véritables questions justifiant un procès : (2004), 43 Alta. L.R. (4th) 41, 2004 ABQB 655. Il a cependant conclu que la déclaration soulevait trois questions donnant matière à procès : (1) la réserve octroyée à la bande Papaschase avait-elle la superficie appropriée? (2) le gouvernement avait-il distribué correctement le produit de la vente de la réserve? (3) la Couronne avait-elle violé les droits de la bande à l'aide alimentaire prévue par le traité?

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[7] The chambers judge went on to find against the plaintiffs on the remaining two issues. He found the plaintiffs lacked standing to bring the representative action; they were claiming collective rights of a Band that had ceased to exist, and did not meet the criteria for Band membership (i.e. showing their ancestors were Band members who had not taken up scrip or joined other bands, or by showing their ancestors were entitled to funds from the Reserve sale). And he found that the claims were barred by the *Limitation of Actions Act*, R.S.A. 1980, c. L-15, with the exception of the claim for an accounting of any proceeds of sale the Crown might still have in its possession.

[8] The majority of the Court of Appeal found that all or most of the issues raised were genuine, triable issues, with Côté J.A. dissenting and finding that the claims for malice, fraud and bad faith should be dismissed: (2006), 66 Alta. L.R. (4th) 243, 2006 ABCA 392. Unlike the chambers judge, the Court of Appeal found that whether the plaintiffs had standing to bring the action was a triable issue. It cited the circularity and unfairness of denying Band status for purposes of litigating the destruction of Band status; and held that the government bore the burden of proving that there were no persons in existence who could have standing. On the limitations issue, the Court of Appeal held that the evidence was mixed on whether the claim was discoverable in the 1970s and that this was a matter that should be resolved at trial.

[9] The government appeals to this Court, asking us to dismiss the plaintiffs' action on the grounds that they have no standing and that their claims are statute-barred, and asking us to reinstate the order of the chambers judge. We note that no notice of a constitutional question was given, and that no constitutional challenges lie before the Court.

[7] Le juge en chambre a ensuite rejeté les prétentions des demandeurs sur les deux questions restantes. Selon lui, les demandeurs n'avaient pas qualité pour intenter un recours collectif; ils revendiquaient les droits collectifs d'une bande qui avait cessé d'exister, et ils ne répondaient pas aux critères d'appartenance à la bande (il leur aurait fallu démontrer que leurs ancêtres étaient des membres de la bande qui n'avaient pas accepté un certificat et ne s'étaient pas joints à d'autres bandes, ou que leurs ancêtres avaient droit à des fonds provenant de la vente de la réserve). Il a conclu aussi que l'action était prescrite par application de la *Limitation of Actions Act*, R.S.A. 1980, ch. L-15, sauf pour la reddition de compte relative aux sommes provenant du produit de la vente que la Couronne pourrait avoir encore en sa possession.

[8] La majorité de la Cour d'appel a conclu que la totalité ou la plupart des questions soulevées étaient de véritables questions donnant matière à procès. Le juge Côté, dissident, estimait qu'il y avait lieu de rejeter les demandes fondées sur la malveillance, la fraude et la mauvaise foi : (2006), 66 Alta. L.R. (4th) 243, 2006 ABCA 392. Contrairement au juge en chambre, la Cour d'appel a jugé que la question de savoir si les demandeurs avaient qualité pour intenter l'action était une question donnant matière à procès. Elle a évoqué la circularité et l'injustice de nier le statut de bande lorsque l'instance a pour but de contester l'anéantissement du statut de bande et elle a conclu qu'il incombait au gouvernement de prouver qu'il n'existait aucune personne susceptible d'avoir qualité pour agir. Au sujet de la prescription, la Cour d'appel a jugé que, sur la question de savoir si la cause d'action était susceptible d'être découverte dans les années 1970, la preuve était contradictoire et que ce point devrait être tranché au procès.

[9] Le gouvernement interjette appel devant la Cour, nous demandant de rejeter l'action des demandeurs, au motif qu'ils n'avaient pas qualité pour l'intenter et que leurs demandes sont prescrites, et de rétablir l'ordonnance du juge en chambre. Nous signalons qu'aucun avis de question constitutionnelle n'a été donné, et que la Cour n'est saisie d'aucune contestation constitutionnelle.

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[10] This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.

[10] Le pourvoi concerne une requête en jugement sommaire. La règle du jugement sommaire sert une fin importante dans le système de justice civile. Elle permet d'empêcher les demandes et les défenses qui n'ont aucune chance de succès de se rendre jusqu'à l'étape du procès. L'instruction de prétentions manifestement non fondées a un prix très élevé, en temps et en argent, pour les parties au litige comme pour le système judiciaire. Il est essentiel au bon fonctionnement du système de justice, et avantageux pour les parties, que les demandes qui n'ont aucune chance de succès soient écartées tôt dans le processus. Inversement, la justice exige que les prétentions qui soulèvent de véritables questions litigieuses susceptibles d'être accueillies soient instruites.

[11] C'est pourquoi les exigences auxquelles il faut satisfaire pour obtenir un jugement sommaire sont élevées. Pour faire rejeter sommairement l'action, le défendeur doit démontrer « qu'il n'y a aucune véritable question de fait importante qui requiert la tenue d'un procès » : *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423, par. 27. Il doit le démontrer en produisant des éléments de preuve; il ne peut se fonder sur de simples allégations ou sur les actes de procédure : *1061590 Ontario Ltd. c. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. c. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (B.R. (protonotaire)), p. 46-47. Si le défendeur présente cette preuve, le demandeur doit soit la réfuter soit présenter une contre-preuve, sans quoi l'action risque d'être rejetée sommairement : *Murphy Oil Co. c. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, p. 331, conf. par (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Chaque partie doit [TRADUCTION] « présenter ses meilleurs arguments » en ce qui concerne l'existence ou la non-existence de questions importantes à débattre : *Transamerica Life Insurance Co. of Canada c. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Div. gén.), p. 434; *Goudie c. Ottawa (Ville)*, [2003] 1 R.C.S. 141, 2003 CSC 14, par. 32. Le juge en chambre peut faire des inférences de fait à partir des faits non contestés dont il est saisi, à la condition qu'elles soient solidement étayées par les faits : *Guarantee Co. of North America*, par. 30.

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[12] We are of the view that, assuming that the claims disclosed triable issues and that standing could be established, the claims are barred by operation of the *Limitation of Actions Act*. There is "no genuine issue" for trial. Were the action allowed to proceed to trial, it would surely fail on this ground. Accordingly, we agree with the chambers judge that it must be struck out, except for the claim for an accounting of the proceeds of sale, which is a continuing claim and not caught by the *Limitation of Actions Act*.

[13] This Court emphasized in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, that the rules on limitation periods apply to Aboriginal claims. The policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims, as stated at para. 121 of *Wewaykum*:

> Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

[14] Pursuant to s. 13 of the *Limitations Act*, S.A. 1996, c. L-15.1, Aboriginal claims are governed by the previous *Limitation of Actions Act*. The applicable limitation periods provision reads:

> **4**(1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
>
> . . .
>
> (c) actions
>
> (i) for the recovery of money, other than a debt charged on land, whether recoverable as a debt

[12] Nous sommes d'avis que, à supposer que la déclaration soulève des questions donnant matière à procès et qu'il soit possible d'établir la qualité des demandeurs, les demandes sont prescrites par application de la *Limitation of Actions Act*. Il n'existe donc « aucune véritable question » à débattre. Si on la laissait suivre son cours jusqu'à l'instruction, l'action serait assurément rejetée pour ce motif. C'est pourquoi nous estimons, comme le juge en chambre, qu'elle doit être radiée, sauf pour la demande de reddition de compte relative au produit de la vente, qui est une demande de nature continue non visée par la *Limitation of Actions Act*.

[13] La Cour a souligné dans *Bande indienne Wewaykum c. Canada*, [2002] 4 R.C.S. 245, 2002 CSC 79, que les règles sur les délais de prescription s'appliquent aux revendications autochtones. Les délais de prescription répondent à la recherche d'un équilibre entre la nécessité de protéger le droit du défendeur, après un certain temps, d'organiser ses affaires sans craindre une poursuite et celle de traiter le demandeur équitablement compte tenu de sa situation. Cela vaut autant pour les revendications autochtones que pour les autres, comme il est précisé au par. 121 de *Wewaykum* :

> Des témoins ne sont plus disponibles, des documents historiques ont disparu ou sont difficiles à mettre en contexte et l'idée de ce que constituent des pratiques loyales évolue. En raison de l'évolution des normes de conduite et de l'application de nouvelles normes en matière de responsabilité, il devient inéquitable de juger des actions passées au regard de normes contemporaines.

[14] Selon l'article 13 de la *Limitations Act*, S.A. 1996, ch. L-15.1, les revendications autochtones sont régies par l'ancienne *Limitation of Actions Act*. Voici les délais de prescription applicables :

> [TRADUCTION]
>
> **4**(1) Les actions suivantes se prescrivent par les délais respectifs indiqués ci-dessous :
>
> . . .
>
> (c) une action
>
> (i) en recouvrement d'une somme d'argent, sauf celle relative à une créance grevant un

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or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or

(ii) for an account or for not accounting,

within 6 years after the cause of action arose;

. . .

(e) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within 6 years from the discovery of the cause of action;

. . .

(g) any other action not in this Act or any other Act specifically provided for, within 6 years after the cause of action therein arose.

[15] The issue becomes when the cause of action "arose" or, in the case of equitable claims, was actually "discovered".

[16] The applicable definition of when a cause of action arises was articulated by this Court in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224:

. . . a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence . . . . [Emphasis added.]

[17] It is argued that the causes of action here advanced were discoverable as early as the 1880s and 1890s. We do not find it necessary, however, to go back so far. The evidence filed by the government establishes that in the 1970s the causes of action now raised would have been clear to the plaintiffs, exercising due diligence. In the

bien-fonds, que cette somme d'argent soit recouvrable à titre de dette, de dommages-intérêts ou à un autre titre, et que cette somme découle d'un engagement, d'un cautionnement, d'un covenant, d'un autre contrat formaliste ou d'un contrat nu, exprès ou tacite;

(ii) en reddition de compte ou pour non-reddition de compte;

se prescrit par 6 ans, à compter de la naissance de la cause d'action;

. . .

(e) une action fondée sur un accident, une erreur ou un autre motif de recours reconnu en equity qui n'est pas régi par les dispositions qui précèdent se prescrit par 6 ans, à compter de la découverte de la cause d'action;

. . .

(g) une autre action qui n'est pas expressément régie par une disposition de la présente loi ou d'une autre loi se prescrit par 6 ans, à compter de la naissance de la cause d'action.

[15] Il s'agit donc de déterminer à quel moment la cause d'action a pris naissance ou, dans le cas d'une demande en equity, à quel moment elle a été réellement découverte.

[16] La Cour a défini le moment auquel une cause d'action prend naissance dans *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, p. 224 :

. . . une cause d'action prend naissance, aux fins de la prescription, lorsque les faits importants sur lesquels repose cette cause d'action ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable . . . [Nous soulignons.]

[17] On fait valoir que les causes d'action invoquées en l'espèce auraient pu être découvertes dès les années 1880 et 1890. Mais il n'est pas nécessaire, à notre avis, de remonter aussi loin. Il ressort de la preuve déposée par le gouvernement que, dans les années 1970, les demandeurs auraient pu constater, à l'évidence, l'existence des causes d'action

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mid-1970s, an Edmonton lawyer, James C. Robb, sent letters of inquiry to the Department of Indian and Northern Affairs on behalf of unidentified Papaschase descendants. The ensuing correspondence reveals that in 1974, a group of Papaschase descendants intended to submit a land claim "in the near future". This suggests some actual knowledge of the relevant facts, but there is more. When the Department advised Mr. Robb that the Enoch Band had already submitted a claim regarding the surrender of the Papaschase Reserve, Mr. Robb responded that a joint claim would not be possible. Having been informed of the Enoch Band's claim, these Papaschase descendants knew that the Enoch Band had or was in the process of gathering the relevant information. Indeed, in 1979 the Enoch Band provided funding to Kenneth James Tyler to write a Master's thesis on the events surrounding the surrender of the Papaschase Reserve. The Tyler Thesis covers most if not all of the facts that form the basis of the claims in this action. Mr. Tyler interviewed several Enoch Band elders in the course of his research. It is thus clear that members of the Enoch Band were aware of the facts on which this action was based in 1979. The chambers judge, on all the evidence, concluded that any interested party exercising due diligence could have uncovered the same facts Mr. Tyler did.

[18] The plaintiffs filed no material in response to this evidence. They did not say whether or not, in the 1970s, they knew of the causes of action they now raise. There is no explanation for how, as members of the Papaschase Descendants Council, they could have been unaware of these matters, with due diligence, when some Papaschase descendants were aware of the Enoch Band's claim. On this state of the evidence, the only available inference is that these causes of action became discoverable within the meaning of the *Limitation of Actions*

qui sont maintenant invoquées, s'ils avaient fait preuve de diligence raisonnable. Au milieu des années 1970, un avocat d'Edmonton, James C. Robb, a écrit à plusieurs reprises au ministère des Affaires indiennes et du Nord canadien au nom de descendants non identifiés de la bande Papaschase pour demander des renseignements. La correspondance qui a suivi révèle que, en 1974, un groupe de descendants de la bande Papaschase avait l'intention de présenter une revendication territoriale [TRADUCTION] « dans un proche avenir ». Ces faits laissent croire à une certaine connaissance réelle des faits pertinents, mais il y a plus. Lorsque le ministère a informé M^e^ Robb que la bande Enoch avait déjà présenté une revendication au sujet de la cession de la réserve Papaschase, M^e^ Robb a répondu qu'une revendication conjointe ne serait pas possible. Ayant été informés de la revendication de la bande Enoch, ces descendants de la bande Papaschase savaient que la bande Enoch avait réuni l'information pertinente ou était en train de la réunir. En 1979, du reste, la bande Enoch a aidé financièrement Kenneth James Tyler à rédiger un mémoire de maîtrise sur les événements relatifs à la cession de la réserve Papaschase. Le mémoire de M. Tyler relate la plupart, voire la totalité des faits à l'origine des demandes formulées dans la présente action. Dans le cadre de sa recherche, M. Tyler s'est entretenu avec plusieurs anciens de la bande Enoch. Il est donc clair que des membres de la bande Enoch étaient au courant, en 1979, des faits sur lesquels l'action est fondée. Le juge en chambre a conclu, à la lumière de l'ensemble de la preuve, que toute partie intéressée faisant preuve de la diligence requise aurait découvert les mêmes faits que M. Tyler.

[18] Les demandeurs n'ont présenté aucun élément en réponse à cette preuve. Ils n'ont pas dit si, dans les années 1970, ils étaient ou non au courant des causes d'action qu'ils invoquent maintenant. Ils n'ont pas expliqué comment, à titre de membres du Conseil des descendants de la bande Papaschase, ils auraient pu ignorer ces choses s'ils avaient exercé la diligence requise, alors que certains descendants de la bande Papaschase étaient au courant de la revendication de la bande Enoch. Dans l'état de la preuve, la seule inférence possible

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Act in the 1970s, and that the claims are now statute-barred.

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

[20] For these reasons, we would allow the appeal and restore the order of the chambers judge. Each party should bear its own costs in this Court.

Appeal allowed.

Solicitor for the appellant: Deputy Attorney General of Canada, Saskatoon.

Solicitors for the respondents Lameman et al.: Lang Michener, Ottawa; Maurice Law, Redwood Meadows, Alberta.

Solicitor for the respondent Her Majesty the Queen in Right of Alberta: Alberta Justice, Edmonton.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

Solicitors for the intervener the Federation of Saskatchewan Indian Nations: McKercher McKercher & Whitmore, Saskatoon.

est que la découverte des causes d'action, au sens de la *Limitation of Actions Act*, est devenue possible dans les années 1970, et que les demandes sont maintenant prescrites.

[19] Nous ajouterons ceci. Devant la Cour d'appel et devant notre Cour, la cause des demandeurs a été plaidée sur le fondement, non seulement de la preuve effectivement produite dans le cadre de la requête en jugement sommaire, mais aussi des éléments de preuve qui pourraient éventuellement être produits ou des modifications susceptibles d'être apportées advenant la tenue d'un procès. Une requête en jugement sommaire ne peut être rejetée sur la base de vagues allusions à ce qui pourrait être déposé en preuve ultérieurement si l'instance suit son cours jusqu'à l'instruction. Accepter cela irait à l'encontre de la raison d'être de la règle. Une requête en jugement sommaire doit être jugée sur la base des actes de procédure et des éléments de preuve dont le juge est véritablement saisi, et non en fonction de suppositions quant à ce qui pourrait être plaidé ou établi plus tard. Cela vaut en matière de revendications autochtones comme en toute autre matière.

[20] Pour ces motifs, nous sommes d'avis d'accueillir le pourvoi et de rétablir l'ordonnance du juge en chambre. Chaque partie assumera ses propres dépens devant notre Cour.

Pourvoi accueilli.

Procureur de l'appelant : Sous-procureur général du Canada, Saskatoon.

Procureurs des intimés Lameman et autres : Lang Michener, Ottawa; Maurice Law, Redwood Meadows, Alberta.

Procureur de l'intimée Sa Majesté la Reine du chef de l'Alberta : Alberta Justice, Edmonton.

Procureurs de l'intervenante l'Assemblée des Premières Nations : Pitblado, Winnipeg.

Procureurs de l'intervenante la Fédération des Nations indiennes de la Saskatchewan : McKercher McKercher & Whitmore, Saskatoon.

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In the Court of Appeal of Alberta

Citation: Shefsky v California Gold Mining Inc, 2016 ABCA 103

2016 ABCA 103 (CanLII)

Date: 20160414
Docket: 1503-0001-AC
Registry: Edmonton

Between:

Martin Shefsky and 2350183 Ontario Inc.

Appellants
(Applicants)

- and -

California Gold Mining Inc., Michael Churchill, Kevin Cinq-Mars, Patrick Cronin, R.W. Tomlinson Limited, John Doe #1-50, and ABC Corporation #1-50

Respondents
(Respondents)

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Frederica Schutz

Memorandum of Judgment of The Honourable Mr. Justice Costigan and The Honourable Madam Justice Schutz

Dissenting Memorandum of Judgment of The Honourable Mr. Justice Slatter

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 28th day of November, 2014
Filed on the 16th day of December, 2014
(2014 ABQB 730; Docket: 1303 17979)

2016 ABCA 103 (CanLII)

Memorandum of Judgment of The Honourable Mr. Justice Costigan and The Honourable Madam Justice Schutz

2016 ABCA 103 (CanLII)

The Majority:

Overview

[1] This is an appeal from the dismissal of the appellants' oppression application. This appeal engages the analytical framework applied to oppression claims and remedies stipulated by the Supreme Court of Canada in ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69, [2008] 3 SCR 560.

[2] Not all unfair conduct rises to the level of oppression for which a court may grant a remedy; what may be oppressive in one factual context may not be oppressive in a slightly different factual context. Fact findings are the crucial foundation for the legal analysis that must follow, because within such fact findings the hearing court identifies the interests that merit relief, and within such fact findings the court assesses the nature of the impugned conduct and its effect. "The evidence is also critical to the court's determination of the appropriate remedy in the event that oppression is found": David S. Morritt, Sonia L. Bjorkquist & Allan D. Coleman, *The Oppression Remedy* [Toronto: Canada Law Book, 2015] at 1-10-1-11.

[3] Although this reviewing Court may have assessed the evidence differently, we have identified no juridically permissible basis upon which to interfere with the chambers judge's decision. Fact findings are entitled to a high degree of deference. The parties were well aware of the limitations of the summary procedure they chose and we are satisfied from our review of the entire record that the chambers judge was entitled to find the facts and apply the law as he did; accordingly, the appeal is dismissed, for the reasons that follow.

Background

[4] Detailed background information can be found in the decision of the special chambers judge: ***Shefsky v California Gold Mining Inc***, 2014 ABQB 730 [***Decision***].

[5] In brief, this was a fight for control of the Board of Directors of California Gold Mining Inc (CGMI), a public corporation involved in mineral exploration. The appellants Martin Shefsky and his solely owned holding company, 2350183 Ontario Inc, alleged that the respondents breached Mr. Shefsky's reasonable expectations that he would control the corporation if he raised at least $5,000,000 in investments for CGMI. In particular, he would be entitled to name three of five directors on the board and would retain control through the shares owned by him and the investors he introduced to CGMI. The appellants assert that the respondents engaged in oppressive conduct, including a secret placement of shares that diluted Mr. Shefsky's voting power and refusing to allow Mr. Shefsky to appoint a third member to the board when his initial nominee, Mr. Cohen, refused to accept the position.

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Decision Below

[6] The chambers judge set out the uncontested facts, the facts that he found could be inferred from the affidavit evidence and documents, and the contested facts, before defining the issues, undertaking a legal analysis and setting out his conclusions. During the two-day special chambers hearing – which hearing was preceded by important interlocutory motions – the sole issues before the chambers judge were:

(i) whether the newly-elected Board of Directors of CGMI ought to be replaced by a Board selected by Mr. Shefsky;

(ii) whether shares ought to be offered to Mr. Shefsky and his designees on the same terms as what the appellants refer to as the "Secret Private Placement" (which also is the terminology used by the chambers judge in his Decision and which phrase we will continue to use as an aid to comprehension); and,

(iii) whether the Court should give control of CGMI to Mr. Shefsky?

[7] The chambers judge reviewed a substantial volume of affidavits, documents and transcripts from cross-examinations on numerous affidavits.

[8] The chambers judge specifically noted the admonition about conflicting evidence in ***Charles v Young***, 2014 ABCA 200 at paras 4-5, 577 AR 54 and the cases cited therein, and to that end reviewed "the extensive materials to ensure that I make findings based on uncontested facts or, where there are contested facts, on reasonable inferences which can be drawn from uncontested facts, objective evidence, and the conduct of the parties": ***Decision*** at para 6. The chambers judge identified facts, and drawn inferences, and noted many of the instances where the evidence conflicted.

[9] After citing the culture shift embedded in ***Hyrniak v Mauldin***, 2014 SCC 7 at para 2, [2014] 1 SCR 87, and this Court's endorsement of same in ***Windsor v Canadian Pacific Railway Ltd.***, 2014 ABCA 108 at para 15, 572 AR 317, the chambers judge noted that the parties chose a chambers procedure knowing the limitations of affidavit evidence, and were aware of the implications of such a decision. Further, the chambers judge noted that the parties expressed a desire to avoid the expense and complication of trial if possible because most, if not all, of the witnesses were in Ontario, some of the lawyers are from Ontario, and because matters in issue were relatively time-sensitive.

[10] The chambers judge identified the alleged reasonable expectations that Mr. Shefsky contended merited oppression relief:

- the Term Sheet be honoured;
- Mr. Shefsky be permitted to appoint a director to replace Mr. Cohen; and
- Mr. Shefsky retain control of CGMI.

[11] As to the first expectation, the chambers judge determined that even though Mr. Shefsky did not raise $5,000,000 by the deadline specified in the Term Sheet, and despite the dispute about whether to count certain investors, Mr. Shefsky had a reasonable expectation that the Term Sheet would be extended and honoured: ***Decision*** at paras 81-103.

[12] As to the second expectation, the chambers judge concluded that Mr. Shefsky had a reasonable expectation that he would be permitted to appoint a director other than Mr. Cohen when the latter refused to take the position: ***Decision*** at paras 104-108. However, he declined to find that Mr. Shefsky had an ongoing right to name a new director after the April 2013 shareholders' meeting because Mr. Shefsky had never taken steps to appoint a new director (which finding of fact is strenuously disputed by the appellants). Since Mr. Shefsky had not taken steps to appoint a new director, the chambers judge decided that Mr. Shefsky was asserting a "purely hypothetical breach of expectations" and concluded that "[w]hile the actions of the Board suggest that its members agreed that Shefsky could nominate a third person to the Board, thus giving rise to both a subjective and objective expectation, Shefsky never tried to act on that expectation and therefore it was never breached": ***Decision*** at paras 109-121.

[13] As to the expectation of control of CGMI, the chambers judge found as a fact that Mr. Shefsky did not have a reasonable expectation that he had sufficient shareholders' support to control CGMI, at any time: ***Decision*** at paras 122-126.

[14] In the result, the chambers judge dismissed the appellants' motion for oppression.

Applicable Legislation

[15] The oppression remedy is located in the Alberta *Business Corporations Act*, RSA 2000, c B-9, in particular sections 239 and 242:

> **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,

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> (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.

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[16] A complainant within the categories mentioned may apply to the court for an oppression remedy:

> **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.
>
> **(3)** In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> (a) an order restraining the conduct complained of;
>
> (b) an order appointing a receiver or receiver-manager;
>
> (c) an order to regulate a corporation's affairs by amending the articles or bylaws;

(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;

(e) an order directing an issue or exchange of securities;

(f) an order appointing directors in place of or in addition to all or any of the directors then in office;

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 244;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting permission to the applicant to

> (i) bring an action in the name and on behalf of the corporation or any of its subsidiaries, or
>
> (ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

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(4) This section does not confer on the Court power to revoke a certificate of amalgamation.

(5) If an order made under this section directs an amendment of the articles or bylaws of a corporation, no other amendment to the articles or bylaws may be made without the consent of the Court, until the Court otherwise orders.

(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in the prescribed form to the Registrar together with the documents required by sections 20 and 113, if applicable.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles is effected under this section.

(8) An applicant under this section may apply in the alternative under section 215(1)(a) for an order for the liquidation and dissolution of the corporation.

RSA 2000 cB-9 s242; 2014 c13 s49

Grounds of Appeal

[17] Although the appellants list numerous grounds of appeal in their factum, the only issues on which they provided written and oral argument can be summarized as follows:

(a) the chambers judge erred by mischaracterizing the appellants' argument about the Secret Private Placement as being loss of control rather than loss of the opportunity to gain control;

(b) the chambers judge erred by limiting their complaint about the Secret Private Placement to being an issue about control and failing to consider that regardless of control, the appellants had a reasonable expectation that the Secret Private Placement would not proceed in the circumstances; and

(c) the chambers judge erred by concluding that the issue of Mr. Shefsky's reasonable expectation that he would be permitted to appoint a third director to the Board was moot because Mr. Shefsky did not propose a replacement nominee for Mr. Cohen.

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Standard of Review

[18] Issues of jurisdiction and the test for oppression are questions of law, and should be reviewed on a standard of correctness: ***Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta***, 2015 ABCA 101 at para 33, 382 DLR (4th) 150; ***McRoberts v Whissell***, 2006 ABCA 388 at para 4, 2006 CarswellAlta 1689.

[19] The application of a legal test to a set of facts is a question of mixed fact and law. Whether conduct amounts to oppression is a question of mixed fact and law and is therefore reviewable for palpable and overriding error. The same standard is applicable to whether a party possessed reasonable expectations, which is a question of fact: ***1216808 Alberta Ltd (Prairie Bailiff Services) v Devtex Ltd***, 2014 ABCA 386 at para 24, 35 BLR (5th) 1.

[20] Normally, when reviewing a decision that omits an issue, an appeal court is left with two options: (1) direct a new trial on the issue; or (2) review the record and attempt to arrive at a conclusion with respect to the missed issue: ***Adeco Exploration Company Ltd v Hunt Oil Company of Canada Inc***, 2008 ABCA 214 at para 49, 437 AR 33.

[21] The imposition of a remedy for oppression is discretionary, and deference should be accorded to it unless an error in principle has been made or the decision is otherwise unjust: ***Naneff v Con-Crete Holdings Ltd*** (1995), 23 OR (3d) 481 at 487, 23 BLR (2d) 286 (CA).

Analysis

The Supreme Court of Canada's Analytical Framework in *BCE*

[22] A court's broad equitable jurisdiction under the oppression remedy is subject to three governing principles.

- First: not every expectation, even if reasonably held, will give rise to a remedy because there must be some wrongful conduct, causation and compensable injury in the claim for oppression: ***BCE*** at paras 68, 89-94.
- Second: not every interest is protected by the statutory oppression remedy. Although other personal interests may be connected to a particular transaction, the oppression remedy cannot be used to protect or advance, directly or indirectly, these other personal interests. "[I]t is only their interests as shareholder, officer or director as such which are protected": ***Naneff v Con-Crete Holdings Ltd*** at para 27. Furthermore, "the oppression remedy protects only the interests of a shareholder *qua* shareholder. Oppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation": ***Stahlke v Stanfield***, 2010 BCSC 142 at para 23, aff'd 2010 BCCA 603 at para 38, 305 BCAC 18.
- Third: courts must not second-guess the business judgment of directors of corporations. Rather, the court must decide whether the directors made decisions

> which were reasonable in the circumstances and not whether, with the benefit of hindsight, the directors made perfect decisions. Provided the directors acted honestly and reasonably, and made a decision in a range of reasonableness, the court must not substitute its own opinion for that of the Board. If the directors have chosen from one of several reasonable alternatives, deference is accorded to the Board's decisions: ***Stahlke*** at para 22; ***Pente Investment Management Ltd v Schneider Corp*** (1998), 42 OR (3d) 177 at para 36, 44 BLR (2d) 115 (CA); ***BCE*** at para 40.

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[23] In ***BCE*** the Supreme Court underlines that the stakeholder's actual expectations are not conclusive; rather, reasonableness implies that the analysis is objective and contextual. "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": ***BCE*** at para 62.

[24] ***BCE*** at para 68 stipulates a two-step inquiry in an oppression claim:

1. Does the evidence support the reasonable expectation asserted by the claimant?

2. Does the evidence establish that the reasonable expectation was

   (a) violated by conduct, and

   (b) falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[25] It is essential that the complainant establish wrongful conduct, causation and compensable injury: ***BCE*** at para 90.

[26] ***BCE*** at paras 72-83 sets out some useful factors the court may consider in determining whether a reasonable expectation exists, including:

- general commercial practice
- the nature of the corporation
- the relationship between the parties
- past practice
- steps the claimant could have taken to protect himself
- any representations and agreements, and
- the fair resolution of conflicts between corporate stakeholders

[27] As the chambers judge states in para 75 of his decision:

> Once it is determined what an applicants' reasonable expectations were, and that those expectations were not met, the Court must go on to determine whether the failure to meet the expectation was unfair. Not all failures to meet a reasonable expectation "will give rise to the equitable considerations that ground actions for oppression." The conduct must be oppressive or demonstrate unfair prejudice, or unfair disregard of the claimants' interests (at para 89). Often the proof required to establish reasonable expectation will also be relevant to the proof of oppression, unfair prejudice or unfair disregard of interests (para 90).

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[28] The chambers judge goes on to state that oppression has been described as conduct that is "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" related to the conduct of the corporations' affairs. That is, "a wrong of the most serious sort": ***Decision*** at para 76.

[29] Unfair prejudice is described in ***BCE*** at para 93 as conduct that is less serious than oppression and includes such things as:

> . . . squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm . . .

[30] Unfair disregard is described as the least serious of the three, and it includes favoring a director by failing to properly prosecute claims, improperly reducing dividends, or failing to deliver a claimant's property: ***BCE*** at para 94.

[31] With all this in mind, each specific ground of appeal is discussed below.

Did the chambers judge err by mischaracterizing the appellants' argument about the Secret Private Placement as being loss of control rather than loss of the opportunity to gain control?

[32] The chambers judge found that there is no evidence the appellants ever had control of CGMI. This finding is supported by the evidentiary record and is fatal to the suggestion that Mr. Shefsky had a reasonable expectation that he could control CGMI, or that this alleged expectation was defeated by the Secret Private Placement.

[33] The appellants now assert that the special chambers judge did not properly characterize their submissions regarding the Secret Private Placement. They say their argument was not that the

Secret Private Placement was oppressive because it resulted in Mr. Shefsky losing control of CGMI, but rather because it resulted in him losing the opportunity to gain control of the company. The appellants acknowledge that it was not a certainty that Mr. Shefsky would win control. However, they argue that the issuance of the Secret Private Placement diluted his shares and ensured that he could not win a shareholder vote. The appellants essentially argue that the Secret Private Placement resulted in the loss of a chance for control of CGMI.

[34] However, the appellants' argument about their expectation as summarized above was not clearly articulated before the chambers judge. The transcript of the hearing below shows that the appellants' arguments focused on Mr. Shefsky's expectation that he would control CGMI once he raised the funds specified in the Term Sheet, and the issue of control underlies the appellants' entire case including their requested remedies; the chambers judge cannot be faulted for characterizing the appellants' expectation in the manner he did. In addition to establishing that their expectations were reasonable, the onus is on the claimants to identify the particular expectations that they allege have been violated: ***BCE*** at para 70.

[35] The respondents rely on ***Quan v Cusson***, 2009 SCC 62 at paras 36-37, [2009] 3 SCR 712 to urge us not to entertain a new issue raised for the first time on appeal because they say the interests of justice do not require it and there is not a sufficient evidentiary record.

[36] We do not agree the appellants are raising a new issue for the first time on this appeal. Despite the fact that their position was not clearly articulated before the chambers judge, the record shows that the appellants did make submissions effectively stating that insofar as Mr. Shefsky was concerned, the true intention of the Secret Private Placement was to dilute his shares and prevent him from winning a proxy war that, absent the Secret Private Placement, would have been a possibility. This issue was sufficiently canvassed on the record such that this Court can address it on appeal.

[37] The essential difficulty with Mr. Shefsky's position is that a finding of oppression requires objective evidence that there has been oppression. A mere speculation or hope or, as the respondents put it, an "aspirational belief" is insufficient to form the foundational evidence for this type of extraordinary action and remedy. The ability of the disappointed or aggrieved to avail themselves of the oppression action and its remedies must be carefully circumscribed so as not to expand the legal right to mere aspirations or disappointments. This is why wrongful conduct, causation, and compensable injury must all be established by the claimant in an oppression claim: ***BCE*** at para 90. An expectation based on a loss of an opportunity, without proof that such opportunity was more than merely speculative, is insufficient to ground an oppression claim because causation and compensable injury have not been established.

[38] In our view, the chambers judge did not err in failing to find that the loss of an opportunity to gain control of CGMI was a reasonable expectation violated by the Secret Private Placement.

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Did the chambers judge err by limiting the appellants' complaint about the Secret Private Placement to being an issue about control and failing to consider that regardless of control, the appellants had a reasonable expectation that the Secret Private Placement would not proceed in the circumstances?

[39] Aside from the issue of control, the appellants argue that the Secret Private Placement was also oppressive because of the circumstances in which it occurred; they allege it involved the issuance of shares to a select group of investors that did not include Mr. Shefsky, at a price below market value, without Mr. Shefsky's knowledge but after he had advised the other Board members that he intended to call a shareholders' meeting for the purpose of electing a new slate of directors, and in the context of what the appellants allege was a significantly better offer from Mr. Caland.

[40] The difficulty with this argument is that the appellants have failed to identify any specific expectation, apart from the expectation of control, which was violated by these actions. The appellants submit that a shareholder does not need to prove control in order to establish that the act of issuing shares to a select group of investors well below market value is oppressive, and that every shareholder, including Mr. Shefsky, has a reasonable expectation that directors will not do this. However, the oppression remedy is a personal claim and requires the complainant to identify a personal interest that is alleged to have been violated. It is not sufficient to allege that shareholders generally have an expectation that directors generally will not act oppressively. Such assertions are contrary to the analytical framework set out in ***BCE***.

[41] In ***Rea v Wildeboer***, 2015 ONCA 373 at paras 34-35, the distinction between a generalized expectation and a personal claim that potentially attracts the oppression remedy is clearly set out:

> The oppression remedy is not available – as the appellants contend – simply because a complainant asserts a "reasonable expectation" (for example, that directors will conduct themselves with honesty and probity and in the best interests of the corporation) and the evidence supports that the reasonable expectation has been violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard". The impugned conduct must be "oppressive" of or "unfairly prejudicial" to, or "unfairly disregard" *the interests of the complainant*: OBCA, s. 248(2). No such conduct is pled here.
>
> That the harm must impact the interest of the complainant personally – giving rise to a personal action – and not simply the complainant's interests as a part of the collectivity of stakeholders as a whole – is consistent with the reforms put in place to attenuate the rigours of the rule in *Foss v. Harbottle*. The legislative response was to create *two* remedies, with two different rationales and two separate statutory foundations, not just one: a corporate remedy, and a personal or individual remedy.

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[42] We agree that the cases cited in support of Mr. Shefsky's claim that he had some other reasonable expectation that was violated are distinguishable. In contradistinction to ***Legion Oils Ltd v Barron*** (1956), 2 DLR (2d) 505, 17 WWR 209 (AB SC-TD), ***Keho Holdings Ltd v Noble***, 1987 ABCA 84, 38 DLR (4th) 368 and ***Smith v Hanson Tire Company Ltd,*** [1927] 3 DLR 786, 21 Sask LR 621 (CA), in the case at bar Mr. Shefsky did not have an articulated reasonable expectation that was violated by the Secret Private Placement. Moreover, oppression cases are highly fact-specific and what may be oppressive or improper in the case of a closely-held private corporation is not necessarily oppressive in the context of a publicly-held corporation: ***BCE*** at para 59.

[43] In any event, the chambers judge did not find that the Secret Private Placement was below market value, nor was there any evidentiary foundation for that assertion. Indeed, the determination of market value for a junior mining company in the context of a private placement (as opposed to a sale of a small block on the stock market) would require expert evidence. The pricing of shares issued through the Secret Private Placement was made in accordance with the rules established by the TSX Venture Exchange. On August 12, 2013 CGMI's lawyers filed for a price reservation at a price of $0.05, which was approved by the TSX Venture Exchange as an acceptable price in light of prevailing market prices.

[44] In connection with the requirement to raise additional funds, there was evidence accepted by the chambers judge that in the aftermath of the COO's termination, it was necessary for CGMI to raise additional funds in order to redo the geological reports and other work that the directors determined had been done improperly. As is a common occurrence in junior mining companies, as admitted by Mr. Shefsky, the Board of CGMI decided to turn to existing shareholders to try to raise these funds. There is no reason that Mr. Shefsky was entitled to prevent the corporation from offering additional shares to investors. The directors were entitled to make decisions in the best interests of the corporation, including raising additional capital, which may adversely affect the interests of particular stakeholders.

[45] Absent any evidence to the contrary, the timing, source and pricing of this financing was solely a matter of business judgment. We agree that a board of directors is entitled to substantial deference and we are loath to step into the discretionary purview of the Board absent any evidence which would lead us to a contrary view. We agree that based upon the unassailable findings of the chambers judge and our review of the record, the decision of the CGMI Board to engage in the Secret Private Placement was reasonable and entitled to judicial deference.

[46] Even if Mr. Shefsky and other shareholders had a claim for loss of value of their shares due to the Secret Private Placement, that claim belonged to the corporation. In ***Alvi v Misir*** (2004), 73 OR (3d) 566, 50 BLR (3d) 175 (SCJ), Cameron J. determined that a claim brought by shareholders for loss of value of their shares was a claim that belonged to the corporation. He stated at para 57 that directors cannot owe statutory fiduciary duties and duties of care to shareholders if they are already owed to the corporation without placing the directors in an intolerable conflict of interest

and explained that "[s]uch parallel duties would create untenable and unreasonable conflicts" that would render impossible the jobs of directors and officers.

[47] The Supreme Court of Canada has adopted a similar analysis in ***BCE*** at para 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 coincides 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.

[48] Put simply, Mr. Shefsky's interests in not having his shares diluted by the Secret Private Placement were not interests that the directors of the corporation were obliged to consider. In fact, Mr. Shefsky's sole interests were diametrically opposed to the interests of the corporation and its directors' attempts to raise additional funding for this junior mining company so that exploration could continue after Mr. Moeller's departure. Mr. Shefsky's only reasonable expectation in these circumstances was that the directors would act in the best interests of the corporation, and there is no evidence to suggest that they did not do so.

[49] Moreover, it was entirely reasonable and open to the Board of CGMI to reject the deal offered by Mr. Caland for reasons that were before the chambers judge as reflected in the minutes of the director's meeting of September 10, 2013. Notwithstanding the rejection of Mr. Caland's offer, there is further evidence upon which the chambers judge did decide that the CGMI Board was open to the possibility of both doing the Secret Private Placement and Mr. Caland's deal, but Mr. Shefsky indicated that the deals were mutually exclusive and that to accept Mr. Caland's offer would require rejection of the other financing.

[50] The chambers judge was not persuaded that the Board's purpose in approving the Secret Private Placement was to dilute Mr. Shefsky's ownership; rather, the chambers judge found that the Secret Private Placement was intended to raise money to replace the money that had been wasted on the improper exploration work done by the COO. Even if the effect was dilutive, Mr.

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Shefsky's only reasonable expectation was that the directors act in the best interests of the corporation, despite that so acting may not have coincided with Mr. Shefsky's personal interests. As ***BCE*** makes clear, the directors owe fiduciary obligations to the corporation only, and when particular shareholder interests do not coincide with the best interests of the corporation, the directors are nonetheless duty bound to protect the interests of the corporation above all else.

[51] Assuming that there was some evidence to support Mr. Shefsky's theory that the CGMI Board was acting to buttress the existing management slate of directors through the Secret Private Placement, contrary to Mr. Shefsky's personal interests, that is insufficient. Mr. Shefsky is required to prove that the Board's actions were contrary to the best interests of the corporation. Directors are entitled to consider who is seeking control and why. If the Board believes there will be substantial damage to the company's interests if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorized as improper: ***Teck Corp Ltd v Millar*** (1972), 33 DLR (3d) 288 at para 99, [1973] 2 WWR 385 (BCSC); ***Icahn Partners LP v Lions Gate Entertainment Corp***, 2011 BCCA 228 at para 83, 333 DLR (4th) 257.

[52] Accordingly, we see no reviewable error in the chambers judge's articulation and application of the binding law, or in his findings of fact or inferences drawn based upon the evidentiary record that was before him. This ground of appeal is dismissed.

> **Did the chambers judge err by concluding that the issue of Mr. Shefsky's reasonable expectation that he would be permitted to appoint a third director to the Board was moot because Mr. Shefsky did not propose a replacement nominee for Mr. Cohen?**

[53] The chambers judge did not find it necessary to decide whether Mr. Shefsky had a continuing right after the April 2013 annual meeting to appoint a third member to the Board of CGMI because Mr. Shefsky did not attempt to exercise this asserted right, and therefore any reasonable expectation he may have had in this regard was never breached.

[54] The appellants argue that it was an error for the chambers judge to rely on this narrow technicality, rather than considering all the circumstances of the alleged oppression. Moreover, the appellants contend that Mr. Shefsky did in fact nominate a third director to the Board, in a letter from his lawyer dated October 2, 2013. Implicit in their argument is the assumption that Mr. Shefsky had a continuing right to appoint a third member to the Board up until the January 2014 annual shareholders' meeting, when a different management slate of board members was elected.

[55] The respondents suggest that there are three fatal problems with the appellants' position:

(i) It mischaracterizes the reasonable expectation that was actually found by the chambers judge in this case;

(ii) Mr. Shefsky's expectations did not arise in his capacity as a shareholder, director, or officer of CGMI and therefore are not protected by the oppression remedy; and

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(iii) Mr. Shefsky's expectation, if it did exist, was not disregarded in an oppressive manner.

[56] Each of these contentions is addressed separately below.

(i) Mischaracterization of the reasonable expectation that was actually found by the chambers judge in this case

[57] The chambers judge found that Mr. Shefsky had not attempted to exercise his right to appoint a third member of the Board of CGMI. In April 2013, the slate of directors was duly elected by the shareholders, so the relevant period of time for complaint by Mr. Shefsky was between April 2013 and the January 2014 annual shareholders' meeting.

[58] Contrary to the appellants' suggestion, the chambers judge did not make a finding that Mr. Shefsky had a continuing right to appoint a third member to the Board up until the January 2014 annual shareholders' meeting. As noted above, the chambers judge found it unnecessary to decide this point, and the evidence does not support the appellants' position. Rather, the record shows that any reasonable expectation Mr. Shefsky may have had to appoint a third member to the Board was extinguished by the April 2013 annual meeting, because any expectation to control the composition of the Board past this date is inconsistent with the corporation's public statements, its statutory disclosure obligations, and the basic rights of its shareholders as a whole to choose the board of directors of their publicly-traded company.

[59] Prior to the April 2013 annual meeting, Mr. Shefsky had an opportunity to comment on the draft circular but did not propose any changes to the slate which listed Messrs. Shefsky, Brandolini, Churchill, Cronin and Cinq-Mars as the management slate of directors. Indeed, at the April 2013 meeting Mr. Shefsky voted for the slate nominated and set out in the circular.

[60] As the respondents point out, if there had in fact been an arrangement whereby Mr. Shefsky retained a unilateral power after the April 2013 shareholders' vote to compel one of the elected directors to resign in favor of an unidentified nominee of his choice, that would have been contrary to the voting shareholders' wishes and would be material information requiring disclosure in the circular. Failure to disclose would constitute an offence under s 122(1)(b) of the Ontario *Securities Act*, RSO 1990, c S-5, the commission of which would clearly not be in the corporation's best interests.

[61] Moreover, the Board has a fiduciary interest to act in the best interests of the corporation, which includes an obligation not to fetter its discretion absent a unanimous shareholders' agreement: ***820099 Ontario Inc v Harold E Ballard Ltd*** (1991), 3 BLR (2d) 113 at 123 at paras 102-103 (Ont Gen Div), aff'd (1991), 3 BLR (2d) 123 (Ont Div Ct). The expectation alleged by Mr. Shefsky is inconsistent with his own obligations as a director, and is not reasonable.

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(ii) Mr. Shefsky's expectations did not arise in his capacity as shareholder, director, or officer of CGMI and therefore are not protected by the oppression remedy

[62] The respondents suggest that there is doubt about the correctness of the chambers judge's analysis of Mr. Shefsky's alleged expectations arising from the Term Sheet.

[63] In particular, they submit that the chambers judge erred in principle in finding that the oppression remedy protects Mr. Shefsky's expectation to appoint Mr. Cohen (or his replacement), when that expectation arose in Mr. Shefsky's capacity as a financier or underwriter of CGMI, and not as a shareholder, officer or director.

[64] In this branch of their argument, the respondents note that the oppression remedy protects the interests of a "complainant" within the meaning of s 239(b) of the Alberta *Business Corporations Act*, which includes security holders, creditors, officers and directors. The statute does not protect the interests of those acting as financiers, underwriters or investment dealers for or on behalf of a corporation.

[65] Simply put, where harm is alleged to have been done to a complainant's interests in a capacity outside of the scope of s 239(b), the oppression remedy is not engaged so as to protect these interests outside the scope of the legislation: Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 265-267.

[66] In particular, ***Rogers Communications Inc v MacLean Hunter Ltd*** (1994), 2 CCLS 233 (Gen Div) makes clear that in a position *qua* bidder, relief cannot be obtained under the applicable legislation; rather, it is only in the position *qua* shareholder that there can be a claim of oppression. Looking at matters as a whole in that case, the court concluded that Rogers' complaint arose in its position as a bidder and not as a shareholder: ***Rogers*** at para 9.

[67] The same point is made by the British Columbia Supreme Court in ***Icahn Partners LP v Lions Gate Entertainment Corp***, 2010 BCSC 1547 at paras 179-83, 15 BCLR (5th) 132, aff'd 2011 BCCA 228, 333 DLR (4th) 257, and in ***Stahlke*** at para 23 where it stated: "The oppression remedy protects only the interests of a shareholder *qua* shareholder. Oppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation."

[68] We agree that Mr. Shefsky's reasonable expectation to appoint a third director found in the Term Sheet, or grounded in the various representations that were made by Mr. Churchill to Mr. Tomlinson, were not made by, or to, Mr. Shefsky in his capacity as a shareholder, director or officer of CGMI. We note that the initial version of the Term Sheet was signed on or about October 19, 2012, well before Mr. Shefsky became an officer (in December of 2012), a shareholder (in February of 2013) or a director (in April of 2013).

[69] We also agree with the respondents' contention that the October 19, 2012 Term Sheet – replaced by the December 12, 2012 Term Sheet but with no change to material terms – is simply a

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sui generis contract made between CGMI and Mr. Shefsky in his capacity as a potential financier, promoter or underwriter in relation to the $5,000,000-8,000,000 private placement to be arranged for CGMI.

[70] The respondents further argue that prospective shareholders do not have standing under the oppression remedy. The requirement that a complainant actually be a shareholder at the time of the oppression complained of is logical, since the question whether a complainant shareholder has sustainable grounds of oppression that brings the shareholder within the ambit of the oppression remedy "requires a time-related factual nexus between the complainant and the oppression complained of": ***Ford Motor Co of Canada Ltd v Ontario Municipal Employees Retirement Board*** (2004), 41 BLR (3d) 74 at para 246, [2004] OTC 53 (SCJ), rev'd (but not on this point) (2006), 263 DLR (4th) 450 (CA), leave to appeal to SCC refused (2006), 267 DLR (4th) ix.

[71] Although this is a legally correct proposition, we find that in October of 2012 Mr. Shefsky possessed a legal entitlement to acquire shares. He had acquired an option, a right of first refusal, to shares and his subscription (and that of other accredited investors) was to be reflected in a formal subscription agreement to be entered into prior to December of 2012. In other words, Mr. Shefsky's acceptance of the Term Sheet conferred upon him the right to perform confirmatory due diligence and exercise his option in respect of the "Issue", defined in the Term Sheet as "[p]rivate placement of units (each unit consisting of one common share . . . in the Capital of the Company and three-quarters one Common Share purchase warrant, each whole warrant . . . being exercisable for one Common Share) of the Corporation (the "Units") (together, the "Offering")" at a price of $0.10 per Unit.

[72] What the Term Sheet did not do, however, was confer upon Mr. Shefsky a right to enjoin any further share placements. Quite simply, an existing shareholder cannot complain about subsequent share offerings even if it has the effect of diluting that complaining shareholder's shares, provided the share offering is done in the best interests of the corporation. And, no shareholder has the right to acquire additional shares and no corporation is obliged to offer additional shares to existing shareholders. When a corporation offers its shares for sale, an individual can decide whether to accept the offer. But, it is not the case that a shareholder or putative shareholder can demand that shares be sold to him personally. There are good corporate business judgment reasons why a corporation may not, in fact, wish to sell shares to a certain individual or entity, either because of regulatory issues or because the directors do not believe that the putative purchaser's participation in the corporation would serve the best interests of the corporation. In this corporate exercise of business judgment, this Court will not and should not lightly interfere.

[73] We reject the respondents' assertion that because the Subscription Agreement contains an "entire agreement" clause that governs the relationship of Mr. Shefsky *qua* shareholder, the effect of the entire agreement clause is that it supersedes any prior understanding between Mr. Shefsky *qua* shareholder and CGMI. Since the Subscription Agreement does not contain any reference to

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the management provisions in the revised Term Sheet upon which Mr. Shefsky bases his claim, the respondents submit that is the end of the matter. We disagree. Similarly, we disagree that Mr. Shefsky's role as CEO, as governed by the terms of the Consulting Agreement between CGMI and 2350183 Ontario Inc, is a complete answer to Mr. Shefsky's oppression claim, despite that the Consulting Agreement also contains an "entire agreement" clause. Put another way, the fact that neither the Subscription Agreement nor Consulting Agreement contain a reference to any expectation or right on behalf of Mr. Shefsky to control the composition of CGMI's Board is not determinative. Rather, we must consider the entire context, not merely the discrete contracts made between the appellants and some of the respondents.

[74] The essential difficulty with Mr. Shefsky's invocation of the oppression remedy in respect of the Term Sheet, however, is that he attempts to gain access to the court's equitable oppression remedy jurisdiction for a *personal* claim that arises pursuant to the provisions of the Term Sheet: his *personal* claim for breach of contract. At its core, the Term Sheet is a commercial agreement negotiated at arm's-length by sophisticated parties. That commercial agreement must not be rewritten by a court importing notions of "just and equitable". It would be dangerous territory, indeed, and an improper conflation of contract law and equitable oppression principles to suggest that the latter can come to the aid of a claim for breach of any contractual promises made to Mr. Shefsky in his personal capacity. See, for example, ***JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd***, 2008 ONCA 183 at para 60, 234 OAC 59.

[75] The legal and jurisdictional boundaries which circumscribe, and delineate, resort to an oppression remedy must be firmly set. A party aggrieved, whether by having made an imprudent, or incomplete, or improvident personal bargain, cannot be permitted to seize an oppression remedy and, thus, gain an equitable remedy that was never in the contemplation of the contracting parties.

[76] In summary, Mr. Shefsky and 2350183 Ontario Inc's claims derivative of the provisions of the Term Sheet are contractual in nature. These claims fall outside the legal and jurisdictional boundaries of an oppression remedy.

(iii) Mr. Shefsky's reasonable expectation, if it did exist, was not disregarded in an oppressive manner

[77] Assuming the appellants had proven that their reasonable expectations were unmet, they must go farther to prove that those reasonable but unmet expectations were violated by conduct that falls within the terms 'oppression', 'unfair prejudice' or 'unfair disregard' of a relevant interest. This proposition is made abundantly clear in ***BCE*** at para 68. See also ***Rea v Wildeboer*** at paras 34-35.

[78] On appeal, the parties conceded that the chambers judge had articulated correctly the principles of law and, in particular, that he was required to consider the meaning of "oppression" and "unfair prejudice" and "unfair disregard".

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[79] In his decision at paras 76-77 the chambers judge correctly notes:

> [76] Oppression has been described as conduct that is "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" related to the conduct of the corporations affairs: "a wrong of the most serious sort" (at para 92). Unfair prejudice is conduct that is less serious than oppression, and includes such things as:
>
> > . . . squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm . . . (at para 93)
>
> [77] The Supreme Court went on to describe unfair disregard as the least serious of the three, and noted that it included favouring a director by failing to properly prosecute claims, improperly reducing dividends, or failing to deliver a claimant's property.

[80] The chambers judge found that the appellants had not met their persuasive burden of showing that they had suffered oppression, unfair prejudice or unfair disregard because Mr. Shefsky did not name a replacement, seek to call, or actually call a shareholders' meeting himself, or propose a different slate of directors. The appellants challenge the trial judge's finding in this regard on the basis of an October 2, 2013 letter from the appellants' lawyer to the respondents.

[81] A demand letter emanating from counsel's office does not amount to Mr. Shefsky naming a replacement, seeking to call, or actually calling a shareholders' meeting himself, nor does it equate to Mr. Shefsky proposing a different slate of directors. The October 2, 2013 letter from WeirFoulds says as follows:

> Mr. Shefsky demands:
>
> (a) that one of Michael Churchill, Kevin Cinq-Mars or Patrick Cronin immediately resigns from the board so that his place can be taken by Charlie Cohen who is prepared to accept the nomination; and
>
> (b) that the September Placement be immediately unwound.

[82] After making the demands cited, the letter abruptly concludes: "If we have not received a positive response by October 11, 2013 our client intends to commence immediate legal proceedings against you, and to seek any appropriate injunction or mandatory order."

[83] The reader of the demand letter would appreciate that the demand to replace one of the duly elected directors within 9 days, without any notice or regard to the shareholders of the corporation, would expose the corporation to significant jeopardy. The law requires that all shareholders be notified of material information. Mr. Shefsky's assertion of a right to appoint a third director was certainly material information. The demand letter from the lawyer was not copied to all other shareholders; thus, it cannot in any sense amount to notification that would have satisfied the reasonable expectations of the other shareholders, which may not have comported with Mr. Shefsky's personal interests, or with the best interests of the corporation.

[84] We find that the demand letter does not meet the requisite degree of proof required of Mr. Shefsky to meet his burden of controverting evidence on the record that he did not – within the corporate governance structure – name a replacement, seek to call, or actually call a shareholders' meeting, or propose a different slate of directors. Compliance with that which was demanded, within a 9-day period, would not have been in the best interests of CGMI.

[85] We conclude that the October 2, 2013 letter is not an exercise of Mr. Shefsky's right to appoint a third member of the Board of Directors, nor is it sufficient evidence to controvert the chambers judge's finding that Mr. Shefsky took no steps to appoint a third director. Further, there is no evidence that Mr. Shefsky's expectation that he could appoint a third director to the Board was violated in a manner that was oppressive, unfairly prejudicial, or that unfairly disregarded his protected interests.

Conclusion

[86] In conclusion, and for the foregoing reasons, the appeal is dismissed.

Appeal heard on February 5, 2016

Memorandum filed at Edmonton, Alberta
this 14th day of April, 2016

Costigan J.A.

Schutz J.A.

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Dissenting Memorandum of Judgment
of the Honourable Mr. Justice Slatter

[87] The issue on this appeal is whether the appellants Shefsky and 2350183 Ontario Inc. are entitled to a remedy for oppressive conduct arising from the way the business of California Gold Mining Inc. was conducted.

Facts

[88] California Gold Mining is a junior mining company listed on the TSX-Venture Exchange. In 2012 it was managed and controlled by its president and CEO, Michael Churchill; its chairman Patrick Cronin; a director, Kevin Cinq-Mars; a major shareholder, R.W. Tomlinson; and other associates of theirs. This original group can conveniently be described as the "Incumbent Group".

[89] California Gold Mining had unsuccessfully attempted to raise money to purchase a gold mining property in Mariposa County, California. The company's financial advisor, Haywood Securities, introduced Shefsky as a person who might be able to assist in raising the necessary funds.

[90] In October 2012, California Gold Mining and Shefsky signed a Term Sheet respecting the raising of funds to purchase the Mariposa property. The essential terms were that Shefsky would attempt to raise between $5 million and $8 million via a private placement of shares by November 30, 2012. If he was successful, certain changes would be made to the management structure of the company:

- two existing board members would resign in favour of Shefsky and his nominee, Charlie Cohen;
- Nuno Bandolini, another ally of the appellants, would be appointed to the board, provided he invested at least $100,000;
- Churchill would resign as CEO, but remain as president, and Shefsky would be appointed as CEO;
- the Chief Operating Officer would resign in favour of Eric Moeller.

The expectation was that Shefsky would nominate three members of a five-person board, and Shefsky and Moeller would essentially control the day-to-day operations: reasons, para. 105.

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[91] Shefsky was unable to raise the funds by the original deadline of November 30, 2012, and the deadline was extended to December 31. All of the money was actually raised by February, 2013, when the private placement closed. The chambers judge found that nobody involved considered time to be "of the essence", and all were content that the funds were actually raised. There was ample evidence about the words and conduct of the parties to support the inference that Shefsky had complied with the fundraising pre-conditions of the Term Sheet.

[92] At some point a dispute arose as to whether Shefsky was entitled to credit for all of the $5 million raised. It was suggested that Shefsky was not entitled to credit for subscriptions from incumbent shareholders, or subscriptions that had been solicited by other members of the Board, or for units given to Haywood Securities for services rendered. Shefsky took the position that he had raised $5 million, or alternatively that the Term Sheet merely required that $5 million be raised for the private placement, regardless of the exact motivation for any specific investment. It is unclear whether this issue was only raised later, after the eventual falling out of the various groups. The chambers judge found (reasons, paras. 60, 102-3) ". . . it was objectively reasonable for Shefsky to conclude that his obligations under the Term Sheet had been met . . .".

[93] However, once Shefsky had raised the necessary funds, there was some resistance among the Incumbent Group to the agreed changes to the Board. None of the incumbents were keen to resign, and the suggestion was made that the deal had "morphed significantly" from what was originally contemplated. Further, Cohen was unexpectedly unable to serve on the Board, and Shefsky could not immediately find a replacement. There were various discussions about the final makeup of the Board, with Shefsky continuing to assert his right to nominate three members of a five-person board.

[94] In March 2013, when the time came to send out the management information circular for the April Annual General Meeting, Shefsky had still not identified a replacement for Cohen. As a result, the slate of directors proposed by management was Churchill, Shefsky, Bandolini, Cronin and Cinq-Mars. The appellants voted in favour of that slate. As a result, the appellants cannot complain that the election of these directors was in any way oppressive. On the other hand the record does not support an inference that Shefsky had abandoned his long-term right to appoint three members of a five-member board. The chambers judge declined to make a finding of fact about whether there were conversations about one board member resigning when a replacement for Cohen was identified: reasons, para. 36.

[95] Problems in the relationship started to appear. None of the incumbent directors was eager or willing to resign in favour of Shefsky's nominee. Moeller was terminated in July, allegedly for shortcomings in the performance of his work. Shefsky had some concerns about his own employment contract. There was evidence on the record that Shefsky continued to raise the topic of calling another shareholders meeting to restructure the composition of the Board.

[96] Matters came to a head in August of 2013. California Gold Mining's lawyers were instructed to file a price reservation with the TSX-V for a private placement with a share price of

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$0.05. This was below both the recent trading range and the book value of the company. At the Board meeting on August 21, 2013, Churchill made a general statement about seeking financing in the short term. Shefsky again expressed a desire to call a shareholders meeting to reconstitute the Board. Churchill approached the Incumbent Group and its supporters to subscribe to a proposed new private placement. The appellants were neither informed of the impending private placement, nor were they invited to participate. On September 9, 2013, a notice was sent to the Board members indicating that a vote would be held the next day to authorize the private placement, which by this point had been fully subscribed. This was the first time that Shefsky and Bandolini became aware of what they accurately describe as the Secret Private Placement.

[97] The Secret Private Placement contemplated the issuance of 15,860,000 units at $0.05 a unit, for gross proceeds to California Gold Mining of $793,000. Shefsky immediately contacted Pierre Caland, an investor, and persuaded him to finance a competing private placement. Within 48 hours, Shefsky was able to present to the Board a "Bought Deal" which contemplated the issuance of about 14,286,000 units at $0.07 a unit, for gross proceeds to California Gold Mining of approximately $1 million. In other words, the Bought Deal generated more capital for the company, through less dilution of the shareholdings.

[98] The Board raised a number of technical objections to the Bought Deal. It refused even a 48-hour adjournment of the meeting to allow Shefsky to address some of their concerns. The Secret Private Placement was approved, thereby diluting the shareholdings of the appellants and their supporters. The next week, Cinq-Mars proposed an equivalent private placement for the appellants' supporters in the sum of $793,000. Churchill, however, would not permit a further private placement for any more than $304,454. That obviously would not neutralize the dilution resulting from the Secret Private Placement. That, combined with the apparent repudiation of the overall arrangement in the Term Sheet by the Incumbent Group, caused Shefsky to decline the offer. Given all that had happened, it was now abundantly clear that the Incumbent Group was not going to implement the provisions of the Term Sheet which would have given Shefsky control of the Board.

[99] The appellants then commenced this litigation, alleging that the affairs of California Gold Mining had been conducted in an oppressive manner that unfairly disregarded their interests.

The Reasons of the Chambers Judge

[100] After reviewing the evidence and the facts, and stating the law with respect to oppression, the chambers judge identified the following issues:

1. What reasonable expectations are alleged by Shefsky? The chambers judge concluded at para. 79 that the applicants had asserted three:

    a. The Term Sheet would be honoured;

b. Shefsky would be permitted to appoint a director to replace Cohen; and

c. Shefsky would have control of California Gold Mining.

2. Were these expectations reasonable?

   a. The Term Sheet

      (i) Did Shefsky meet the deadline? If not, was there conduct that could have led Shefsky to a reasonable expectation that the deadline in the Term Sheet was extended?

      (ii) Did Shefsky reach the goal of $5 million in subscriptions?

   b. Appointment of a director to replace Cohen

      (i) Did Shefsky have a reasonable expectation that he could nominate a third director when Cohen refused the nomination?

      (ii) Were Shefsky's reasonable expectations regarding Board nominations breached?

   c. The expectation of control.

3. If any reasonable expectations were breached, did any actions of the respondents constitute oppressive conduct?

4. If oppressive conduct was found, what is the appropriate remedy?

In summary, the chambers judge found (reasons at para. 127) that the applicants had established the first two reasonable expectations: that the Term Sheet would be honoured, and that Shefsky would be allowed to appoint a third member to the Board. The chambers judge concluded, however, that those two expectations were not violated. He found that the third expectation, that of "retaining control", was not reasonable, because Shefsky never had control.

[101] The chambers judge found that the first expectation, respecting the honouring of the Term Sheet, was established on the record. Even considering the dispute about who brought in some of the subscribers, Shefsky could reasonably expect that he had met his obligation of raising $5 million: reasons at para. 103. The record showed that the parties did not regard time as being "of the essence", and the fact that a small amount of the money was raised after December 31 was not significant.

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[102] With respect to the second expectation, the chambers judge found that Shefsky had a reasonable expectation that he could appoint a third member to the Board. He was not limited to appointing only Cohen, and Shefsky was entitled to find a replacement when Cohen was unable to accept the appointment: reasons at para. 108. However, this expectation was not breached. Shefsky voted for the slate in the 2013 management circular, and never thereafter named a replacement director: reasons at para. 114. Whether one of the existing directors would have resigned in favour of this nominee was therefore moot. Further, Shefsky did not prove that if he had nominated a replacement, a majority of the shareholders would have elected that nominee.

[103] The chambers judge found that the third expectation, that Shefsky would retain control of the Board, was not reasonable since he never had control to start with. Shefsky had not brought forward affidavits from a majority of the shareholders indicating that they would vote for him, an absence of evidence that the chambers judge found to be fatal: reasons at paras. 119, 123, 126. Thus, any expectation that Shefsky had about control was unreasonable.

[104] Given these conclusions, it was not necessary for the chambers judge to decide the third issue (whether any of the conduct was oppressive) nor the fourth issue (the appropriate remedy): reasons at para. 127.

Issues and Standards of Review

[105] The formulation of the core standards of review is set out in ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235:

(a) conclusions on issues of law are reviewed for correctness: ***Housen*** para. 8,

(b) findings of fact, including inferences drawn from the facts are reviewed for palpable and overriding error: ***Housen*** paras. 10, 23; ***H.L. v Canada (Attorney General)***, 2005 SCC 25 at para. 74, [2005] 1 SCR 401, and

(c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": ***Housen*** para. 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*** paras. 33, 36.

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

[106] The appellants allege a number of errors. Firstly they argue that the chambers judge mischaracterized the third complaint as being limited to "a reasonable expectation of control". They argue that in the whole context, they had a reasonable expectation that the Incumbent Group

would not proceed with the Secret Private Placement, which itself was an oppressive act that unfairly disregarded their interests. This issue engages a mixed question of fact and law. The facts surrounding the Secret Private Placement are not materially in dispute; the remaining issue is whether they can reasonably amount in law to oppressive conduct.

[107] Secondly, error is alleged in the finding that any question about the reasonable expectation of nominating three directors out of five was moot. This is essentially a finding of fact.

[108] Thirdly, it is alleged that the chambers judge erred in requiring that the appellants bring forth direct evidence from shareholders that they would support Shefsky by voting their shares as he recommended. This is primarily a question of the weight of the evidence, which is only reviewable for palpable and overriding error.

The State of the Record

[109] The chambers judge unfortunately declined to make key findings of fact on some issues. He concluded that the law prevents a chambers judge from making findings on disputed evidence. He thus decided at para. 6 to resolve contested factual issues only "on reasonable inferences which can be drawn from uncontested facts, objective evidence, and the conduct of the parties." The reluctance of the chambers judge to draw inferences from the evidence before him leaves gaps in the record that require the necessary inferences to be drawn on appeal.

[110] There are admittedly cases that point out the dangers of attempting to resolve disputed issues, especially those that rely on findings of credibility, based on conflicting affidavits and documents that would support either party's position. An example is ***Charles v Young***, 2014 ABCA 200 at para. 4, in which the chambers judge attempted to decide whether the respondent was the adult interdependent partner of the deceased. But the record before the court will never be perfect or complete, even after a trial. Not every conflict in the evidence precludes the chambers judge from drawing inferences from the admitted facts, the disputed evidence, the conduct of the parties, and the corroborating evidence (such as documents with objective reliability).

[111] ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87, a summary judgment case, pointed out the need to make greater use of summary procedures for deciding disputes. Rules that saw the trial as a default method of proving disputed facts should be moderated:

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

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

[112] The cases where it was impossible to resolve disputed factual issues in chambers tend to be more extreme. One category is cases that depend almost entirely on credibility, without any collateral documentation to support either side: ***Nieuwesteeg v Barron***, 2009 ABCA 235 at paras. 9-10, 460 AR 329; ***Haluschak v Stokowski*** (1990), 104 AR 10 at paras. 23-25, 39 CPC (2d) 8 (Master). In these cases, sometimes there has not even been cross-examination on the affidavits: ***Montgomery v Riviere***, [1989] AJ No 958 (CA); ***Guimond v Sornberger*** (1980), 25 AR 18 at para. 20, 13 Alta LR (2d) 228 (CA); ***Burton v Burton*** (1987), 84 AR 338 at para. 15, 12 RFL (3d) 113 (CA). As another example, in ***Schmidt v Wood***, 2013 ABCA 138, which involved an application for contempt, it could not be seen from the record with clarity what the underlying order actually required, never mind whether the respondent had complied. Some issues are particularly unsuited to resolution on a paper record: ***Achtem v McConnell***, [1986] AJ No 207 (CA) (the *bona fides* of a party); ***Barter v Barter*** (1996), 42 Alta LR (3d) 221 at para. 8 (CA) (best interests of a child with special medical needs).

[113] Not every piece of disputed evidence requires a trial. For example, a "bare denial" or bald allegation does not raise a triable issue: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para. 11, [2008] 1 SCR 372; ***Goldman v Devine***, 2007 ONCA 301 at para. 23; ***R. Floden Services Ltd. v Solomon***, 2015 ABQB 450 at para. 23, 24 Alta LR (6th) 76; ***Confederation Trust Co. v Alizadeh***, [1998] OJ No 408 (QL) (Gen Div). Nor does a self-serving affidavit unsupported by other evidence: ***Guarantee Co. of North America v Gordon Capital Corp.***, [1999] 3 SCR 423 at pp. 436-37. Nor does evidence that flies in the face of the balance of the record: ***Dagher v Glenn***, 2016 ABCA 38 at paras. 30-2; ***Pioneer Exploration Inc. (Trustee of) v Euro-Am Pacific Enterprises Ltd.***, 2003 ABCA 298 at para. 25-6, 27 Alta LR (4th) 62; ***Rogers Cable TV Ltd. v 373041 Ontario Ltd.*** (1994), 22 OR (3d) 25 (Gen Div); ***Klein v Wolbeck***, 2016 ABQB 28 at para. 26; ***Pizza Pizza Ltd. v Gillespie*** (1990), 75 OR (2d) 225 at p. 253 (Gen Div). Whether there is truly a "genuine issue requiring resolution at a trial" requires a nuanced balancing of the weight and perceived reliability of the evidence, the importance of the issue, the likelihood of there being a better record at trial, and any other relevant considerations.

[114] Where the parties decide, for whatever reason, that they do not wish to suffer the expense or delay of a full trial, a chambers judge should still attempt to resolve the dispute, if possible. It is important to note that the *Business Corporations Act*, RSA 2000, c. B-9, contemplates that oppression disputes will be decided "on application". Section 242(3)(p) includes as a possible remedy "an order requiring the trial of any issue", which demonstrates that a trial is not the presumptive forum for oppression litigation. Rigid rules preventing the reconciliation of inconsistent evidence in a chambers setting are inconsistent with this approach.

[115] As the chambers judge noted at para. 9:

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> 9 In this case, the parties chose a chambers procedure, knowing the limitations of affidavit evidence and aware of the implications of such a decision. It is appropriate, then, to decide the issues that I can, based on the best available evidence before me.

This is the proper approach, but it should not be constrained by artificial or formalistic rules stating that any issue of fact disputed on the record cannot be resolved in chambers. As noted in ***Windsor v Canadian Pacific Railway Ltd.***, 2014 ABCA 108 at para. 15, 94 Alta LR (5th) 301: "Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication."

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The Oppression Remedy

[116] The *Business Corporations Act* provides a remedy to any "complainant" (defined to include any security holder, creditor, director, officer or "other proper person") who has been the subject of oppressive conduct with respect to the business of the corporation. The scope of the remedy is provided in s. 242(2):

> (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.

This statutory remedy has been described as extending beyond strict legal rights to encompass "not just what is legal but what is fair . . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities": ***BCE Inc. v 6796508 Canada Inc.***, 2008 SCC 69 at para. 58, [2008] 3 SCR 560. The three types of conduct mentioned in s. 242(2) are not mutually exclusive and should be read in combination: ***BCE*** at para. 89.

[117] ***BCE*** at para. 68 outlines a two-step process for the analysis:

(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?

Once these two initial conditions are satisfied, the applicant must still go on to establish wrongful conduct, causation, and compensable injury: ***BCE*** at para. 90.

[118] The first part of the analysis is factually and contextually driven:

> 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 relationships at play. Conduct that may be oppressive in one situation may not be in another. . . .
>
> 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.

Again, the assessment of the "reasonable expectations" is driven by the context and business realities, not merely by the strict legal rights and relationships existing between the parties.

[119] There is no strict legal constraint on what can generate reasonable expectations. ***BCE*** listed some factors that might commonly be in play:

> 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.

Reasonable expectations may also arise from the dealings and relationships of the parties, and from the way the corporation was operated.

[120] However, not every disappointed expectation will be oppressive:

> 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

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> 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*.

It is thus necessary for the applicant to prove that the challenged conduct was oppressive, or unfairly prejudicial to it, or unfairly disregarded its interests.

[121] It is not suggested on appeal that the chambers judge erred in his statement of the law of oppression. The alleged errors arise primarily from the way the law was applied to the facts.

Status of the Appellants

[122] The respondents argue that the *Act* only gives rights to "complainants" and that the appellants' complaints arise in another context. Complainants are defined to include any security holder, creditor, director, officer or "other proper person". The appellants are clearly security holders, and Shefsky was a director and officer. It is sufficient that their status arose as a result of the Term Sheet; it matters not that Shefsky was not a director when the Term Sheet was signed, because the oppressive conduct occurred later. Given the conduct of the Incumbent Group in entering into the Term Sheet, it would be artificial to think that the appellants are not also "other proper persons" for the purposes of the oppression remedies.

[123] The respondents argue, however, that the dispute does not arise out of Shefsky's status as a shareholder, director, or officer. Rather, they argue that the complaints of oppression arise in his capacity as a financier or underwriter, which does not entitle him to oppression remedies. In support of this argument, the respondents cite ***Rogers Communications Inc. v Maclean Hunter Ltd.*** (1994), 2 CCLS 233 at para. 9; ***Stahlke v Stanfield*** , 2010 BCSC 142 at para. 23; and ***Icahn Partners LP v Lions Gate Entertainment Corp.***, 2010 BCSC 1547 at paras. 182-3, 75 BLR (4th) 212 affirmed other grounds 2011 BCCA 228 at para. 89. Those cases are, however, distinguishable; while the applicants were shareholders, the complaints they made did not arise out of their status as shareholders, but rather out of collateral contracts or relationships.

[124] Allegations of oppression will generally arise against a background of other legal rights. There will frequently be contractual relationships between the various parties. Further, there are

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always corporate law rights in play, some of which are loosely analogous to contractual rights. It is generally not oppressive for a party to rely on clear contractual rights, unless they are asserted entirely out of proportion to the reasonable expectations of the parties. If the real complaint is a breach of contract, it should be pursued as such, and not under the guise of an oppression claim: ***Stahlke*** at para. 23. "Reasonable expectations", however, can arise from a background of contractual rights, and can also arise absent any specific contractual right. In this case the expectations of the appellants arose primarily as a result of the terms of the Term Sheet, combined with rights arising from the law of corporations. There were also contractual relationships between the parties, but they were primarily in place to implement the understandings set out in the Term Sheet.

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[125] It is difficult to regard the Term Sheet as being merely a contract. The only parties to it were California Gold Mining and Shefsky, yet the expectations it created required the cooperation of other parties. Many of the things outlined in the Term Sheet were beyond the practical power of the corporation, for example, the composition of its own board. As another example, it contemplated that one or more of the sitting directors would resign in favour of Shefsky's nominees. Given the reality of "shareholder democracy", the Term Sheet contemplated others (such as the Incumbent Group) voting their shares in ways that would make possible the realization of the reasonable expectations it created. Whatever its contractual content, the Term Sheet was equally important in creating reasonable expectations that could be relied on by the appellants once they became shareholders and Shefsky became a director and officer.

[126] Further, describing Shefsky as merely an underwriter or financier does not accurately describe his role. It is true that he was to raise a certain amount of money for California Gold Mining, but that was only the precondition to him taking a larger role. In addition to becoming a shareholder, Shefsky was to become the Chief Executive Officer, a board member, and was also to have a control of the appointment of the Board. The expectations thus created went well beyond what he might have had as a mere financier.

[127] Given the factual context, and having regard to the particular allegations and complaints being made by the appellants, they are properly regarded as being complainants, and the allegations that they make are properly characterized as complaints about oppressive corporate conduct.

The Expectation of Control

[128] The chambers judge found that Shefsky had met the requirement of raising $5 million in capital, which created a reasonable expectation that the provisions of the Term Sheet would be honoured. That in turn created an expectation that Shefsky could nominate three directors, but this issue was said to be moot because Shefsky never purported to name a third director. Finally, the chambers judge found that the Shefsky's expectation of "control" was unreasonable because the appellants never had control.

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[129] The appellants argue that the chambers judge defined the alleged scope of the oppressive conduct too narrowly. They argue that the expectation of control went well beyond demonstrating that they could prove a majority of the shareholders would vote as Shefsky recommended. Further, the chambers judge erred in concluding that Shefsky had never nominated a replacement director. The respondents argue that any expectation of control was unreasonable because, at the end of the day, the shareholders control who will be elected as a director.

[130] On this issue it is important to highlight what is not in dispute. Neither side disputes the concept of "shareholder democracy". It is not disputed that only the shareholders can elect the directors. It is thus artificial to characterize Shefsky's asserted expectation of "control", as an expectation that he could override shareholder democracy. His expectations could, however, encompass:

(a) an agreement by the Incumbent Group that they would vote their shares with the appellants in such a way that they could maximize their chances of obtaining control of the Board,

(b) an understanding that Shefsky would never have to concern himself with "winning a proxy fight", because the Incumbent Group agreed that they would vote to elect his three nominees; there would never be a proxy fight, and

(c) the business reality that if Shefsky had control of the Board he could effectively control the management nominees for directors.

The chambers judge's description of the appellants' expectation as centering around whether they could "maintain control" artificially characterizes what was alleged, and sets up an expectation that would be impossible to achieve. It focusses on "narrow legalities" rather than "business realities": ***BCE*** at para. 58.

[131] Further, in the context of an oppression action, "shareholder democracy" is not an absolute. The *Business Corporations Act* allows the Court to order several remedies that are inconsistent with a strict view of shareholder democracy. Thus, the Court can amend the articles or bylaws, appoint additional or replacement directors, and make other corporate changes that usually require shareholder approval. The respondents' artificial reliance on the concept of "shareholder democracy" to justify their oppressive conduct is unsupported by the statute. The statute makes it clear that "shareholder democracy" is not a trump card that always overrides reasonable expectations.

[132] The chambers judge also set an unreasonably high evidentiary standard. The appellant filed affidavits from a few key investors indicating that they had invested because of the appellant's involvement. The chambers judge would not, however, draw an inference that they would have voted as Shefsky recommended. The chambers judge would not accept that Shefsky could have ensured the election of his nominees because he had not brought forward affidavits from all of

those who subscribed for units at his invitation indicating that they would support him. The suggestion that such affidavits would be required from every shareholder sets an artificially high evidentiary standard that could never be met for a publicly traded company.

[133] In any event, the only reasonable inference is that many, if not all who subscribed for units at Shefsky's invitation had a considerable measure of confidence in him, which they demonstrated by writing cheques for units. Absent some noticeable change of circumstances, it is unreasonable to infer that they would have abandoned support for him in favour of the Incumbent Group. Any findings and inferences to the contrary represent palpable and overriding errors.

[134] Further, as noted the chambers judge ignored the business realities. Churchill acknowledged that the "shareholders had never voted against the slate of directors proposed by management": reasons, para. 15. If Shefsky had control of the Board, he controlled the management slate. Further, the Term Sheet implied that the Incumbent Group would vote their shares to support Shefsky's nominees, or at the very least they would not obstruct the process. The finding that the appellants had not proven an ability to control the Board is inconsistent with the finding that they had a legitimate expectation that the Term Sheet would be honoured. The chambers judge's refusal to draw the inference that the board of a company could be controlled notwithstanding the concept of "shareholder democracy" was unreasonable. The only reasonable inference is that if the appellants and the Incumbent Group had joined together to nominate and then vote for a particular slate, that slate would undoubtedly have been elected.

[135] It is also unreasonable to interpret the Term Sheet as only creating reasonable expectations about control of the Board until the next shareholders meeting. Gold mining is not a short-term enterprise. There is nothing in the Term Sheet to suggest that Shefsky's control of the Board would end only a few months after he raised the $5 million. The Term Sheet in fact specifies that Shefsky's initial term as Chief Executive Officer would be for 36 months. The respondents argue that because of "shareholder democracy" no one could guarantee the composition of the Board beyond the next shareholders meeting. As previously discussed, that is an artificial argument and no answer to Shefsky's reasonable expectations that he would have control of the Board, with the support of the Incumbent Group at least in the medium term.

[136] The appellants argue that their reasonable expectation that Shefsky could nominate a third member of the Board was well-established on this record, and that this issue was not moot.

[137] The essence of the arrangement in the Term Sheet was that Shefsky would be able to nominate three members of a five-person board. The Term Sheet specifically provides that if the $5 million was raised "two of the existing members of the board of the Company shall resign in favour of Martin Shefsky and Charlie Cohen". The essential business arrangement was control of the Board, and it is unreasonable to interpret the Term Sheet as meaning that Shefsky could only nominate the two candidates specifically named. If (as it turned out) one of them could not act, or if one commenced to serve but had to resign, the only commercially reasonable interpretation is that Shefsky could nominate qualified replacements: reasons, paras. 107-8. Indeed, the record does

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not appear to disclose that the respondents ever asserted otherwise. Further, it must be implicit in this arrangement that incumbent directors would resign in order to make place for Shefsky's nominee; in any event the Term Sheet says so explicitly.

[138] The chambers judge concluded at para. 114 that the refusal of any members of the Incumbent Group to resign was a "red herring and moot" because Shefsky "did not name a replacement, seek to call, or actually call a shareholders meeting himself". This fact finding and inference are surprising, as all the objective evidence on the record discloses that Shefsky was persistently asserting his right to nominate three members of a five-member board. On several occasions he proposed calling a shareholders meeting, but was rebuffed. On October 2, 2013 the appellants' counsel wrote a letter demanding that one of the Incumbent Group's directors "immediately resign from the board so that his place can be taken by Charlie Cohen who is prepared to accept the nomination". The chambers judge appears to have overlooked this evidence.

[139] The appellants are justified in arguing that the findings on this point represent palpable and overriding error. Shefsky did nominate a third director, and none of the incumbent directors resigned as specifically required by the Term Sheet, which further defeated a reasonable expectation of the appellants.

[140] In summary, the appellants have demonstrated palpable and overriding error with respect to the expectation of control. The conclusion that Shefsky could not prove potential control arose only because an impossible and unreasonable standard of proof was set. Further, the chambers judge's failure to draw the inference that Shefsky, once in control of the Board, could effectively control the election of directors, reflects palpable and overriding error. The finding that Shefsky never nominated a third director reflects a reviewable error of fact; the letter of October 2, 2013 proves that he did do so no later than then. The failure of one of the incumbent directors to resign to make room for Shefsky's nomination reflected a clear breach of the Term Sheet and the expectation that it would be honoured.

Was the Conduct Oppressive?

[141] ***BCE*** confirms that it is not sufficient for a complainant to prove a breach of a reasonable expectation. The complainant must also show that the offending conduct falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest.

[142] The Secret Private Placement unfairly disregarded the appellants' interests and was prejudicial to them, making it oppressive. The primary reason it unfairly disregarded the appellants' interests was that it was in direct breach of the Term Sheet. As the chambers judge found, once Shefsky had raised $5 million, he had a reasonable expectation that the Term Sheet would be honoured. Not only did the Secret Private Placement dilute the shareholdings of the company, it was part of an overall pattern of conduct by the Incumbent Group that demonstrated their repudiation of the Term Sheet.

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[143] No later than at the time of the Secret Private Placement, it became apparent that the Incumbent Group had no further intention of respecting the provisions of the Term Sheet. It may well be that the conditions of the financing had "morphed significantly", but that did not justify secret, unilateral steps by the Incumbent Group to change the agreement. At this point, Shefsky had completely performed his side of the deal; he had raised the $5 million that California Gold Mining needed to buy the Mariposa property. It was unfair and oppressive for the Incumbent Group to aspire to enjoy the benefits of Shefsky's performance of the Term Sheet, while not performing their reciprocal obligations under it.

[144] The inference is clear that the Incumbent Group was not motivated to perform its obligations under the Term Sheet. It appears that in some quarters there was a lack of enthusiasm from the very beginning for the concept of giving Shefsky control of the company. There was also the view that the capital structure had "morphed" from what was originally envisioned. The Incumbent Group was not disposed to perform its obligations under the Term Sheet, and persistently resisted or deflected attempts by Shefsky to call a shareholders meeting or to appoint a third member to the Board. They seized on the idea, rejected by the chambers judge, that Shefsky had not performed his obligations under the Term Sheet.

[145] There are further aspects of the Secret Private Placement which demonstrate that it unfairly disregarded the appellants' rights. Its very secrecy was objectionable, as was the appellants' exclusion from the opportunity to subscribe to shares. It was only offered to supporters of the Incumbent Group, not to the shareholders as a whole. It was done on very short notice, without opportunity for any amendment or mitigation. For the purposes of the oppression analysis, another important distinction between the Bought Deal and the Secret Private Placement is that the former was consistent with the Term Sheet, which stipulated that Shefsky would retain control, whereas the latter was inconsistent with that agreement.

[146] Further, the Secret Private Placement was oppressive because it was not in the best interests of the corporation. The Secret Private Placement contemplated the issuance of 15,860,000 units at $0.05 a unit, for gross proceeds to the California Gold Mining of $793,000. At the time, the shares were trading at about $0.07 each, and the book value was higher than that. The Bought Deal contemplated the issuance of about 14,286,000 units at $0.07 a unit, for gross proceeds of approximately $1 million. In other words, the Bought Deal generated more capital for the company through less dilution of the shareholdings. While the directors of a company are entitled to act in what they consider to be in the best interests of the company, it is impossible to rationalize how the Secret Private Placement could possibly have been the better deal.

[147] The respondents argue that it is neither unusual nor improper for a junior mining company to want to raise additional capital. That is not the issue. No one doubts that any junior mining company can benefit from more capital. That, however, does not justify oppressive methods of raising that capital.

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[148] It also unfairly disregards the interests of the shareholders if the Board acts in its own best interest, rather than in the interests of the corporation: ***Legion Oils Ltd v Barron*** (1956), 2 DLR (2d) 505 at p. 516 [33], 17 WWR 209 (Alta SC, TD); ***Noble v Keho Holdings Ltd***, 1987 ABCA 84 at para. 38, 52 Alta LR (2d) 195. While the courts defer to the reasonable business judgment of the directors, no reasonable justification for the Secret Private Placement has been advanced. The respondents cite ***Teck Corp Ltd. v Millar***, [1973] 2 WWR 385 at p. 413 (BCSC) for the proposition that it may sometimes be acceptable for the directors to act to retain control of the corporation:

> My own view is that the directors ought to be allowed to consider who is seeking control and why. If they believe that there will be substantial damage to the company's interests if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorized as improper.

Having expressly agreed in the Term Sheet to voluntarily give control of the company to Shefsky, the Incumbent Group can hardly argue that there was anything contrary to the interests of the company in that change of control. The Secret Private Placement was undoubtedly better for the Incumbent Group, but it cannot reasonably be said to have been in the best interest of the company.

Justification for the Oppressive Conduct

[149] While ***BCE*** makes it clear that corporate oppression is as much concerned with equitable expectations as it is with strict legal rights, the respondents' frequent response to the appellants' claims is that they are inconsistent with strict legal rules.

[150] For example, the respondents argue that after the Term Sheet was signed, the appellants subscribed to shares using a standard form subscription agreement. That agreement had a "whole agreement" clause that disclaimed any prior representations or covenants. Thus, the respondents argue, the subscription agreement overtook the Term Sheet, and at that point any of Shefsky's expectations arising from it expired. This is a completely technical and artificial argument. It was obvious that the arrangements in the Term Sheet would not become operational until after the $5 million private placement had been successfully completed. If that was the true meaning of the whole agreement clause, Shefsky would never be entitled to become Chief Executive Officer, or to nominate three out of five directors; the entire Term Sheet would become meaningless. This proposition is simply unreasonable. The whole agreement clause in the subscription agreement must mean that there were no prior surviving representations representing the subscription itself, not representing other agreements relating to the operation of the company.

[151] Another example of this technical response is the respondents' reliance on artificial and technical concepts of "shareholder democracy", as previously discussed.

[152] The respondents justify the Board's refusal of the Bought Deal in favour of the Secret Private Placement on other technical grounds. For example:

(a) the respondents reply that the Bought Deal, as proposed, was not compliant with the securities regulations because Caland was not licensed to engage in underwriting. That is undoubtedly so, but that does not mean that the Bought Deal could not have easily been made compliant, for example by enlisting Haywood Securities as the underwriter;

(b) the respondents also allege that the Bought Deal required shareholder approval because it would result in Caland owning more than 20% of the shares. That presupposes that Caland was going to retain control of that entire block, whereas the concept of a "bought deal" is that the underwriter will sell the shares to numerous investors. Indeed, the minutes of the Directors' meeting of September 10, 2013 confirm that the "proposed financing would be distributed widely so as to avoid creation of a control person".

If some of the proposed steps and filings were inadvertently non-compliant with securities regulations, that does not necessarily mean that the appellants' expectations were unreasonable.

[153] Neither side disputes that the securities industry is highly regulated. All concerned were sophisticated players, and they knew that whatever was to be done had to be done in compliance with the rules of the TSX-Venture Exchange and the directives of the Securities Commission. The Term Sheet contains numerous references to securities' regulatory requirements. Thus, when proposals were made to take certain steps with respect to California Gold Mining, it must have been the intention of all concerned that such steps were subject to, and would be undertaken in compliance with, the appropriate securities regulation. Securities regulation being extremely complex, it must have been anticipated that expert advice would have been sought on how exactly to implement any steps. It is thus no answer to the oppression claim, or to the appellants' expectations, to say that any particular proposed step required regulatory approval, as it must have been anticipated that such approval would be obtained. It is also no answer that any particular step, as proposed, would be offside the securities regulations, because it must have been intended that all steps would be structured to be compliant.

[154] It should also be remembered that the Bought Deal was put together and presented to the Board with great haste because the Incumbent Group had essentially ambushed the appellants with the Secret Private Placement. It is hardly surprising that the appellants had not had time to explore all of the regulatory requirements that would have to be met, but it was not unreasonable for them to think that those details could be worked out if the Board accepted the Bought Deal in principle. The Board would not even consider a 48 hour adjournment of the meeting to allow the appellants to deal with these regulatory details.

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[155] The respondents argue that any agreements about the composition of the board, or about control of the company, should have been publicly disclosed in accordance with the securities regulations. If such an obligation rested on the company or the directors, they may well have been in breach of them. However, those breaches cannot fairly be used to defeat Shefsky's rights; any consequences of a breach of the Board's duties in that regard more fairly lie on the Incumbent Group. Any such duty of disclosure was equally knowable to all involved, including counsel for the company, and any deficiencies in disclosure should obviously have been promptly remedied as soon as they were identified. The failure to comply with those duties does not, in any event, justify oppressive conduct.

[156] The respondents complain that the Bought Deal was presented on an "all or nothing" basis. Having unilaterally foisted the Secret Private Placement on the appellants, they can hardly complain about the Bought Deal on that basis. The appellants had made it clear that the Bought Deal was an "either/or" proposal, in that it could not proceed contemporaneously with the Secret Private Placement. But it would be unreasonable to permit the Incumbent Group to acquire units at $0.05 under the Secret Private Placement, and then expect those participating in the Bought Deal to acquire units at $0.07. Any of the subscribers to the Secret Private Placement would undoubtedly have been offered shares under the Bought Deal.

[157] The respondents also argue that the appellants failed to mitigate the effect of the Secret Private Placement because they refused an offer to take up units on the same terms. A few days after the Secret Private Placement, Cinq-Mars proposed a further private placement for the appellant's supporters in the sum of $793,000. Churchill, however, would not permit a further private placement for any more than $304,454. That obviously would not neutralize the dilution resulting from the Secret Private Placement. Combined with the Incumbent Group's obvious repudiation of the overall arrangement in the Term Sheet, there was ample justification for the appellants to decline this offer.

[158] In summary, the conduct of the respondents breached the expectations of the appellants in ways that were unfairly prejudicial, and unfairly disregarded their interests. The reasons disclose reviewable error to the extent that they overlooked these breaches based on any of the technical defences raised. They overlook the point that oppression remedies are as much concerned with fairness as they are with strict legal rights, and they are based on unreasonable assumptions, or draw unreasonable inferences about the legitimate expectations of the parties.

The Appropriate Remedy

[159] Given a finding of oppressive conduct, it would be necessary to consider the appropriate remedy. Both parties agree that, given the passage of time, it would be inappropriate to attempt to devise an appropriate remedy from this record. It would accordingly be appropriate to refer the issue of a remedy back to the chambers judge.

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Conclusion

[160] In conclusion, the appeal should be allowed. The appellants were able to demonstrate breaches of their reasonable expectations resulting from conduct of the respondents that was unfairly prejudicial and unfairly disregarded their interests. The question of remedy should be referred back to the chambers judge.

Appeal heard on February 5, 2016

Memorandum filed at Edmonton, Alberta
this 14th day of April, 2016

Slatter J.A.

Appearances:

A.G. Formosa
for the Appellants

S.M. Robinson and M.J. Diskin
for the Respondents

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In the Court of Appeal of Alberta

Citation: Arndt v Banerji, 2018 ABCA 176

Date: 20180509
Docket: 1701-0158-AC;
1701-0161-AC
Registry: Calgary

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Between:

Jordan Arndt

Respondent (1701-0158-AC)
Appellant (1701-0161-AC)

- and -

Dr. Kunal Banerji MD

Appellant (1701-0158-AC)
Respondent (1701-0161-AC)

- and -

Workers' Compensation Board of Alberta; Appeals Commission for WCB Matters; Office of the Appeals Advisors for WCB; Rita Pizarro; Liz Skene; Lily Mah; Jane Does 1 and Others; John Does 1 and Others

Not Parties to the Appeals

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment of the Honourable Madam Justice Paperny and the Honourable Mr. Justice Slatter

Dissenting Memorandum of Judgment of the Honourable Mr. Justice O'Ferrall

Appeal from the Order by
The Honourable Madam Justice C. Dario
Dated the 27th day of April, 2017 and
Dated the 5th day of May, 2017
Filed the 21st day of July, 2017
(Docket: 1301-02123)

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Memorandum of Judgment

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The Majority:

[1] Mr. Arndt suffered an injury that he attributed to his work. He was dissatisfied with the procedures followed by the Workers' Compensation Board, and the compensation and treatment he received. He sued the WCB and some of its staff, including the medical consultant who had assessed his claim, Dr. Banerji. Dr. Banerji brought an application to summarily dismiss the claim, which was partly successful. Dr. Banerji appealed, arguing that the entire claim should have been dismissed (appeal #1701-0158AC). That same day Mr. Arndt also appealed, arguing that his entire claim should have been sent to trial (appeal #1701-0161AC). The two appeals, which are essentially an appeal and cross-appeal, were argued together.

[2] One issue on appeal is whether a medical consultant of the WCB is entitled to a privilege or immunity from a damages suit for advice given to the WCB. A related issue is whether any such suit is an impermissible collateral attack on the WCB's decisions.

Facts

[3] Mr. Arndt pleads that he was employed by the Scandinavian Cultural Society of Calgary. The Society is affiliated with the Calgary Scandinavian Centre Co-Op Ltd., although the exact legal relationship between the two is unclear on this record. It is alleged that one of them may have been an "employer" under the *Workers' Compensation Act*, RSA 2000, c. W-15, but that the other was not.

[4] For reasons that are in dispute, Mr. Arndt's contract was not extended beyond February 7, 2007, and shortly thereafter he reported work related injuries. For example, he complained of stiffness, pain and numbness in his hands, wrists, elbows, and shoulders that he attributed to repetitive lifting of furniture. He also reported lung problems from inhaling dust, fumes, and other irritants. It appears that Mr. Arndt had reported some of these symptoms to his family doctor, Dr. Beeharry, shortly before he was laid off, but no workers' compensation claim was filed.

[5] The WCB retained Dr. Banerji as a medical consultant to review medical documentation and provide an opinion to the Board. Specifically, he was asked to identify the most reasonable diagnosis for Mr. Arndt's condition, and to advise whether a relationship could be established between that diagnosis and the mechanism of injury. As instructed, Dr. Banerji reviewed the medical documentation, but did not examine Mr. Arndt. Dr. Banerji also spoke with Dr. Beeharry, Mr. Arndt's family doctor. Dr. Banerji recorded his activities, conversations, and conclusions in various correspondence with the Board and Dr. Beeharry. In his correspondence he generally invited Dr. Beeharry to indicate if he had not correctly recorded their conversations.

[6] Dr. Banerji could not initially connect Mr. Arndt's symptoms to work related injuries. Dr. Banerji was under the impression that the injuries had not been reported by Mr. Arndt until his

employment was terminated. Dr. Banerji accordingly put forward the possibility that there were "secondary gain factors" at play (EKE A22). It subsequently emerged that Mr. Arndt had previously reported some of these symptoms to his family doctor, Dr. Beeharry, although the Board, and possibly the employer, had not been advised of that.

[7] The WCB ultimately acknowledged a work related claim arising from bilateral shoulder strain, and for bilateral medial and lateral epicondylitis. The Board determined that those injuries should resolve within six weeks. The Board denied coverage for bilateral carpal tunnel syndrome. In assessing Mr. Arndt's claim for compensation for carpal tunnel syndrome both Dr. Banerji and the WCB applied the Board's published position paper on *Carpal Tunnel Syndrome* (EKE A270).

[8] In November 2007 and March 2008 Mr. Arndt had a left and right carpal tunnel release performed.

[9] In June 2008 the Appeals Commission sent the claim for bilateral carpal tunnel syndrome back for further assessment of whether or not there was a causal connection between this syndrome and the mechanism of injury. Dr. Banerji recommended that a pre-accident job demand census be done (EKE A15). When that census was completed, it revealed a sharp disagreement between Mr. Arndt and his employer over the nature of his duties. One source of the carpal tunnel syndrome was said to be vibrations from a floor scrubber, but the job assessor reported that vibration was not discernible through the handles (EKE A40). There was also a discrepancy in how frequently Mr. Arndt had been required to move furniture. Dr. Banerji reviewed the new information, and confirmed his previous opinion that the carpal tunnel symptoms were not work related.

[10] Mr. Arndt applied for judicial review of one of these WCB decisions (ABQB #1101-02777), but abandoned that application before it was heard. Mr. Arndt subsequently applied for a reconsideration of a decision of the Appeals Commission, but that application was dismissed. All of his opportunities for appeal and review have been exhausted.

[11] Mr. Arndt also sued his former employer. The claim alleged, in part, that his employer was not actually covered by the workers' compensation system, and accordingly it could be sued for the injuries Mr. Arndt had suffered on the job. That litigation is not yet finally resolved.

[12] In addition, Mr. Arndt commenced the present action (ABQB #1301-02123). In it he sues the Workers' Compensation Board, a number of its employees, and its medical consultant, Dr. Banerji. This action alleges many wide-ranging forms of actionable misconduct:

- It alleges that the WCB "began private communications with the Employer to develop specific measures intended to prevent proper medical assessment and acceptance of the Plaintiff's claim for compensation".
- It alleges that the: "WCB . . . The Office of the Appeals Advisor for WCB Matters, and the Appeals Commission . . . took clear and calculated advantage of their respective positions

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and capacities over the Plaintiff and further proceeded to behave improperly, abusively and with the utmost bad faith and intent, details of which exceed 200 words but shall be proven at the trial of this action."

- It pleads that the Scandinavian Cultural Society was not eligible for WCB coverage, and did not have WCB coverage.
- It names a number of individual employees of the WCB, and makes wide claims that they "made false statements and claims, ignored and altered testimony . . . all . . . designed to disparage the Plaintiff and to cause further conflict and bias . . .", including that they ignored the instructions of the Appeals Commission.
- It alleges that all of the defendants acted intentionally to punish the plaintiff, raised false allegations, manipulated information, acted outside the legislation, concealed medical information, and generally abused their positions.

No particulars are provided for these allegations, which provide context to these appeals but which are not directly in issue.

[13] The statement of claim contains specific allegations against Dr. Banerji:

> 14. The Plaintiff states . . .
>
> b) Beginning in March of 2007, the Defendant, Dr. Banerji, acting as a medical consultant under the Act ("Medical Consultant") and thus agent for the WCB:
>
> (i) failed to perform within his mandate as such Medical Consultant;
>
> (ii) failed to provide valid and proscribed medical assessment as required and set out the Act, acted outside the scope and intent of his duties in a punitive manner, and further made actions and decisions intended to conceal his errors;
>
> (iii) neglected, failed and ignored entirely his responsibilities as a duly licensed physician in the Province of Alberta, which not only led to improper diagnosis, but also led to further injury of the Plaintiff;
>
> and
>
> (iv) in attempts to conceal his aforesaid errors, pressured and harassed the Plaintiff's physician, Dr. Beeharry, on several occasions in an effort to promote and foster distrust of the Plaintiff by his own physician.

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Dr. Banerji brought an application for summary dismissal of this part of the claim that was made specifically against him. It is the outcome of that application which forms the subject matter of these appeals.

[14] Dr. Banerji's application for summary dismissal was based on his own affidavit, in which he deposed that his only role in this matter was as a medical consultant to the WCB. He deposed that he discharged his duties honestly, in good faith, independently, and within the acceptable standard of care. He also filed an affidavit of Dr. C. Edward Findlay, who provided an expert opinion confirming that Dr. Banerji had met the applicable standard of care. Dr. Banerji and Dr. Findlay were subsequently questioned on their affidavits.

[15] One specific basis for Dr. Banerji's application for summary dismissal was s. 34(4) of the *Workers' Compensation Act*:

> 34(1) A physician who attends an injured worker shall
>
> (a) forward a report to the Board . . .
>
> (b) advise the Board when, in the physician's opinion, the worker will be or was able to return to work, . . . , and
>
> (c) without charge to the worker, give all reasonable and necessary information, advice and assistance to the worker and the worker's dependants in making a claim for compensation . . . .
>
> (4) A report made or submitted to the Board under this Act by a physician or a hospital or other treating agency is for the use and purpose of the Board only, and is a privileged communication of the person making or submitting it and, unless it is proved that it was made maliciously, is not admissible in evidence or subject to production in any court in an action or proceeding against that person.

Dr. Banerji argues that s. 34(4) is a complete answer to this action, and accordingly the scope and interpretation of the section is central to these appeals.

[16] Mr. Arndt filed an affidavit in response to the summary dismissal application, which he stated was a rebuttal of the affidavits of Dr. Banerji and Dr. Findlay. This wide-ranging affidavit covers a number of topics:

- It states Mr. Arndt's belief that there is no evidence that the *Workers' Compensation Act* is applicable to his claim, including whether Dr. Banerji's opinions were provided within the workers' compensation system.
- It expresses the belief that the court will have to determine the scope of s. 34(4), and the presence of malice, in deciding the application.

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- It expresses the opinion that Dr. Banerji's communications with Dr. Beeharry were unauthorized, unwarranted, improper, false, misleading, or outside Dr. Banerji's role as a medical consultant to the WCB.
- It alleges that the documents produced by the WCB and his former employer are intentionally incomplete, inaccurate, untruthful, or mal-intended.
- It alleges that Dr. Banerji relied on these inaccurate records, and failed to give any or sufficient weight to other information, documents and records.
- Mr. Arndt deposes that he does "verily believe" that Dr. Banerji "used his position to benefit and protect the employer and the WCB, and later used his position to protect himself and conceal his errors." No particulars are provided.
- Mr. Arndt specifically challenges Dr. Banerji's inference that he did not report his injuries until he was laid off, noting that he had consulted his family doctor, Dr. Beeharry, prior to that, and he specifically denies any "secondary gain factors" were in play. He alleges that Dr. Banerji and the WCB misapplied the WCB policy *Cost and Entitlement Adjustments* 05-01 Part II (EKE A296) on the effect of deliberate misrepresentations in claims.
- Mr. Arndt challenges the accuracy of Dr. Banerji's reporting of his conversations with Dr. Beeharry, and specifically challenges Dr. Banerji's interpretation of Dr. Beeharry's opinion about Mr. Arndt's injuries.
- Mr. Arndt asserts that Dr. Banerji acted outside his "role as a medical consultant for the WCB", exceeded his authority or mandate, and that he acted with "unwarranted malice".
- The affidavit also challenges many particulars of the interpretations, opinions, and statements of individual employees of the WCB that are found in the documents.
- Mr. Arndt also asserts that Dr. Banerji failed to properly assess and test him, failed to properly diagnose his problems, and failed to properly conclude that they were work-related injuries. This is alleged to have arisen from Dr. Banerji's reliance on inaccurate information on the file, a lack of professional care and skill, and bad faith.
- Mr. Arndt asserts that Dr. Banerji and other employees of the WCB did not properly follow the directions of the Appeals Commission when it directed a reassessment of his carpal tunnel claim. He further asserts that the need for a reassessment caused delay, and was a result of Dr. Banerji's initial inadequate assessment.
- Overall, Mr. Arndt asserts that the WCB and its employees and consultants did not properly diagnose his conditions, did not accurately review the documentation provided, did not conduct the proper tests, and generally failed to come to the correct conclusion with respect to his claim.

As can be seen, this affidavit is partly argumentative, partly engages questions of law, and is largely based on Mr. Arndt's opinions or beliefs on various subjects. He repeatedly deposes that he "takes

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issue" with various documents, actions, and findings relating to his claim, by which he seems to mean merely that he disagrees with them. Mr. Arndt did not file any expert medical opinions to engage the opinion provided by Dr. Findlay. There was no affidavit from Dr. Beeharry asserting that he had been misquoted, his opinions misinterpreted, or that he was harassed or otherwise intimidated.

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The Summary Dismissal

[17] The case management judge gave lengthy oral reasons in disposing of the summary dismissal application. After outlining the facts and stating the legal test for summary dismissal, she proceeded to review the issues that had been raised.

[18] The first issue was whether s. 34(4) of the *Act* applied. This depended on whether it applied to "claims that should have been dealt with outside the WCB regime", and whether it applied to a medical consultant or only to "treating physicians".

[19] Mr. Arndt argued that his employer was not covered by the workers' compensation system, so that the entire *Act*, including s. 34(4), did not apply. Further, if the *Act* did not apply to his injuries, then Dr. Banerji was working entirely outside the statute, and s. 34(4) would not apply to him. The case management judge assumed that whether Mr. Arndt's employer was covered by the statute was still undecided, but that in any event the protection of s. 34(4) applied to Dr. Banerji because he was acting at the request of the WCB, and was presumptively working under the auspices of the *Act.*

[20] The case management judge followed the decision in ***Milne v Barnes***, 2013 ABCA 379, 561 AR 256 (***Milne #2***), and assumed that s. 34(4) applied to "medical consultants", not just treating physicians. In the alternative, she was prepared to consider Dr. Banerji's reports in assessing his potential liability in negligence.

[21] The protection provided by s. 34(4) is specifically conditional on the absence of malice. The case management judge disregarded the opinion of Dr. Findlay that there was no malice, as that was a topic outside the proper scope of his expert opinion. Even if Dr. Banerji's diagnosis and conclusions were careless or inept, that would not constitute malice. Further, there was no indication on the record that the interactions between Dr. Banerji and Dr. Beeharry demonstrated malice. On the record, malice had not been proven.

[22] The case management judge next considered the claim for misfeasance of public office, which requires a) deliberate unlawful conduct in the exercise of public functions, and b) awareness that the conduct is unlawful and likely to injure the plaintiff. The case management judge found no evidence of unlawful conduct or an intention to harm.

[23] Mr. Arndt argued that Dr. Banerji's conduct was actionable, regardless of whether the contents of his reports were privileged and protected under s. 34(4). He drew a distinction between Dr. Banerji's "report", and Dr. Banerji's activities in assessing Mr. Arndt's injuries. The case management judge agreed that s. 34(4) and ***Milne #2*** meant that Dr. Banerji's report could not be used

as evidence in an action for negligence. However, she concluded that the section did not insulate any action or conduct of the physician from suit. Liability, however, would have to be established without reliance on the report.

[24] The case management judge next discussed Mr. Arndt's claim that Dr. Banerji was negligent. Mr. Arndt alleged that Dr. Banerji erred in suggesting there was secondary gain motivating the claim, and that such considerations were outside the scope of his expertise. Further, it was alleged that Dr. Banerji's authority did not extend to discussing the case with Dr. Beeharry, and that Dr. Banerji was not entitled to dispute the existence of the injury, only to determine if it was caused by work related activities.

[25] The case management judge examined the four part test for medical negligence or malpractice: a) the existence of a duty of care, b) a breach of the standard of care, c) the suffering of damage, and d) proof of causation.

[26] The case management judge held that the duty of care owed by a medical consultant is unsettled, but for the purposes of the summary judgment application she assumed a duty of care, recognizing that the duty owed by a medical consultant might be different from that owed by a treating physician.

[27] The standard of care applied to a medical consultant was not the same as that for a treating physician. Whatever the standard of care might be, Mr. Arndt had not produced any expert medical evidence to establish a breach by Dr. Banerji with respect to the allegations that he had failed to reasonably diagnose Mr. Arndt's symptoms. The evidence of Dr. Findlay on this issue was uncontradicted. With respect to the allegations that Dr. Banerji had failed to properly perform his duties under the *Workers' Compensation Act*, the evidence on the record was inadequate:

- Dr. Findlay's opinion only concluded that Dr. Banerji had reached a reasonable conclusion based on the information available, not whether he had reached the "correct" conclusion.
- No opinion was provided on whether the WCB position paper on *Carpal Tunnel Syndrome* was reflective of the state of the art, only that Dr. Banerji's diagnosis was consistent with that position. Thus, there was no evidence on whether following the position paper was negligent.
- There was no opinion provided on whether the WCB's procedures met the standard of care.

As a result, there were gaps in the expert evidence and the rest of the record as to whether the standard of care had been met.

[28] The case management judge found that Mr. Arndt had clearly suffered loss or damage, because it was not disputed that he had carpal tunnel syndrome. For the purposes of the summary

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judgment application, she was prepared to assume that Mr. Arndt would be able to prove that the carpal tunnel syndrome was a work related injury.

[29] On the final issue of causation, there was no evidence that Dr. Banerji's conduct caused, prolonged or worsened Mr. Arndt's medical conditions. Dr. Banerji was not the treating physician, and Dr. Beeharry was free to recommend any medical care that Mr. Arndt needed. There was, however, a potential related source of loss occasioned by the "delay or denial of Mr. Arndt's claim":

> Having said all of this, the remaining argument that is open to a possible finding of actual and legal cause of the loss sustained by Mr. Arndt is that Dr. Banerji, in complying with WCB policies and procedures, including the WCB position papers on carpal tunnel syndrome, had in any event failed in the requisite standard of care in identifying a causal connection between Mr. Arndt's work duties and the injuries that he has sustained. (reasons, p. F22, l. 13-7)

Since there was no expert opinion on whether the WCB's carpal tunnel syndrome paper was "correct", or whether a physician had an obligation to go beyond the WCB policies, a triable issue remained.

[30] One week later, the case management judge supplied supplemental oral reasons. She clarified that the issue that remained open was ". . . whether Dr. Banerji failed to meet the standard of care by not identifying a causal connection between Mr. Arndt's work and the injuries that he sustained" (reasons, p. F31, l. 34-6). This failure might potentially exist whether or not Dr. Banerji was operating within or outside the WCB parameters. As a result, the issue of whether Dr. Banerji was working within or with outside the WCB policy was also a triable issue. With respect to the duty of care, the case management judge clarified that:

> ". . . somebody owes Mr. Arndt a duty of care to ensure that his claim has been reviewed with the level of care, skill and knowledge of an average practitioner in the relevant specialty based on the knowledge and practice of a medical practitioner at the time of the alleged negligence. Who owes that duty is left open to be determined at trial; whether that duty rests with Dr. Banerji or with the WCB . . ." (reasons, p. F32, l. 10-4)

The supplemental reasons accordingly expanded the identified triable issues.

[31] The formal order ultimately signed by the case management judge reads as follows:

> 1. Partial Summary Judgment is granted in favour of the Defendant, Dr. Kunal Banerji MD, and the action against him is hereby dismissed on all issues except the following:

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(a) recognizing one or both of Dr. Banerji and the Workers' Compensation Board ("WCB") owe the Plaintiff such a duty, whether Dr. Banerji owes the Plaintiff a duty of care to ensure the Plaintiff's claim is reviewed with the level of knowledge, competence and skill expected of a similarly qualified practitioner;

(b) whether Dr. Banerji failed to meet that standard of care by not identifying a causal connection between the Plaintiff's work duties and the injuries he sustained, not limited to Dr. Banerji's consideration of this issue within the policies or procedures of the WCB;

(c) whether the Plaintiff suffered an injury or loss not recognized by the WCB;

(d) whether Dr. Banerji's failure to comply with the applicable standard of care was the actual and legal cause of the Plaintiff's loss or injury not recognized by the WCB; and

(e) whether some or all of Dr. Banerji's actions fall outside the scope of subsection 34(4) of the *Workers' Compensation Act* where there is no malice.

These appeals are from this order.

Issues on Appeal and Standard of Review

[32] In appeal #1701-0158AC Dr. Banerji raises the following issues:

(a) Whether Dr. Banerji's involvement is covered by s. 34(4) of the Act whether or not he was operating "within or outside" the parameters of the WCB.

(b) Whether there is a genuine issue for trial as to whether Dr. Banerji failed to meet the standard of care by not identifying a causal connection between Mr. Arndt's work and the injuries he sustained.

In order to properly analyse the substantive issues it is necessary to confirm the mandate of the Workers' Compensation Board (*infra*, para. 49). Further, it is necessary to examine the role of medical consultants within that system (*infra*, para. 73). Threshold issues are the test for summary judgment in a case like this, and the standard of review when appeals are brought from summary judgment decisions.

Summary Judgment

[33] In appeal #1701-0158AC Dr. Banerji argues that the case management judge erred in only summarily dismissing part of Mr. Arndt's claim, and should not have sent any of it to trial. In appeal #1701-0162AC Mr. Arndt argues generally that the case management judge erred in summarily dismissing any parts of the claim. He argues that the correct test for summary judgment was not stated, or alternatively that it was an error in the exercise of discretion to strike parts of the claim. Mr. Arndt alleges misapprehensions of the facts and evidence, and misinterpretation of the law, including the relevant provisions of the *Act*. He argues that the entire claim should be sent to trial.

[34] In ***Hryniak v Mauldin***, 2014 SCC 7 at para. 28, [2014] 1 SCR 87 the Supreme Court of Canada called for a "shift in culture" with respect to the resolution of litigation. Reliance on the "the conventional trial no longer reflects the modern reality and needs to be re-adjusted" in favour of more proportionate, timely and affordable procedures. Summary judgment procedures should increasingly be used, and the previous habit of routinely referring any contentious matter to trial should end:

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

This new approach to the disposition of litigation applies in Alberta: ***Windsor v Canadian Pacific Railway Ltd.***, 2014 ABCA 108 at para. 14, 94 Alta LR (5th) 301, 572 AR 317.

[35] In Alberta an action may be summarily dismissed where "there is no merit to a claim or part of it": R. 7.3(1)(b). Summary judgment is an appropriate procedure when the process (a) allows the judge to make the necessary findings of fact, (b) allows the judge to apply the law to the facts, and (c) is a proportionate, more expeditious and less expensive means to achieve a just result: ***Hryniak v Mauldin*** at para. 49; ***Windsor v Canadian Pacific Railway*** at para. 13.

[36] Summary judgment and summary dismissal applications usually fall into one of two categories:

(a) Those where the "merit" of the claim is said to rest on the facts and the evidence. In that sort of case, if the moving party can prove on a balance of probabilities that it has proven the facts needed to support its claim or defence, it is entitled to summary disposition: ***Stefanyk v Sobeys Capital Incorporated***, 2018 ABCA 125 at paras. 14-6.

(b) Those where the "merit" is said to rest on the legal basis for the claim. This type of summary dismissal application proceeds on the assumption either that the plaintiff (i) will be able to prove the facts alleged, or (ii) has proven the relevant facts, but those facts do not support any claim in law.

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The analytical approach in these two types of cases, and the standard of review, are subtly different.

[37] The suitability of the summary judgment procedure in the first category of case is often tied back to whether "there is a genuine issue requiring a trial". The test in factually based summary judgment applications is naturally tied back to "issues requiring trial", because trials are designed to find facts. Material disputed facts will often preclude summary judgment. Where none of the material facts are unknown or uncertain, a trial is not called for.

[38] Parties to a summary disposition application are expected to put their "best foot forward", meaning that gaps in the record do not necessarily prevent summary disposition: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para. 11, [2008] 1 SCR 372. A summary judgment motion must be decided on the record before the Court, and not by speculation about what evidence may be adduced in the future if the matter is allowed to proceed to trial: ***Lameman*** at para. 19.

[39] On the other hand, where the summary dismissal application is based on questions of law, a trial will less frequently be necessary. If the factual basis of the claim is established on the record, or if the plaintiff's claim discloses no merit even if the underlying facts are assumed to be true, summary judgment is generally the appropriate procedure: ***Lameman*** at para. 12; ***Jackson v Canadian National Railway***, 2013 ABCA 440 at para. 29, 91 Alta LR (5th) 401, 566 AR 247. There is usually no need for a trial, because as noted trials are for finding facts. There are cases where the legal issues are complex and intertwined with the facts, in which event a trial still may be necessary: ***Tottrup v Clearwater (Municipal District No. 99)***, 2006 ABCA 380 at para. 11, 68 Alta LR (4th) 237, 401 AR 88. However, litigation that depends primarily on the applicable law is ideally suited for summary disposition.

[40] This appeal and the underlying litigation fall into the second category of summary disposition applications, those that are primarily based on the law. The argument that is that even assuming the facts alleged by Mr. Arndt are true, the claim he advances has no merit. Where the outcome of the summary dismissal application depends on resolving questions of law, the necessary legal decisions should be made, and the dispute should not simply be kicked down the road. A full trial of this action would consume significant court resources, take a considerable amount of time, and be very expensive for all concerned. This would be contrary to the new culture mandated by ***Hryniak v Mauldin***.

[41] As will be seen, Mr. Arndt's claim is premised on certain assumptions that are wrong in law. Many of the issues discussed in the reasons for decision do not properly arise on this record. They are, simply put, red herrings. This appeal is primarily concerned with the legal assumptions underlying the claim asserted by Mr. Arndt.

[42] Mr. Arndt's claim and his affidavit contain many sweeping allegations of misconduct that are unsupported by any particulars or confirming documentation. They include allegations of untruthful, false or misleading statements, bad faith, ulterior motives, interference with Mr. Arndt's claim, and "malice". Such allegations do not bar summary dismissal of the action unless there is credible

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evidence to support them: ***Goodswimmer v Canada (Attorney General)***, 2017 ABCA 365 at para. 96; ***Papaschase Indian Band No. 136 v Canada (Attorney General)***, 2004 ABQB 655 at para. 54, 43 Alta LR (4th) 41, 365 AR 1, affirmed on other grounds by ***Lameman*** (SCC). As stated in ***Ernst v Alberta Energy Regulator***, 2017 SCC 1 at para. 57, [2017] 1 SCR 3: "Immunity is easily frustrated where the mere pleading of an allegation of bad faith or punitive conduct in a statement of claim can call into question a decision-maker's conduct". These unproven allegations are insufficient to support Mr. Arndt's appeal.

Standard of Review

[43] The legal test for summary dismissal is subject to review for correctness. Where the summary dismissal application depends on assessment of the facts, the case management judge's assessment of the facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are all entitled to deference: ***Hryniak v Mauldin*** at paras. 81-4; ***Amack v AW Holdings Corp.***, 2015 ABCA 147 at para. 27. While there is a discretionary element to summary disposition, the discretion is not unbridled and it must be exercised in a manner consistent with the underlying principles, having regard to the reasonable expectations of and fairness to both of the parties.

[44] Issues of law are reviewed at the appellate level for correctness. The legal components of the cause of action underlying a summary dismissal application are thus subject to review for correctness; there is no point in having a trial on a claim that does not exist in law, or is otherwise unsustainable. If the chambers judge has made errors of law, or has proceeded on incorrect assumptions about what the law is, no deference is owed. The Court of Appeal must intervene and correct those errors. The core business of the Court of Appeal is to opine on the legal merits of claims.

[45] As a practical matter, the applicable standard of review will therefore depend on the type of summary disposition application under appeal. Where summary judgment was sought under the first category, that is based on the factual merits of the claim, the standard of review will be deferential. The chambers judge's decision to grant summary judgment on the facts will not be interfered with unless it reflects palpable and overriding error. Likewise, a decision to refuse summary judgment, and direct a trial, is a discretionary decision that will not be interfered with unless it is unreasonable.

[46] On the other hand, where summary judgment was sought because the underlying claim had no legal basis, the standard of review is more likely to be correctness. An appeal on this kind of summary disposition application will generally raise issues of law. If the claim has no merit because it lacks a proper legal foundation, a discretionary refusal to grant summary disposition would invite appellate review. As noted, the present appeal falls into this category. If Mr. Arndt's claim has no legal foundation, there it was no principled basis to refuse summary dismissal.

[47] The outcome of summary disposition applications is always going to depend on the record. If the record is inadequate, the chambers judge might not be able to grant summary judgment, and a trial might be necessary. On the other hand, if the record is robust and complete, either summary judgment

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or summary disposition will be a likely outcome. Likewise, appellate review, and the outcome of appellate review, will depend on the state of the record that was before the chambers judge, and that is brought forward before the Court of Appeal. That being said, there is no reason to think that some types of summary dismissal appeals are more likely to be amenable to appellate review than others. The standard of review is the same, and it must be applied to the record as it actually exists: ***Lameman*** at para. 19. Specifically, some of the leading cases involve successful appeals from denial of summary dismissal, confirming that appeals like the present one should be fully adjudicated on the merits: see ***Lameman*** and ***Windsor v Canadian Pacific Railway Ltd***.

Summary

[48] In summary, the summary dismissal application underlying this appeal is primarily concerned with questions of law, and the presumptive standard of review is correctness. The basis for the application was that even if the facts alleged by Mr. Arndt were assumed to be true, they do not disclose a claim with merit. Accordingly, there is no reason why the Court cannot fully adjudicate on all of the issues raised.

The Workers' Compensation System

[49] Workers' compensation is a system of compulsory no fault mutual insurance administered by the state. Its features are:

(a) compensation is paid to injured workers without regard to fault;

(b) employers must pay the premiums required to support the system, but in return the insurance component of the scheme insulates them from potentially financially crippling claims;

(c) injured workers enjoy security of payment, independent of the employer's solvency;

(d) the compensation scheme and adjudication of claims is handled by an independent commission, and

(e) compensation is provided to injured workers quickly without court proceedings.

The system is based on what has been described as the "historic trade-off" by which workers lost their cause of action against their employers or fellow employees who were responsible for their injuries, but gained compensation that depends neither on the fault of the injured worker, nor of the employer: ***Pasiechnyk v Saskatchewan (Workers' Compensation Board)***, [1997] 2 SCR 890 at paras. 24-7; ***Downs Construction Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)***, 2012 BCCA 392 at paras. 23-6, 38 BCLR (5th) 105.

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[50] An important feature of workers' compensation schemes is that they are administered by an independent administrative tribunal. That tribunal registers eligible employers, collects premiums from those employers, assesses complaints of workplace injuries, provides compensation for those injuries, and also provides rehabilitative medical services to injured workers. In Alberta that administrative tribunal is the Workers' Compensation Board: ***Buckley v Entz Estate***, 2007 ABCA 7 at para. 26, 71 Alta LR (4th) 25, 401 AR 231. The scope of its mandate is confirmed by the *Act*:

> 13.1(1) Subject to sections 13.2(11) and 13.4, the Appeals Commission has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act and the regulations in respect of . . .
>
> (c) appeals from determinations of the Board under section 21(3), . . .
>
> and the decision of the Appeals Commission on the appeal or other matter is final and conclusive and is not open to question or review in any court. . . .
>
> 17(1) Subject to section 13.1, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act or the regulations and the action or decision of the Board on such matters and questions is final and conclusive, and is not open to question or review in any court.
>
> (2) No proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceedings in any court or are removable by certiorari or otherwise into any court, nor shall any action be maintained or brought against the Board, any employee or officer of the Board or any member of the board of directors in respect of any act or decision done or made in the honest belief that it was within the jurisdiction of the Board. . . .
>
> 21(1) No action lies for the recovery of compensation under this Act and all claims for compensation shall be determined by the Board.
>
> (2) This Act and the regulations apply instead of all rights and causes of action, statutory or otherwise, to which a worker, the worker's legal personal representatives or the worker's dependants are or might become entitled against the employer of the worker by reason of any accident happening to the worker, and no action in respect of that accident lies against the employer.
>
> (3) Any party to an action may, on notice to the other parties, apply to the Board for determination of whether a worker who is a party to the action is entitled to compensation under this Act and the regulations.

As noted, a key feature of the system is that claims are resolved through the Board's processes, not in court.

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[51] The *Workers' Compensation Act* sets the broad framework of the rights and obligations under the system. The Board sets the overall compensation policy, as in the Board's position paper on *Carpal Tunnel Syndrome*: *Workers' Compensation Act*, s. 6(a)(ii); ***Nabors Canada Ltd. v Alberta (Appeals Commission for Alberta Workers' Compensation)***, 2010 ABCA 243 at para. 23, 35 Alta LR (5th) 21, 490 AR 121; ***Denton v British Columbia (Workers' Compensation Appeal Tribunal)***, 2017 BCCA 403, 4 BCLR (6th) 250. There are internal review and appeal mechanisms, and specifically s. 13.1 empowers the Appeals Commission to review many decisions made under the system. There is a right of appeal under s. 13.4 to the Court of Queen's Bench on a question of law or jurisdiction, and a further right of appeal to the Court of Appeal under s. 13.4(14).

[52] Once the Board makes a decision on compensation, and all appeals are exhausted, issue estoppel applies. In ***Penner v Niagara (Regional Police Services Board***), 2013 SCC 19, [2013] 2 SCR 125 the Court confirmed the principles governing the discretionary application of issue estoppel to administrative proceedings, as previously set out in ***Danyluk v Ainsworth Technologies Inc.***, 2001 SCC 44, [2001] 2 SCR 460. As ***Penner*** noted at para. 28, issue estoppel is a legal doctrine in support of finality of decisions:

> 28 Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.

Issue estoppel will not be applied when it would result in an injustice, but the discretion to not apply it "must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme": ***Penner*** at para. 31.

[53] Unfairness in applying issue estoppel may arise from unfairness of the prior proceedings, or unfairness in using the decision to preclude the subsequent claim. The second type of unfairness may arise "where there is a significant difference between the purposes, processes or stakes involved in the two proceedings": ***Penner*** at para. 42. In these proceedings, the purposes and stakes involved are identical. Mr. Arndt's claim to the Board was to receive that reasonable compensation for his workplace injuries to which he was entitled under the *Act*, and his civil action substantively seeks the same remedy. Issue estoppel must clearly arise in the circumstances, because allowing the civil action to proceed would "undermine the legislature's intent in setting up the administrative scheme", "sanction collateral attack", and "undermine the integrity of the administrative scheme".

[54] In summary, the system is designed as a "closed system". All issues about coverage under the *Act* and entitlement to compensation are to be dealt with within the system. One of the premises of the system is that compensation is determined outside court. Attempting to bring an action in the ordinary courts for benefits under the workers' compensation system is not an option. Specifically:

(a) Whether Mr. Arndt's employer was an "employer" under the system is within the exclusive mandate of the Board, and can only be challenged through the review and appeal procedures in the *Act*: ***Pasiechnyk*** at paras. 30-1, 42-3. In this case the Board provided compensation to Mr. Arndt for his bilateral medial and lateral epicondylitis. A finding that Mr. Arndt's employer was covered by the system was implicit in that ruling; unless the employer was covered, no compensation was possible. In any event, any dispute about whether an employer is covered by the system is within the mandate of the Board. It was an error of law for the case management judge to assume this issue might be at play in Mr. Arndt's action.

(b) The Board's policy on how particular injuries, such as carpal tunnel syndrome, should be compensated is within the Board's mandate. It is not open to any injured worker (such as Mr. Arndt), any worker's experts or personal physician, or any court to second guess the Board's position paper on *Carpal Tunnel Syndrome.* The test is not whether that position paper is "appropriate", "correct", "state of the art", or inapplicable in a particular case. At best the policy could be challenged on the basis that it is "one that no reasonable Board would have enacted": ***Green v Law Society of Manitoba***, 2017 SCC 20 at para. 20, [2017] 1 SCR 360. Any such challenge, however, must *prima facie* be made through the appeal and review mechanisms in the *Act*. It is not open to an injured worker to commence an independent civil action for damages second-guessing the policy or the decisions made in applying it: ss. 17, 21; ***Gill v WorkSafeBC***, 2017 BCCA 239, leave to appeal denied April 5, 2018 SCC #37803.

(c) Further, an application of any Board policy to a particular worker is not open to review in a civil action. The case management judge erred in law in assuming that there was an open issue as to whether "Dr. Banerji, in complying with WCB policies and procedures, including the WCB position paper on carpal tunnel syndrome, had in any event failed in the requisite standard of care". The "standard of compensation" available to Mr. Arndt is that provided in the Board's policies, and Mr. Arndt is not entitled to collaterally attack the Board's decisions by asserting a "standard of care" based on a different policy.

(d) Whether any particular injury was caused by workplace factors is also within the mandate of the Board. In this case the Board decided that Mr. Arndt's bilateral medial and lateral epicondylitis did arise in the workplace, but his carpal tunnel syndrome did not. Mr. Arndt is not able to challenge those findings in a separate civil action in court, and it was an error of law for the case management judge to assume that Mr. Arndt might be able to prove, in this action, that his carpal tunnel syndrome was work related: ***Medicine Hat (City) v Wilson***, 2000 ABCA 247 at paras. 30-5, 88, 87 Alta LR (3d) 25, 271 AR 96; ***Quimado v Aetna Life Insurance Co.*** (1996), 19 CCEL (2d) 150 at para. 3 (Ont Gen Div).

It follows that many components of Mr. Arndt's claim are an impermissible collateral attack on the decisions of the Board and the entire workers' compensation system.

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[55] All sorts of compensation decisions are made on a daily basis within the workers' compensation system by the claims managers. A worker who is dissatisfied with a decision is not without remedies: ***Medicine Hat (City) v Wilson*** at paras. 33-4. As noted, there are internal appeal procedures. There is a further right of appeal to the Appeals Commission. There are further appeals to the courts on questions of law or jurisdiction. Commencing an ordinary civil action against the Board for failure to properly assess and compensate an injury is not an available remedy; it is an impermissible collateral attack on the processes and decisions of the Board: ***Gill v WorkSafeBC***.

[56] In this case Mr. Arndt took advantage of some of these appeal procedures. He also applied for judicial review. When his appeals were unsuccessful, or he allowed the appeal periods to run without filing an appeal, he exhausted his remedies. The present action against Dr. Banerji is not maintainable as a matter of law. It follows that all of the issues found to be triable as against Dr. Banerji should have been summarily dismissed.

"Someone Owes a Duty"

[57] The supplemental reasons clarified that there was a finding that "someone owes a duty" to Mr. Arndt. That duty might have been owed by Dr. Banerji, or by the Board, but the trial of the issues was to be held based on that assumption.

[58] It was not unreasonable to assume that Mr. Arndt had a legitimate expectation that his claim would be processed fairly and properly. This assumption does, however, conceal an error of law as the supplemental reasons assume that the duty is a "duty in tort". The Board, as a public institution, clearly owes a duty under the statute to employers, injured workers, and the public generally to administer the workers' compensation regime in a reasonable manner. It is, however, a statutory, public duty, not a duty in tort. Further, if the Board fails to discharge that duty, the remedy is to be found within the appeal and review procedures contemplated by the *Act*. It is not a "duty in tort remedied by a damage award" that can be enforced through an ordinary civil action: ***Yuill v Alberta (Workers' Compensation Appeals Commission)***, 2017 ABQB 523 at para. 33; ***Goodwin v New Brunswick (Workplace Health, Safety and Compensation Commission)***, 2015 NBQB 32 at paras. 287-8, 439 NBR (2d) 124.

[59] The law does not recognize any tort such as "negligent administration of a regulatory scheme" or "negligent processing of a claim for statutory benefits". As was said in ***Ernst v Alberta Energy Regulator*** at para. 44 (affirming ***Ernst v Alberta Energy Regulator***, 2014 ABCA 285 at para. 17, 580 AR 341, 2 Alta LR (6th) 293):

> 44 No one contests that the Board owes Ms. Ernst no duty of care under the private law of negligence. In negligence law, whether there is a duty of care depends on the existence of foreseeability and proximity, and the absence of countervailing policy considerations: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 30; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129. In the case of public regulators, for reasons of insufficient

> proximity or countervailing policy considerations, or both, courts have generally held that these state actors do not owe claimants a duty of care: *Cooper*; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562.

The particular "duty" on a medical consultant, such as Dr. Banerji, is discussed *infra*, paras. 73ff. However, to the extent that Dr. Banerji's work, opinions, and recommendations were done as part of the Board's process of assessing Mr. Arndt's claims, they too do not generate a "duty in tort": ***Lowe v Guarantee Co. of North America*** (2005), 80 OR (3d) 222 at paras. 52-4, 256 DLR (4th) 518 (CA).

[60] As the Supreme Court points out in ***Ernst*** at para. 54, tort actions of this type amount to impermissible collateral attacks of the tribunal's decisions:

> 54 Furthermore, allowing *Charter* damages claims to be brought for the Board's actions and decisions has the potential to distort the appeal and review process. The corollary of immunity is that a judicial or quasi-judicial decision can be challenged only through judicial review or the appeals process: *Royer v. Mignault*, [1988] R.J.Q. 670 (C.A.), at pp. 673-74. This prevents judicial and quasi-judicial decision-makers from having to justify their decisions beyond the justification disclosed by the record which will be available for appeal or judicial review: *Canada (Attorney General) v. Slansky*, 2013 FCA 199, [2015] 1 F.C.R. 81, at para. 136, per Mainville J.A., concurring. It is worth remembering that in order not to compromise the decision-maker's impartiality or the finality of his or her decision, the decision-maker has a limited role in an appeal or judicial review proceeding: see, e.g., *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147. However, no such limit can apply to the scope of a quasi-judicial regulatory board's defence against damages claims. Moreover, damages claims against such bodies, whether under the *Charter* or otherwise, open up new avenues of collateral attack. By protecting judicial and quasi-judicial decision-makers from having to defend their decisions against damages suits, the immunity simultaneously strengthens public confidence in the legal system, preserves impartiality, both in fact and in perception, and closes off routes of collateral attack. See *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at pp. 828-30.

The remedy for a claim for workers' compensation benefits is to be found within the workers' compensation system, not in an action for damages for negligent administration of the system.

[61] Similar issues were raised in the ***Milne*** litigation, which was also a claim against doctors who had never examined or met the claimant, but who had provided opinions to the Board based on a review of documentation. The claimant sued them, claiming their reports were negligent or otherwise actionable. In 2008 a Master summarily dismissed the action against these doctors based on conspiracy, dismissed some claims based on the expiry of the limitation period, but concluded there was a triable issue with respect to whether they owed a duty to be fair, and whether they were negligent: ***Milne v Alberta (Workers' Compensation Board)***, 2008 ABQB 710, 100 Alta LR (4th)

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311 (***Milne #1***). That decision was never appealed, but after multiple examinations for discovery the doctors brought a second application for summary dismissal, which was ultimately successful based on the privilege established by s. 34(4): ***Milne #2***. The result in ***Milne #2*** clearly undermined the decision in ***Milne #1***. In any event, the reasoning in ***Milne #1*** is inconsistent with ***Yuill***, ***Goodwin, Ernst*** and the other modern authorities on the existence of a duty of care in tort. Even if ***Milne #1*** left any legal question open, the proper solution would be to decide that question, not to direct a trial.

Inside or Outside the System

[62] The supplemental reasons left open the issue of whether Dr. Banerji was operating "inside or outside the workers' compensation system". There was said to be a triable issue about the effect this would have on the standard of care, on Dr. Banerji's immunity under s. 34(4), and overall on whether Mr. Arndt's claims for compensation were properly dealt with. This reflects reviewable error.

[63] There were several facets to the "inside or outside" argument. The first one was whether Mr. Arndt's employer was covered by the system. Mr. Arndt appeared to take inconsistent positions on this issue. On the one hand, he argued that his employer was outside the system, and therefore not protected by the immunity from suit that is an integral part of the "historic trade-off" underlying the system. This allowed him to commence a separate action against his employer for his injuries. On the other hand, he argued that the Board had wrongly denied him compensation for his carpal tunnel syndrome, which would depend on his employer being within the system. As previously noted, the Board's acceptance of Mr. Arndt's claim for his bilateral medial and lateral epicondylitis implicitly determined that his employer was covered by the system. Mr. Arndt is not in a position to collaterally attack that decision in any civil court action: ***Pasiechnyk*** at para. 42.

[64] The second facet of the "inside or outside" argument was whether Mr. Arndt's carpal tunnel syndrome was a work related injury. The Board decided that it was not, and Mr. Arndt is not able to collaterally attack that decision either. Whether an injury is work related is a core part of the Board's mandate.

[65] The third facet was whether, depending on the answers to the first two facets of the issue, Dr. Banerji was operating inside or outside the workers' compensation system. A consequential issue was whether his conduct therefore fell within s. 34(4). The argument appeared to be that if either a) Mr. Arndt's employer was not within the system, or b) Mr. Arndt's injuries were not work related, then Dr. Banerji had no business making any recommendations about them. Dr. Banerji's mandate was said to be exclusively limited to matters within the workers' compensation system.

[66] The argument is doubly circular:

(a) Firstly, it is that if a medical consultant is retained by the WCB to decide if an injury was work related, and the medical consultant decides that it was not work related, then the medical consultant had no mandate in the first place to examine whether or not the injury was work related.

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(b) Secondly, it is that if Dr. Banerji was acting outside the system, he is not protected by s. 34(4). However, if Mr. Arndt's claim is not covered by the system, then any opinion given by Dr. Banerji to the Board could not cause him any damage. If Mr. Arndt can sue his own employer for his injuries, what Dr. Banerji said or did can have no effect on that action, and there is nothing for s. 34(4) to protect. On the other hand, if Dr. Banerji concluded that the carpal tunnel syndrome was not work related, that can only have relevance or meaning for a claim that is within the system, and s. 34(4) must apply.

Neither of these arguments identifies or supports any issue that requires a trial of this action.

[67] The third facet of the "inside or outside" argument, if nothing else, is inconsistent with Mr. Arndt's pleading, which expressly alleges that Dr. Banerji was "acting as a medical consultant under the Act ("Medical Consultant") and thus agent for the WCB". Not only is that a binding admission, it is an incontrovertible fact on this record. Dr. Banerji's only involvement with the matter came as a result of this retainer by the WCB, and all of his actions occurred solely within the discharge of that mandate. A consultant who is asked to determine whether a claim is within the workers' compensation system does not somehow take himself out of that system if he concludes that the claim is not covered.

[68] It follows that there was no triable issue as to whether Mr. Arndt's claim was within the system, or whether Dr. Banerji was acting inside or outside the system. The Board decided that Mr. Arndt's employer was covered by the system, but that his carpal tunnel syndrome was not a work related injury. No collateral attack of those conclusions is possible in this action. Further, Dr. Banerji was at all times acting as a medical consultant for the Board, and his liability has to be determined on that basis.

Application of WCB Policies

[69] The second identified triable issue was, in part, whether processing Mr. Arndt's claims "within the policies or procedures of the WCB" breached the standard of care. This issue arose from the comment that there was no evidence on the summary dismissal application demonstrating that the Board's position paper on carpal tunnel syndrome was "correct" or "state of the art". As previously discussed (*supra*, paras. 52-4), whether a Board policy is inappropriate in general, or inapplicable to a specific injured worker, must be decided within the system. If the Board adopts a policy, and the claims manager applies that policy, that decision is final once any appeal to the Appeals Commission and the court either is waived or is unsuccessful.

[70] Once again, an injured worker who has been denied compensation cannot collaterally attack that decision by commencing a civil tort action claiming that the Board's policy with respect to his type of injury is not "correct" or "state of the art". Unless the policy has been attacked in an appropriate manner, in a timely way, as being one that "no reasonable Board could adopt", the Board is entitled to apply it. Further, any challenge of this type must be to the Board policy itself; if

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employees and consultants of the Board apply in good faith the policies that are given to them, no civil cause of action exists against them personally.

[71] The order under appeal also identified the following triable issues:

> (c) whether the Plaintiff suffered an injury or loss not recognized by the WCB;
>
> (d) whether Dr. Banerji's failure to comply with the applicable standard of care was the actual and legal cause of the Plaintiff's loss or injury not recognized by the WCB;

The intended scope of these two issues is not clear. The reference to injuries "not recognized by the WCB" should not be read as meaning that the Board denied that Mr. Arndt had carpal tunnel syndrome. No one disputed that he did, and the two surgeries that he had are compelling evidence of the existence of the underlying condition. What the WCB decided (based on Dr. Banerji's opinions) was that the carpal tunnel syndrome was not work related. As previously noted, a collateral attack of that conclusion in a tort action is not possible.

[72] The reference to injuries "not recognized by the WCB" may be intended as a challenge to the Board's position paper on carpal tunnel syndrome. Alternatively, it may be a suggestion that the Board failed to properly conclude that Mr. Arndt's carpal tunnel syndrome was work related. As discussed, neither a challenge to the underlying policy, nor to the application of that policy to Mr. Arndt's injuries is susceptible to collateral attack in this action.

The Liability of Consultants and Advisors

[73] Decision makers from time to time seek the input and recommendations of persons with special expertise. The expert generally owes a duty to the person retaining him or her to provide that advice in a reasonable (i.e., non-negligent) manner.

[74] Expert advisors generally do not owe any duty to third parties, even those who might be specifically impacted by the advice given: ***Elliott v Insurance Crime Prevention Bureau***, 2005 NSCA 115 at para. 80, 256 DLR (4th) 674. An important reason for not recognizing any duty by an advisor in favour of a third party is that the advisor would be put in a conflict of interest: ***Elliott v Insurance Crime Prevention Bureau*** at paras. 90-2. As was said in ***O'Connor Associates Environmental Inc. v. MEC OP LLC***, 2014 ABCA 140 at para. 21, 95 Alta LR (5th) 264, 572 AR 354:

> Those who are retained to give advice must be singularly committed to the person who retained them. They must be free to give full and frank advice to their principal, without being concerned about the impact that their advice would have on others.

Thus, a medical consultant retained by the WCB has an overriding duty to give full and frank advice to the WCB about the injured worker and his injuries. The injured worker can challenge that advice

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within the WCB system and through the WCB review and appeal processes. The injured worker, however, cannot in the absence of malice sue a medical consultant on the basis that the advice given was "negligent" or "incorrect".

[75] It follows that the injured worker cannot sue the medical consultant based on the scope of his retainer, or the nature of the opinion requested. Here Dr. Banerji was retained to do an assessment of Mr. Arndt's injuries based on a review of documentation only, without actually examining Mr. Arndt. Dr. Banerji did that, and did not represent that his report was based on anything else. It is not open to Mr. Arndt to sue Dr. Banerji at all for providing his advice to the Board, much less on the basis that he should have provided his report on a different basis, i.e. after a physical examination. Likewise, Dr. Banerji cannot be faulted for assessing Mr. Arndt's claims in light of the Board's position paper on carpal tunnel syndrome. Dr. Banerji was not retained to advise if that position paper was "state of the art", or anything else. His assessment of Mr. Arndt's claims within the existing Board policies, as instructed, is not actionable.

[76] "Expert witnesses" are a special type of professional advisor. They are retained to provide an opinion about an issue that is the subject of litigation. Where the expert witness is a physician giving an opinion on an injury, the expert is usually not the treating physician. The duties owed by such an expert witness were set out in ***White Burgess Langille Inman v Abbott and Haliburton Co.***, 2015 SCC 23 at para. 32, [2015] 2 SCR 182:

> Underlying the various formulations of the duty [of the expert witness to the court] are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another.

Medical consultants for the WCB operate in an analogous situation. The proceedings before the WCB can become adversarial, in which case the medical consultants take on the role of expert witnesses.

[77] If an expert witness's opinion is not sufficiently impartial and unbiased, the opinion may be inadmissible as evidence. However, once the expert is qualified to testify and provides the opinion, the expert cannot be sued on the basis that the opinion was "incorrect" or even "negligent". There are repercussions for a faulty expert opinion, but liability in a tort action for damages is not one of them.

[78] A litigant may, in limited circumstances, sue its own expert for negligence: ***Jones v Kaney***, [2011] UKSC 13, [2011] 2 AC 398; ***Kelly v Lundgard***, 2001 ABCA 185, 95 Alta LR (3d) 11, 286 AR 1. The standard of care, however, is nuanced. While the expert has a duty to provide a non-negligent opinion to the litigant, that duty is informed by the expert's obligation to provide an honest, unbiased opinion. The expert cannot be sued just because the litigant "does not like the advice", or because the advice given is not supportive of the litigant's position in the underlying lawsuit.

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[79] A suit against the adverse party's expert is generally blocked by the immunity provided to witnesses. The rationales for that common law protection are that immunity is necessary a) to promote the candour and cooperation of expert witnesses, and b) to prevent inappropriate relitigation: ***Elliott v Insurance Crime Prevention Bureau*** at paras. 119, 203; ***Jones v Kaney*** at paras. 15, 39-41; ***Meadow v General Medical Council***, [2006] EWCA Civ 1390 at para. 14, [2007] QB 462. The immunity was originally intended to protect witnesses from suits in defamation, but it was later extended into a general immunity from suit: ***Jones v Kaney*** at paras. 11-2, 72. The objective is to bar actions that are effectively a collateral attack on the original adjudication, and raise a risk of inconsistent verdicts, because the "value or truth of the evidence of a witness would be tried all over again": ***Jones v Kaney*** at para. 17.

[80] The exact boundaries of expert witness immunity are at present unclear: see ***Jones v Kaney*** and ***Sansome v Rubens***, 2017 NLCA 32. It has been asserted in the following circumstances:

(a) where a claim is alleged to have been settled on improvident terms, or with greater difficulty, because of faulty expert advice:

in an action by the party who retained the expert: ***Jones v Kaney*** at paras. 10, 71; ***Kelly v Lundgard***; or

(i) in an action by the party adverse in interest: ***Sansome v Rubens***;

(b) where an opinion was provided, although never actually used in evidence: ***M.N. v Froberg***, 2009 ABQB 145 at para. 49, 11 Alta LR (5th) 117, 468 AR 33; ***Smith (Next friend of) v Kneier***, 2001 ABQB 291, 98 Alta LR (3d) 299, 288 AR 144.

(c) after the issue has been adjudicated, in a suit by a disgruntled, adverse litigant: ***Elliott v Insurance Crime Prevention Bureau*** at para. 80; ***Carnahan v Coates*** (1990), 47 BCLR (2d) 127, 71 DLR (4th) 464; and

(d) in professional disciplinary proceedings against the expert: ***Meadow v General Medical Council***.

These particular appeals involve a suit against the expert after the adjudication, in this instance an adjudication before an administrative tribunal (the WCB), not an ordinary court. The protection can extend to quasi-judicial administrative proceedings in the right circumstances: ***McLennon v Furlong***, [2001] OJ No 890 (CA).

[81] It is not, generally, permissible for a litigant to sue the other party's expert on the basis that the expert gave that other litigant "negligent advice". Sometimes such actions are commenced for tactical reasons, in the hope that the expert will change or moderate his or her opinion, or be dissuaded from testifying. Actions of that kind are an abuse of process. On other occasions the losing litigant may attempt to sue the expert, after-the-fact, alleging that the litigant only lost because the court or tribunal

accepted the expert's opinion. Such actions are not maintainable as a matter of law, because the opposing party's expert does not owe the losing litigant a duty of care in tort.

[82] If the expert's opinion is accepted by the court or tribunal, then any external attack on that opinion amounts to a collateral attack on the decision. On the other hand, if the expert's opinion is rejected by the court or tribunal, then that opinion cannot have caused any damage. If the trial judge rejected that expert's opinion, and relied on a competing expert, or decided without reliance on expert evidence, the only consequence of the rejected expert opinion might potentially be some increased court costs or disbursements. Such increased court costs are dealt with in the very action, and cannot be claimed in a collateral suit for damages: ***Lowe v Guarantee Co***. at paras. 53-4.

[83] It follows that Mr. Arndt's claim against Dr. Banerji for the opinions he provided to the Board is flawed as a matter of law. Dr. Banerji did not owe Mr. Arndt a duty of care in tort. Dr. Banerji's obligation was to provide an honest, unbiased and objective opinion, and that duty was owed to the Board. Any challenge to Dr. Banerji's opinion had to have been made within the workers' compensation system. Once the WCB has adjudicated the claim, and all appeals are exhausted, issue estoppel prevents the re-litigation of the merits of the evidence (including the expert evidence) in a fresh civil action.

[84] Dr. Findlay's opinion on the standard of care that would be applied in a medical malpractice action is irrelevant. This is not a medical malpractice action, and the reasons for decision reflect an error of law in analysing the claim on that basis. Dr. Banerji did not have any duty in tort to properly diagnose Mr. Arndt's injuries or their causes. Since the Board accepted Dr. Banerji's opinion, any challenge of that opinion amounts to a collateral attack on the Board's decision.

Section 34(4)

[85] As just discussed, expert advisors and consultants, including expert witnesses, are generally immune from suit because they do not owe any duty of care in tort to the opposing litigant. In addition, witnesses enjoy immunity for testimony given in court. Absent a finding of perjury, a witness cannot be sued based on whether their testimony was inaccurate, unreasonable, or rejected by the trial judge. A witness cannot be sued in defamation for things said in court.

[86] Section 34(4) is a specific manifestation of these general common law principles. It provides that a medical opinion given to the WCB ". . . is a privileged communication [and] is not admissible . . . in an action or proceeding against . . ." the expert providing the opinion. It expresses the protective shield as a "privilege", which can be defeated by "malice".

[87] The reasons for decision concluded that s. 34(4) creates a privilege over the physician's report, but does not insulate any action or conduct of the physician from suit. A medical consultant might be liable for the opinion expressed, but that liability would have to be established without reliance on the report. The underlying assumption that s. 34(4) creates an evidentiary privilege is inconsistent with ***Milne #2*** and reflects an error of law.

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[88] The privilege referred to in s. 34(4) is not an evidentiary privilege. To illustrate, expert reports prepared for the dominant purpose of litigation are covered by an evidentiary privilege. That includes, for example, medical reports prepared in personal injury litigation. The litigant that commissions such a report can assert evidentiary privilege and suppress the report. However, litigants who commission such reports routinely waive that privilege, and use the reports at trial. If that is to be done, proper notice of the intention to use the expert report must be given under R. 5.35.

[89] That, however, is not what s. 34(4) is about. As stated in ***Milne #2***, the privilege created in the section is a defensive privilege, not an evidentiary privilege. It is more like the defences of "qualified privilege" and "absolute privilege" that exist in the law of defamation. The opinions of a consultant to the WCB are not actionable, including the background actions of the consultant used to develop that opinion: ***Smith (next friend of) v Kneier***, 2001 ABQB 291 at paras. 10-11, 98 Alta LR (3d) 299, 288 AR 144; ***Lowe v Guarantee Company of North America*** (2005), 80 OR (3d) 222 at para. 58, 256 DLR (4th) 518 (CA). They are provided to the WCB on a privileged occasion, and the resulting privilege can only be defeated by malice. There is no distinction between the report and the opinion of the consultant, and the section does not merely bar the use of the "report" as evidence. It bars the underlying action. As stated in ***Milne #2*** at para. 4 the privilege "provides a justification for the allegedly actionable act", it does not just block some evidence.

[90] It follows that there is no triable issue in this action with respect to the applicability of s. 34(4). As noted in the next section of these reasons, all of Dr. Banerji's actions took place within his retainer by the WCB. There is no basis for excluding the operation of s. 34(4) based on him "stepping outside his role". Further, there is no legal distinction between what Dr. Banerji did and his reports. It is his entire involvement that is privileged.

[91] In any event, even if Dr. Banerji did not strictly fit within the parameters of s. 34(4), he would still be entitled to the common law protection that is available to a person who gives advice to his principal, and whose opinion becomes evidence in an adversarial proceeding. Since the case management judge specifically found that "malice" had not been proven, no cause of action can be maintained against Dr. Banerji.

Dr. Banerji's Mandate

[92] Dr. Banerji was retained to provide an opinion to the WCB. His mandate and duties arose from that retainer. He was not the treating physician. As discussed, Dr. Banerji's duties were as an expert advisor or consultant, and extended only to providing an honest and unbiased opinion to the WCB.

[93] Mr. Arndt's claim includes a number of allegations about the scope of Dr. Banerji's mandate, none of which demonstrate actionable conduct:

(a) It is asserted that Dr. Banerji was only entitled to opine whether Mr. Arndt's injuries were work related, but he was not entitled to identify other causes, specifically "secondary gain

factors". If a WCB medical consultant concludes that an injury is not work related, it is only natural that the consultant might try to identify an alternative source of the injury. Indeed, eliminating other potential sources might be one method of proving that the injuries were work related. A medical consultant is entitled to explore various possible causes of the injury, including whether the claim is motivated by "secondary gain factors".

(b) It is asserted that Dr. Banerji was not entitled to dispute the existence of Mr. Arndt's injuries, only whether they were work related. Firstly, Dr. Banerji never denied that Mr. Arndt had carpal tunnel syndrome. Secondly, a medical consultant is entitled to form an opinion that the worker does not in fact have the injury reported.

(c) It is asserted that Dr. Banerji was not entitled to discuss the case with Dr. Beeharry. Discussing the injured worker's symptoms with the family doctor is not only permissible, it is highly desirable. There is no merit to this assertion.

There is no merit to any of these pleadings, and any claims arising from them were properly summarily dismissed.

Summary on the Claim Against Dr. Banerji

[94] It follows that the first two of the identified triable issues relating specifically to Dr. Banerji also do not arise:

(a) recognizing one or both of Dr. Banerji and the Workers' Compensation Board ("WCB") owe the Plaintiff such a duty, whether Dr. Banerji owes the Plaintiff a duty of care to ensure the Plaintiff's claim is reviewed with the level of knowledge, competence and skill expected of a similarly qualified practitioner;

(b) whether Dr. Banerji failed to meet that standard of care by not identifying a causal connection between the Plaintiff's work duties and the injuries he sustained, not limited to Dr. Banerji's consideration of this issue within the policies or procedures of the WCB;

As noted, any duty owed is not a duty in tort. This is not a medical malpractice action. Dr. Banerji was a medical consultant retained to provide an opinion to the Board. This does not engage the tort standard of care of "knowledge, competence and skill of a medical practitioner". Dr. Banerji was not retained to diagnose or treat Mr. Arndt. Dr. Banerji was not retained to comment on whether the Board's carpal tunnel syndrome policy met some "standard of care", and in any event Mr. Arndt is not able to challenge that policy or decisions made under it in this civil action.

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Conclusion

[95] In conclusion, Mr. Arndt submitted a claim for workplace injuries to the Board. The Board assessed those claims, granted some, and denied others. Mr. Arndt exhausted the appeal and review procedures in the statute. Neither the opinion of Dr. Banerji nor the decisions of the Board can be collaterally attacked in an action of this type. Appeal #1701-0158AC is allowed, and the action against Dr. Banerji dismissed. Appeal #1701-0161AC is dismissed. Dr. Banerji is entitled to assessed costs and disbursements of the action against him, including the summary dismissal proceedings, assessed on Column 5. He is also entitled to assessed costs of these two appeals, on the basis that they were an appeal by him and a cross appeal.

Appeal heard on December 7, 2017

Memorandum filed at Calgary, Alberta
this 9th day of May, 2018

Paperny J.A.

Authorized to sign for: Slatter J.A.

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O'Ferrall J.A. (dissenting):

Introduction

[96] As a general principle, when a trial judge, or a case management judge on behalf of the trial court, dismisses an application to summarily dismiss a claim, this Court ought to be loathe to second-guess either. An appellate court does not ordinarily assess the merits of claims until the trial court has completed its assessment. Appellate courts are confined to reviewing the assessment of the merits of claims by trial judges. Much of the analysis in the majority reasons is devoted to assessing the merits of the claims of Mr. Arndt which were permitted to go to trial. In my view, our reasons should be limited to assessing whether the case management judge was unreasonable in concluding that the court required more evidence and more fulsome legal argument in order for it to properly assess the plaintiff's claims. The majority's assessment of the merits of the plaintiff's claims may ultimately be found to be correct, but that assessment was done in the absence of evidence, argument and the answers to a number of questions which the case management judge felt needed to be answered with that further evidence and more fulsome legal argument.

[97] When a trial judge, or a case management judge on behalf of the trial court, finds herself in the position of being unable to decide a matter without more evidence and argument, deference ought to be accorded to her decision to seek more evidence and further argument. After all, in order for a trial court to either allow a claim or dismiss a claim, it, not this Court, must be satisfied on a balance of probabilities that the claim is valid or that it has no merit. Absent obvious error, it is the trial judge's conviction which governs. Determining whether a claim has merit is a matter of persuasion based on both law and evidence. If the trial court is not persuaded of the merits of a claim, one way or the other, what is it to do? Certainly not summarily dismiss it. As the U.S. District Court in New York put it in a 1971 case, *Chubbs v New York (City of)*, 324 F Supp 1183 (Dist Ct ED NY 1971), "Since courts are composed of mere mortals they can decide matters only on the basis of probability, never on certainty." But if a trial judge or case management judge is uncertain about the merits (the probability) of a claim or a defence, summary judgment is out of the question.

[98] As Justice Berger of this Court pointed out in another context, the overarching principle governing judicial decision-making is that the judge should decide what justice requires: *R v Gashikanyi*, 2017 ABCA 194 at para 7. If one's vision of the law is the search for truth and justice, then for an appellate court to cut short that search which the trial court has decided to conduct requires that it be plain and obvious that the search will be futile. Considerations of judicial resources, of proportionality and timely and affordable procedures surely are secondary considerations, particularly where the state is the party seeking to cut the process short.

[99] What this Court might think about the merits of a claim in respect of which the trial court is uncertain is ordinarily of no import until the trial court has ruled on the merits aided by whatever evidence and argument it might seek. In this case, there was no ruling on the merits of the claims of Mr. Arndt which were permitted to proceed for this Court to assess. The case management judge

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simply declined to dismiss the appellant's claim without further evidence and argument. As this Court stated in *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157 at 71, [2017] CarswellAlta 1133, "[r]estrictions on appellate review are not simply matters of polite deference but of jurisdiction." Unless it can be demonstrated to the trial court that a claim is "without merit", this Court's jurisdiction to summarily dismiss claims which have not been litigated and adjudicated upon ought to be limited to cases of obvious error.

[100] When a trial judge has summarily dismissed a claim, as the case management judge did with respect to some of Mr. Arndt's claims, this court can then safely commence to assess the merits of the claim which has been summarily dismissed.[1] But absent plain and obvious error, this Court ought not to be assessing the merits of claims which have not been summarily dismissed.

[101] The so-called modern approach to summary judgment motions is intended to improve access to justice by empowering trial courts to adjudicate more cases through summary judgment motions, not by compelling them to do so when they find they are unable to make the necessary findings of fact without more evidence. The so-called modern approach is likewise not intended to empower appellate courts to decide the merits of claims at first instance. As this Court stated in *776826 Alberta Ltd v Ostrowercha*, 2015 ABCA 49 at para 7, 593 AR 391, "appeals from *denials* of motions for summary judgment will be difficult to establish" [emphasis in original]. Again, in *Ostrowercha*, which was a case where the chambers judge declined to summarily dismiss a claim, this Court stated at paragraph 7:

> While the culture shift in Canadian law towards using alternative but fair and just methods of adjudication is well established in Alberta, front line judges are entitled to deference on their decisions as to whether summary judgment under Rule 7.3 is a fair and appropriate means for adjudication in a given case: *W. P. v Alberta*, 2014 ABCA 404 at para 15.

And in *Mulholland v Rensonnet*, 2018 ABCA 24 at paragraph 3, this Court stated:

> A chambers judge is not required to grant summary judgment where he or she does not feel they can fairly and properly adjudicate the issue before them on the record presented.

[102] As Justice Wakeling of this Court pointed out in his extensive examination of summary judgment in *Stoney Tribal Council v Canadian Pacific Railway*, 2017 ABCA 432, most, but not all, jurisdictions make the granting of summary judgment discretionary. The Ontario rule which was the subject of the litigation in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 employs the phrase "shall grant summary judgment" if there is no genuine issue requiring a trial with respect to a claim.

[1] Ironically, very little analysis of the claims which were summarily dismissed is to be found in either the majority or the dissent reasons, notwithstanding that their dismissal was also appealed. Most of the analysis is directed at the claims which were not summarily dismissed. And therein lies irony.

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The Alberta rule provides that the trial court "may" summarily dismiss claims if they have "no merit". There are, of course, other fundamental differences between Ontario summary judgment/summary trial rules and Alberta's. But the point is that the phrase "may grant summary judgment" if a claim has "no merit" in the Alberta rule expressly preserves the discretion.

[103] *Hryniak v Mauldin*, which articulated the so-called modern approach, was a case involving a group of plaintiff-investors who were granted summary judgment against a defendant promoter. The promoter in *Hyrniak* had taken the plaintiffs' money and the money disappeared without having been invested. It was not a case of a denial of a summary dismissal application. It was a case where summary judgment was granted in favour of the plaintiffs and therefore the decision was ripe for appellate review. Keeping this distinction in mind, the Supreme Court in *Hryniak* had this to say about the granting of summary judgment at paragraphs 47 and 49:

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

[104] In the case before us, the case management judge, who was familiar with the litigation, was unable to make the necessary findings of fact and unable to apply the law to the facts without more evidence and argument.

[105] While a party resisting summary dismissal must "put its best foot forward" (*Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372), many of the facts required to establish the plaintiff's claim in this case appear to be within the sole knowledge of the Workers' Compensation Board (WCB) and may only become evident upon document production, discovery or trial. In such cases, plaintiffs can only provide evidence of facts they are aware of because necessary supporting facts, if they exist at all, are within the defendants' knowledge. The question for the judge hearing the summary dismissal application in such circumstances is whether there is anything to indicate that such evidence might reasonably exist.

[106] In *Hryniak*, the Supreme Court confirmed the long-held view that, absent an error of law, the decision to grant summary judgment to a plaintiff attracts deference and should not be overturned absent palpable and overriding error. That, of course, has implications for the standard of review to be applied in this case. The standard of review of a refusal to summarily dismiss a claim must be at least as deferential, if not more deferential, than the standard of review of a summary judgment or a summary dismissal of a claim. In a refusal to summarily dismiss a claim, all that has been decided is that the trial court is not yet persuaded of the merit of a claim, one way or the other. The decision is a non-decision except from the perspective of requiring further proceedings. It is not final or

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dispositive. One might even question why it would be subject to appellate review at all except in cases of obvious error. A trial judge's decision not to summarily dismiss a claim is not the same as summary dismissal of a claim or summary judgment for the plaintiff. In the latter two cases, the ruling is final and dispositive and therefore ripe for appellate review.

[107] The foregoing are essentially my reasons for dissenting in this case. However, since the majority hold that there was obvious error in this case and provide extensive reasons for so doing, it is incumbent upon me to deal with the merits of Mr. Arndt's claim as well. Opining on the merits of a claim which has yet to be litigated, let alone decided, is something I do reluctantly. I do so only for the purpose of suggesting that it is premature to conclude that it is plain and obvious that the plaintiff's claim is without merit, particularly as the law in this area appears not to be completely settled.

[108] For the purposes of deciding the summary dismissal application, the case management judge identified issues raised by the summary judgment application. Some of them she dismissed. That is, on the record before her and presumably only for the purpose of deciding the summary dismissal application, the trial judge found, for example, that there was no evidence of malice on the part of Dr. Banerji. She also found that Dr. Banerji did not act with the express purpose of harming Mr. Arndt. Whether those findings can bind the ultimate trier of fact if convincing evidence to the contrary comes out at trial I leave for another day. Suffice it to say that while eliminating issues prior to trial or the discovery process for the purpose of identifying the real issues between the parties is commendable, the dangers of trying to define or limit the issues to be litigated on the basis of an incomplete record is one of the challenges of case management.

Discussion

A. Duty of Care owed by Dr. Banerji?

[109] One of the issues the case management judge was unable to summarily dismiss was whether the defendant, Dr. Banerji owed Mr. Arndt a duty of care and, if so, what the standard of care might be. Was Dr. Banerji required to ensure that Mr. Arndt's Workers' Compensation claim was reviewed with the level of knowledge, competence and skill expected of a similarly qualified practitioner?

[110] As an aside, when novel duties or standards of care are sought to be established, it is not only open to the applications judge to direct a trial, it may be preferable. As this Court stated in *Condominium Corporation No 0321365 v Cuthbert*, 2016 ABCA 46 at 35, 612 AR 284:

> While it may be possible to determine in a summary judgment application whether a novel duty of care is owed (particularly when material facts are undisputed), it is often preferable to consider novel claims at trial on a full factual record: *Royal Bank v Société Générale (Canada)* (2006), 219 OAC 83 at para 51, 31 BLR (4th) 63 (Ont CA). This approach is consistent with *Hryniak*, *Amack* and *Templanza*; that is, a trial may be required when the action involves unsettled legal issues or the applications

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> judge is not satisfied she can fairly resolve the dispute on the record. The case management judge's decision is entitled to deference.

[111] For the purpose of the summary dismissal application, the case management judge assumed the existence of a duty of care after making brief reference to three decisions with comparable factual matrices (one from a Master of the Alberta Court of Queen's Bench; the other two from Ontario). Those cases are considered in some detail below. That consideration led me to conclude that it was reasonable, based on the case law the case management judge referred to, for her to assume a duty of care for the purpose of the summary dismissal application before her.

[112] The first of the decisions referred to by the case management judge was *Milne v Alberta (Workers' Compensation Board)*, 2008 ABQB 710, 461 AR 117 [*Milne No 1*], a decision of Master Hanebury. Master Hanebury's decision in *Milne No 1* was based on a different record and considered different issues than that of the Court of Queen's Bench in *Milne v Alberta (Workers' Compensation Board)*, 2012 ABQB 302, 541 AR 112 [*Milne No 2*], summarily dismissing Mr. Milne's claim against medical advisors to the WCB, which was upheld by this court in *Milne v Barnes*, 2013 ABCA 379, 561 AR 256 [*Milne No 2 CA*]. Master Hanebury's decision in *Milne No 1* apparently was not appealed and her reasons therefor were never subjected to appellate review. In my view, they are instructive on the issue of a potential duty of care owed by a medical advisor to the WCB. The Master relied on *Worthman v AssessMed Inc* (2006), 80 OR (3d) 249, 265 DLR (4th) 682 (SCDC) and *Lowe v Guarantee Co of North America* (2005), 80 OR (3d) 222, 256 DLR (4th) 518 (CA), neither of which were referred to us by the parties in this appeal.

[113] The circumstances in *Milne No 1* were similar to those here. Master Hanebury considered an application for summary dismissal of Mr. Milne's claims by the two defendant doctors (employed by the WCB). As in this case, the doctors in *Milne No 1* provided advice to the WCB with respect to Mr. Milne's WCB claim. Mr. Milne sued the doctors and the WCB seeking damages for a wide-range of claims including negligence, misfeasance, failure to discharge their statutory duties, conspiracy and defamation. One of main issues in the doctors' summary dismissal application was whether the doctors, as independent medical examiners of the WCB, were immune from liability. The doctors argued that they owed no duty of care to Mr. Milne because of that immunity.

[114] In *Milne No 1*, after reviewing *Worthman* and *Lowe*, Master Hanebury made a number of observations. She observed that the law of negligence in this area continues to evolve, and that there was no case on point in Alberta. She also noted that, unlike in *Worthman* and *Lowe*, in the case before her there were no actual physical examinations of Mr. Milne by the defendant doctors. She then reflected on the purpose of the WCB as expressed by Alberta courts. She pointed out that, as in the Ontario cases, the legislated scheme was mandatory. She concluded by posing and then responding to the question as to the existence of a duty of care, at paragraph 54:

> Do the professionals utilized or employed pursuant to that legislative scheme owe a duty of care to the injured worker? There is no case law precisely on point and in my view, this question cannot be determined on a summary judgment application. It is a

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> decision that must be made after a careful analysis of the *Anns/Kamloops* test and, if necessary, a consideration of important public policy factors. Therefore, this aspect of the claim of Mr. Milne cannot be summarily dismissed.

[115] Master Hanebury was clearly of the view that careful analysis and a consideration of important policy considerations were required before the claim could be dismissed. In dismissing the doctors' summary dismissal application and in concluding that Mr. Milne's claims in negligence, breaches of the duty to be fair and neutral, and defamation should proceed to trial, Master Hanebury found the cases of *Lowe* and *Worthman* to be instructive because they too concerned a statutorily mandated insurance scheme that limited the options and remedies open to injured claimants.

[116] Briefly, in *Lowe*, the plaintiffs were injured in a motor vehicle accident and applied to their insurer for statutory accident benefits. The insurer refused to pay for the rehabilitative devices/treatments recommended by the plaintiffs' treating physicians. Pursuant to a statutory scheme for settling such claims, the plaintiffs were sent to a designated assessment centre for a third party medical and rehabilitation assessment. Under the statutory scheme this assessment was final and binding unless one of the parties chose to dispute it. The assessors who examined the plaintiffs determined that the cost of recommended rehabilitative devices/treatments were not reasonable and not necessary. The plaintiffs brought an action against the two assessors and the assessment centre. The defendants brought an application to strike, and a motions judge struck out their claims on the basis that they disclosed no reasonable cause of action for reasons similar to those given by the majority in this case.

[117] The plaintiffs in *Lowe* appealed and some of their claims against the assessors, including a claim in bias, were permitted to go forward on the basis that it was not plain and obvious that there was no cause of action for conducting a statutorily-prescribed assessment in a biased manner. In allowing the claims to go forward, the Ontario Court of Appeal also held that it was not plain and obvious that the doctors were protected by the doctrine of witness immunity notwithstanding that the Ontario Legislature had indicated an intention to provide witness immunity by subsequently amending the *Ontario Insurance Act*, RSO 1990, c I-8, s 268.4 to include an immunity provision for such medical and rehabilitative assessments conducted in good faith. The Ontario provision is not unlike that contained in Alberta's *Workers' Compensation Act*.

[118] On the issue of whether or not a duty of care was owed, the Ontario Court of Appeal held that on an application to strike a claim, the question is not whether a duty of care will be recognized, but rather whether or not it is plain and obvious that no duty of care can be recognized. If the trial court is unable to discern that it is plain and obvious that no duty of care is owed without further evidence and argument, the trial court's view of the matter is entitled to deference.

[119] On the issue as to whether there was a duty of care owed by the defendants, the Ontario Court of Appeal concluded that it was at least arguable that the relationship between the assessors and the insured persons had both relational and causal proximity. The court posited that even if such relationship was not an *analogous* category (see *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537),

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it may have constituted a new category in which a duty of care should be established. In order to determine that, a trial was deemed necessary.

[120] Notwithstanding that it allowed the claim to go forward, the Ontario Court of Appeal suggested there may be policy reasons not to recognize the alleged duty of care. The Ontario Court identified three policy reasons that militated against recognizing a duty as to a claim in negligence. First, rejecting the existence of such a duty was thought to encourage neutrality on the part of a decision-maker on the theory that affording immunity for simple negligence to the decision-maker encourages neutrality. Second, the dispute resolution context in which the designated assessment centre's opinion was rendered would provide relief for most, if not all, of any damages that an insured person was likely to suffer as a result of a careless medical assessment. And third, the plaintiffs' losses would have been substantially, if not wholly, recoverable against the insurer. In my view, the latter two policy reasons from *Lowe* militating against the existence of a duty in negligence may not apply to the instant case.

[121] But with respect to public policy considerations generally, the Ontario Court of Appeal stated that, without evidence, an appellate court should be circumspect in using such public policy concerns to determine that it is plain and obvious that the cause of action could not succeed, citing *Hughes v Sunbeam Corp (Canada) Ltd* (2002), 61 OR (3d) 433, 219 DLR (4th) 467 (CA). In the case before us, there was no such evidence put before the case management judge.

[122] With respect to witness immunity, the Ontario Court of Appeal in *Lowe* stated that it was not prepared to conclude that it was plain and obvious that the role of the doctors should be viewed as merely providing expert opinions to the insurer and the insured. The Court stated that because of the consequences arising from their opinions, it might be reasonable to require them to assume responsibility for the accuracy of their opinions and reports.

[123] *Lowe* may be applicable to the facts of the instant case. It may not be. But until some of the unanswered questions posed by the case management judge are answered and argument made with respect to their significance, it cannot be asserted with certainty that some of the principles enunciated in *Lowe* are not applicable.

[124] I now turn to *Worthman*, where the injured plaintiff applied to her auto insurer for certain statutory accident benefits on the basis that she could not perform essential tasks of her employment as a result of injuries she sustained in a motor vehicle accident. Pursuant to a regulation authorizing same, the insurer required that Worthman be examined by a health professional of its choosing. The insurer made an appointment for the plaintiff to be examined. A physician examined the plaintiff and prepared a report for the insurer. The insurer subsequently stopped providing income replacement benefits to Worthman. The matter proceeded to arbitration and the arbitrator determined that the plaintiff was entitled to receive income replacement benefits notwithstanding the doctor's opinion. Subsequent to the conclusion of the arbitration, the plaintiff sued the physician who prepared the report and the company he worked for. She claimed damages for, among other things, bad faith, bias,

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misrepresentation, and negligence. The doctor and the company for which he performed the examination applied unsuccessfully to have the claim summarily dismissed.

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[125] In dismissing the appeal of the trial court's decision not to summarily dismiss the respondent's claim, the majority in *Worthman* relied on *Lowe* in concluding that the doctor who prepared the report may have owed a duty of care to the plaintiff. All of the plaintiff's claims, including the claim in negligence, were permitted to proceed. The court noted that the allegations were not simply based on the medical-legal report of the doctor, but also related to the role played by the doctor with respect to the manner in which the medical examination was conducted. The majority concluded at paragraph 31:

> [The motion's judge] was correct in holding that "although many of the authorities cited seem to establish the principle that a doctor retained by a third party to examine and report on a person to the third person owes no legal duty to the person other than to avoid injuring her, it may well be that, on the facts of this case, the legal duty owed by the defendants to the plaintiff may have been broader in the context of the mechanism established for the resolution of contested claims for no-fault benefits by the Insurance Act, R.S.O. 1990, c. I.8."

The Ontario Court of Appeal's reasoning was not unlike that of the case management judge in this case.

[126] The court in *Worthman* also made the following remarks with respect to the plaintiffs' claims and their attendant public policy issues, at paragraph 21:

> [The motion's judge] was…correct in concluding that it would be dangerous for him, on a summary judgment motion, to conclude that the plaintiff's claims are inevitably bound to fail and that, in fact, the plaintiff had demonstrated to him that her claims raise genuine issues for trial. The plaintiff must have a full opportunity to develop her claim so that the trial judge will be in a position to weigh the relevant facts and to consider the public policy issues that are inherent in this proceeding.

[127] On my reading of *Lowe*, *Worthman*, and the Master's *Milne No 1* decision, there is at least some uncertainty with respect to the existence of a duty of care in relation to the plaintiff's negligence claim against Dr. Banerji, that being a potential duty owed by the WCB's medical consultant to an injured worker under the various legislated schemes for compensating injured workers. And I say this cognizant of contrary authority such as the British Columbia Court of Appeal's recent decision in *Gill v WorkSafeBC*, 2017 BCCA 239. In my view, deference is owed the case management judge's conclusion that this issue could not be determined summarily.

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B. Duty of Care owed by WCB?

[128] Although the question as to the existence of a duty of care owed by the WCB to the plaintiff (important in the plaintiff's broader action against the WCB) is not directly at issue in this particular appeal (this being an appeal of Dr. Banerji's application for summary dismissal), the issue was touched upon by the case management judge in her supplementary oral reasons and addressed by the majority in its reasons. In those supplementary reasons, the case management judge stated:

> …somebody owes Mr. Arndt a duty of care to ensure that his claim had been reviewed with the level of care, skill and knowledge of an average practitioner in the relevant specialty based on the knowledge and practice of a medical practitioner at the time of the alleged negligence. Who owes that duty is left open to be determined at trial; whether that duty rests with Dr. Banerji, or with the WCB[.]

[129] The majority concluded that the WCB does not owe a duty in tort to an injured worker. Rather, they said that the duty owed by the WCB is a public and statutory one, the remedies for which are found solely within the appeal and review procedures in the *Workers' Compensation Act*, RSA 2000, c W-15.

[130] While this is generally the case and may ultimately be the case here, it is a generalization which is not without exception. When policy considerations otherwise working against the duty are absent, it may not be the case. Where there has been a deprivation of a common law right to sue for damages and the common law right is replaced with a legislative scheme which binds the ultimate decision-maker to adhere to the policies of the party which determines compensation in the first instance (under s. 13(6)(b) of the Alberta *Workers' Compensation Act*, the Appeals Commission is bound by the Board's policies with respect to the matter under appeal), there may be a duty on that party to have policies which are fairly compensatory and not designed to preclude what would otherwise be appropriate compensation in order to save money, whether that saved money be in the form of industry assessments or the public purse. In such cases, the regulatory body may owe duties which are not owed by other regulatory tribunals who are not administering compensation schemes which are put in place expressly for the purpose of replacing rights of action which would otherwise have been available to injured parties at common law. It is unclear whether the policy considerations identified by the majority are at work in this case until that issue has been litigated, and I am of the view that the chambers judge was correct in being hesitant to endorse an all-encompassing conclusion that the WCB or its assessors owe no duty in tort to an injured worker. The initial determination as to whether a duty of care is owed by the WCB in these circumstances is best left to the trial court.

[131] I note the recent case of *Castrillo v Workplace Safety and Insurance Board*, 2017 ONCA 121, 136 OR (3d) 654, a proposed class action against the Workplace Safety and Insurance Board, Ontario's version of the WCB. The proposed class of plaintiffs had their non-economic loss benefits reduced by the Board allegedly as a result of the Board's implementation of an internal policy that broadened the interpretation of what was considered to be a pre-existing impairment. The appellant (the proposed representative plaintiff) asserted that the interpretation was improperly made to limit

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legitimate claims to reduce the cost of claims where there might have been a previous impairment. They sued in negligence among other claims including misfeasance and bad faith. The Board successfully brought an application to strike the statement of claim on the basis that (1) it disclosed no reasonable cause of action and (2) that the court had no jurisdiction over the subject matter.

[132] On appeal, the Ontario Board argued that it owed no duty of care in negligence to individual workers. The Ontario Court of Appeal was not persuaded that the appellant's claim in negligence had no reasonable prospect of success, despite a strongly worded privative clause similar to that found at s.17 of the Alberta *Workers' Compensation Act*. With respect to duty of care, the court indicated that the *Cooper v Hobart* test to determine whether a duty of care existed is fact and policy intensive and made in the context of a statute, and that such an analysis was not undertaken by the motions judge or by the parties.

[133] *Castrillo*, of course, was not simply a case of a complaint about the Board not granting an individual the entitlement to benefits he or she sought. The Ontario Court of Appeal was of the view that such a duty of care would not ordinarily be owed by the Board: *Castrillo* at para 51; *Taylor v Workplace Safety and Insurance Board*, 2018 ONCA 108 at para 9. Rather, the claim in *Castrillo* was brought by a class of plaintiffs and challenged the legality of Board's actions "across a category of benefits" (*Castrillo* at para 51)—i.e., those relating to persons alleged to have pre-existing conditions. The Ontario Court of Appeal concluded that the proposed plaintiffs were entitled in the circumstances to a proper assessment as to the existence of a duty of care. In the instant case, while we are not dealing with a class action, certain policies (position papers) of the WCB with respect to the assessment of carpal tunnel syndrome were questioned as being something less than state of the art. As in *Castrillo*, the claimant may have lost his entitlement to WCB coverage as a result of policies which were something less than state of the art. His claim arguably touches on WCB policy "across a category of benefits", which may distinguish his case from others in which a duty of care was held not to arise.

[134] Parallels may be drawn between the Ontario Board's policy of defining pre-existing impairment with the Alberta Board's policies on carpel tunnel syndrome. But the propriety of drawing such parallels ought to be determined by the trial court after hearing relevant evidence and argument. The *Castrillo* case may ultimately be distinguished because it was a class action lawsuit, but it was not clear to the case management judge why an individual complainant cannot likewise challenge a policy of the Board which causes him to be denied entitlement to compensation for a work-related injury if that policy is not science-based or empirically valid. Section 13.2(6)(b) of the Alberta *Workers' Compensation Act* appears to preclude such a challenge before the Appeals Commission of the Workers' Compensation Board. The British Columbia Court of Appeal in *Lockyer-Kash v Workers' Compensation Board*, 2013 BCCA 459 held that such challenges to the British Columbia Board's orders must be brought by judicial review. Clearly the respondent seeks a form of judicial review.

[135] Finally, I am not persuaded by the majority that *Ernst v Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3 is authoritative for the proposition that the WCB cannot be liable for negligently administering a regulatory scheme or negligently processing a claim for statutory benefits. Such immunity from liability is very much dependent upon the nature of the regulatory scheme the specific regulator was administering.

[136] The "historic trade-off" upon which the WCB system is based, as discussed in the reasons of the majority, makes the WCB a much different tribunal that the Alberta Energy Regulator which regulates oil and gas exploration, extraction and production which, but for the regulation, could be conducted without restrictions. The WCB scheme is decidedly different. It extinguishes common law rights and replaces them with what is considered to be a superior system for assessing claims and compensating injured workers. The WCB scheme is thought to be superior because it provides benefits to employers (who are exempt from being sued by the injured worker) and to workers (who are compensated without regard to fault). But injured workers who may have been wrongfully denied coverage by WCB policies and who are otherwise prevented from asserting their previously-held common law rights to sue may not perceive the scheme as benefitting them. For reasons which follow, I am of the view that they may require recourse to the courts in certain limited circumstances.

[137] The existence of internal WCB processes, including the opportunity to appeal to the Appeals Commission to rectify any potential errors made by the Board, supports the majority's conclusion that, generally speaking, no duty of care is owed to individual claimants. However, in cases in which unfair WCB policies affecting a range of possible claimants are being applied, the Appeals Commission does not have the jurisdiction to assess those policies, but is instead bound to decide the workers' appeals on the basis of those policies: section 13(6)(b) of the *Workers' Compensation Act*. In such cases, there may be no public policy reasons to preclude a finding of a duty of care.

[138] Underlying the issues in this appeal is whether the existence of a Workers' Compensation Appeals Commission, a tribunal assigned with judicial branch functions (making decisions on workers' rights to be compensated for job-related losses) insulates the Workers' Compensation Board from action. In his book, *Unjust by Design* (Vancouver: UBC Press, 2013), Ron Willis, the first chair of Ontario's Workers' Compensation Appeals Tribunal (now the Workplace Safety and Insurance Appeals Tribunal) relays the story of his first 10 years (1985-1995) as chair of that tribunal during which time he suggested the Ontario Tribunal was a properly structured judicial tribunal, impartial and independent (relatively free from interference by the executive branch). A new government apparently changed all that. Legislation and certain executive orders limited the Tribunal's independence. Significantly, among the legislative provisions limiting the Tribunal's independence was one ensuring that the Workers' Compensation Appeals Tribunal was bound by the Board's policies. The Ontario provision binding the Workers' Compensation Appeals Tribunal to the Board's policies is different than section 13(6)(b) of the Alberta Act. But both provisions have the effect of binding the appeals commission or tribunal to policies which may limit a claimant's recovery of compensation to which he might otherwise have been reasonably entitled. Now it may be argued, as the majority does with some justification, that if the statute makes it clear that was the Legislature's

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intention to bind the Appeals Commission to Board policies, then the only remedy is legislative change. And just such legislative and regulatory changes have been made from time to time which presume that certain disabilities are work-related if suffered by persons in certain specified industries or vocations. But I can do no more than suggest that if a branch of the executive arm of government (the Workers' Compensation Board) restricts the ability of a tribunal exercising a judicial branch function (the Workers' Compensation Appeals Commission) to discharge its function impartially and independently, then a duty of care may be owed to ensure that the restriction does not unfairly prejudice one of the parties to the judicial proceeding (namely, the injured worker). That is, if one party to a *lis* is given the right to have the *lis* decided in accordance with its policies, then the policies must permit a fair determination of the matter. A duty may be owed to the other party to insist only on binding policies which ensure that the overall mandate of the compensation scheme is properly discharged in accordance with the legislation and the historic trade off upon which it is based.

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[139] And so, like the case management judge, I am not persuaded at this stage of the proceedings that the Workers' Compensation Board necessarily owes no duty of care to ensure that its policies do not unfairly prevent compensation from being awarded to workers for injuries which are work-related, which is one of the Board's core mandates. And since the Workers' Compensation Appeals Commission is legislatively precluded from ensuring that Board policies do not prevent the awarding of appropriate compensation for work-related injuries, there may be a need for the court to determine whether such a duty is owed and whether or not it was discharged in this case. And both determinations require evidence and argument.

C. Standard of Care

[140] With respect to whether a trial is required to determine whether Dr. Banerji failed to meet the standard of care, the order of the case management judge stated as follows:

> (a) recognizing one or both of Dr. Banerji and the [Workers'] Compensation Board ("WCB") owe the Plaintiff such a duty, whether Dr. Banerji owes the Plaintiff a duty of care to ensure the Plaintiff's claim is reviewed with the level of knowledge, competence and skill expected of a similarly qualified practitioner;
>
> (b) whether Dr. Banerji failed to meet that standard of care by not identifying a causal connection between the Plaintiff's work duties and the injuries he sustained, not limited to Dr. Banerji's consideration of this issue within the policies or procedures of the WCB[.]

[141] In my view, the case management judge's determination that the issue of standard of care required a trial was reasonable. She recognized that the scope of Dr. Banerji's duty of care might be limited by the understanding that the medical consultant is not conducting an examination on the claimant directly, but rather reviewing the medical and related information made available to him to fulfil various tasks assigned to him, including providing a medical opinion and identifying missing information necessary to come to an appropriate opinion.

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[142] In the case management judge's view, Dr. Banerji's burden to establish that there was no merit to Mr. Arndt's claim was not discharged because a number of questions about the nature of Dr. Banerji's assessment remained unanswered. For instance, little by way of WCB policy or mandate was provided to the court to make an assessment outside of Dr. Findlay's expert opinion that Dr. Banerji met the standard of care required by the WCB policies. While Dr. Findlay provided his opinion as to whether a similarly qualified medical consultant would have reached the same conclusion as Dr. Banerji, the opinion was reached using a WCB position paper and supplementary background paper on carpal tunnel syndrome as the benchmark. Dr. Findlay did not provide an opinion as to whether the WCB papers were reflective of the state of the art at the time of the assessments. Neither was the case management judge informed as to whether the WCB's medical consultants were at liberty to deviate from the WCB policies. The case management judge pointed to the possibility that the WCB policies might have prevented Dr. Banerji from meeting the standard of care required of him following a trial of the issue.

[143] The case management judge was also alive to the fact that Mr. Arndt had provided little by way of evidence to support his claim. However, she referred to case-law suggesting that want of evidence by the plaintiff is not necessarily fatal to a claim that has been challenged on a summary dismissal application: see, for instance, *Sabey v Whidden*, 2016 ABQB 487. Ultimately, the case management judge permitted the matter to proceed on the issue of standard of care because she was not satisfied the claim had no merit. "No merit" is the test our *Rules of Court* prescribe.

D. Applicability of section 34(4) of the *Workers Compensation Act*

[144] The case management judge assumed, for the purposes of the summary dismissal application, that Dr. Banerji was covered by the protection of section 34(4) of the *Workers' Compensation Act* as she found no evidence of malice, which would have provided an exception to the provision's application.

[145] The more significant question then becomes the extent to which section 34(4) protects Dr. Banerji from liability for the conduct alleged against him by Mr. Arndt. On this point, the case management judge determined that notwithstanding that a *report* under s.34(4) could not be used in a negligence action, that provision did not mean that "any action or conduct of the physician [was] therefore protected by virtue of the existence of that report". The case management judge gave examples of situations in which a medical consultant may not be protected. For example, if the medical consultant were to pressure a general practitioner to change his mind or come to a different conclusion, there might be liability. Another example she gave was a situation in which injury was caused to the patient during an examination. The effect she found section 34(4) had in those situations was that a claimant would need to establish his or her claim without reliance on the medical report.

[146] The majority concludes that the underlying assumption in the case management judge's reasons that section 34(4) merely creates an evidentiary privilege reflects an error of law because it is inconsistent with the Court of Appeal decision in *Milne No 2 CA*.

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[147] A few words of background might be said here about this Court's decision in *Milne No 2 CA* which upheld a lower court decision summarily dismissing Mr. Milne's claim against medical advisors to the WCB (*Milne No 2*). This summary dismissal application was made subsequent to Master Hanebury's decision in *Milne No 1*, discussed earlier, and was based on a different record and considered different issues. Master Hanebury's reasoning and the Ontario cases cited therein do not appear to have been considered by either the chambers judge or this Court in *Milne No 2*. The second summary dismissal application in *Milne* was based on section 34(4) of the *Workers' Compensation Act* and made after additional examinations for discovery had been completed. This Court upheld the summary dismissal and found that section 34(4) was a "defensive privilege that provided a justification for the allegedly actionable act" (para 4). The Court found that the doctors' reports were "the very tortious act that [was] alleged", which justified its decision to uphold the chambers judge's decision to grant summary dismissal of the action. The Court noted that the justification provided by section 34(4) was not absolute, it could be defeated by evidence of malice.

[148] In this case, assessing the case management judge's decision in light of the conclusions in *Milne No 2 CA* may not be as straightforward as suggested by the majority. For example, Dr. Banerji argued in his factum:

> The allegations against the Appellant arose solely as a result of his tasks for the WCB and subsection 34(4) provides justification for his conduct. The Appellant submits that *even if* he did not draw the correct conclusions, even *if* the WCB position paper did not reflect the state of the art at the time, or even *if* he had an obligation to go beyond the WCB's policies to meet a duty of care to the claimant, subsection 34(4) applies to provide him a defensive privilege. [emphasis in original]

Can the existence of a defensive privilege as articulated in *Milne No 2* truly extend as far as that asserted by Dr. Banerji? The question remains to be answered and the case management judge did not err in concluding that more evidence and argument would better enable a considered answer to be given. With respect, I do not share the view that, assuming the facts alleged by Mr. Arndt are true (and for which there was some evidence), his claim has no merit.

[149] The majority correctly states in its reasons that section 34(4) is a manifestation of the general common law principles concerning witness immunity. The majority indicates that the opinions of a consultant to the WCB, including the background actions of the consultant used to develop his or her opinion, are simply not actionable. The majority cites, *inter alia*, *Lowe* for this proposition. In *Lowe*, however, on the issue of witness immunity, the Ontario Court of Appeal was *not* persuaded that witness immunity applied in the circumstances, given that an alleged "independent wrong" had been alleged to have been committed by the defendants. Here, the alleged independent wrongs committed by Dr. Banerji may include Dr. Banerji's failure to properly assess the case of Mr. Arndt's injury pursuant to his professional obligations, notwithstanding that WCB policies may have purported to limit those obligations. As the Ontario Court of Appeal stated in *Lowe* at paragraph 59:

> Notwithstanding the broad scope of the doctrine of witness immunity, I am not persuaded that it is plain and obvious that it applies in this case. As already noted, the foundation of the appellants' claim is not the potential testimony of the respondents as witnesses nor their actions in collecting or considering material on which they may be called upon to testify. Rather, the appellants rely on the independent wrong occasioned by the respondents' conduct as decision-makers, i.e., the delay in receiving the benefits to which they are otherwise entitled.

[150] Also note that in *Worthman* (discussed earlier in this judgment), the majority of the court, in allowing the plaintiff's claims to proceed, stated at paragraph 71 that: "if [the plaintiff's] allegations are proven, surely it would be contrary to public policy to cloth the defendants with an absolute privilege or immunity".

[151] In my view, the majority's conclusion that defensive privilege under section 34(4) bars the plaintiff's claims may extend the protection of section 34(4) too far. But that will be up to the trial judge to assess in light of the evidence. Then and, in my view, only then may this Court get an opportunity to opine. The case management judge's conclusion to allow Mr. Ardnt's claim in negligence to proceed despite section 34(4) of the *Workers' Compensation Act* was reasonable. In short, I do not see any of the issues identified by the case management judge as requiring further evidence and argument as being settled such that one could, without more, conclude that Mr. Arndt's claim against Dr. Banerji was without merit. I would have dismissed Dr. Banerji's appeal. With respect to Mr. Arndt's appeal, I have nothing to say other than the point made earlier in these reasons about the focus of this appeal.

Appeal heard on December 7, 2017

Memorandum filed at Calgary, Alberta
this 9th day of May, 2018

O'Ferrall J.A.

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Appearances:

R. Dudelzak, Q.C.
for the Respondent

M.L. McMahon
for the Appellant

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2017 BCCA 324

Date: 20170915
Docket: CA43877

Between:

Trial Lawyers Association of British Columbia

Appellant
(Plaintiff)

And

Attorney General of British Columbia and Director of Sheriff Services

Respondents
(Defendants)

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated July 26, 2016 (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2016 BCSC 1391, Docket S149303).

Counsel for the Appellant:	R.D. Holmes, Q.C. N.W. Peterson
Counsel for the Respondents:	J.D. Hughes K. Evans
Place and Date of Hearing:	Vancouver, British Columbia April 27, 2017
Place and Date of Judgment:	Vancouver, British Columbia September 15, 2017

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Fenlon

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Summary:

The appellant filed a claim challenging the constitutionality of provisions of the Jury Act, R.S.B.C. 1996, c. 242 and Supreme Court Civil Rules providing for civil jury fees. The appellant argued that the provisions are vague, ultra vires the power of Sheriff Services and wrongfully impede access to justice, thereby offending the rule of law and impinging on the court's jurisdiction under s. 96 of the Constitution Act, 1867. After a summary trial, the trial judge dismissed the appellant's claim. The appellant appealed on the basis that the trial judge erred in finding the impugned provisions constitutional. Held: Appeal dismissed. The trial judge did not err in concluding that the provisions are not an unlawful impediment to access to justice. He also did not err in concluding that Sheriff Services acted intra vires the Jury Act when collecting the fees. The provisions are not unconstitutionally vague; a "sum sufficient to pay for the jury and the jury process" meets the requisite standard of precision.

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Reasons for Judgment of the Honourable Chief Justice Bauman:

Introduction

[1] The Trial Lawyers Association of British Columbia (the "Association") appeals from Chief Justice Hinkson's order pronounced 26 July 2016 following a summary trial, dismissing its constitutional challenge to civil jury fees. The Association seeks to have this Court set aside that order and make the following declarations:

a) s. 17 of the *Jury Act*, R.S.B.C. 1996, c. 242 (the "*Act*") and Rule 12-6(3)(b) of the *Supreme Court Civil Rules* (the "*Rules*") are unconstitutional and of no force and effect;

b) the sheriff's civil jury fees are *ultra vires* the *Act*; and

c) the sheriff's civil jury fees are unconstitutional and of no force and effect.

[2] The Association also seeks an order restraining and enjoining the sheriff from publishing and demanding payment of the civil jury fees. It says the choice between a civil trial by judge alone and a trial by jury is at the core of the court's jurisdiction under s. 96 of the *Constitution Act, 1867* and is a fundamental part of providing equal rights to access justice.

[3] The Association seeks to build on the decision of the Supreme Court of Canada in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 ("*TLA, 2014*"). In my view, the Association's reach in this regard exceeds its grasp. I would dismiss the appeal.

Facts

[4] The option to try a civil matter before a judge and jury has been available in British Columbia since the Proclamation of Governor James Douglas on 19 November 1858. Since that time, British Columbia has adopted different variants of a user-pay system that requires a litigant wishing to have a civil jury trial to deposit some amount of money with the sheriff. Presently, s. 17 of the *Act* requires that the party must pay to the sheriff "a sum sufficient to pay for the jury and jury process", and any additional fees prescribed by the *Act* or the *Rules* for the expenses of a jury and attendance of the sheriffs. Rule 12-6(3)(b) requires that a party pay to the sheriff "a sum sufficient for the jury and the jury process" at least 45 days before trial. The Association challenges these two provisions.

[5] On 1 July 2013, Sheriff Services issued a notice to the legal profession and public to advise of changes in the process for collecting civil jury fees (the "Deposit Notice"). It replaced an earlier notice that had been effective as of 1 July 2011. The Deposit Notice advised that Sheriff Services requires a deposit of $1500 no less than 45 days prior to the scheduled trial date, and daily deposits, paid in advance, of $800 for days two through ten, $900 for days 11 through 49, and $1200 for days 50 and beyond. According to Staff Sergeant Steven Jervis, the initial deposit amount has been $1500 since 2003. This initial amount reflects an estimate of the fees required to pay for the jury and jury process up to and including the first day of the jury trial. The further deposits are based on daily jury fees and expenses and an estimate of the costs to the sheriff in summoning and empanelling the jury, attending in court, escorting the jury, and related administration duties. At the end of a jury trial, the sheriff provides the party responsible for paying the jury fees with information about the total costs associated with the trial and their breakdown.

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[6] The Association is a registered British Columbia non-profit society consisting of lawyers from across the province. Its constitutional mandate includes, among other things, to uphold and defend the rights and freedoms of individuals inherent in a free and democratic society; to seek justice for all; to further the rule of law and administration of civil and criminal justice for the public good; to uphold and preserve the right to trial by jury; and to promote access to justice.

[7] On 2 December 2014, the Association filed a notice of civil claim, challenging the constitutionality of the provisions of the *Act* and *Rules* providing for civil jury fees, and seeking an order restraining and enjoining Sheriff Services from demanding payment of the fees. On 26 January 2016, the Association filed a notice of application to have the claim determined by way of summary trial. The Chief Justice heard this application over two days on 11 and 12 April 2016 and rendered his decision on 26 July 2016. He dismissed the Association's claim.

Decision Under Appeal

[8] In his reasons, the Chief Justice dealt first with the issue of standing. The Association sought public interest standing. Applying the three-pronged test from *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 37, the judge found that a serious justiciable issue had been raised (at para. 16); the Association had a genuine interest in the validity of the civil jury fees (at para. 18); and the proposed suit was the only reasonable and effective way to bring the litigation (at paras. 28-31).

[9] Turning to the substantive issue of the constitutionality of the fees, the Chief Justice laid out the common law and statutory framework surrounding civil juries and the associated fees in British Columbia as compared to other Canadian provinces. He outlined the portions of the *Rules* and the *Supreme Court Family Rules*, B.C. Reg. 169/2009 dealing with juries and the circumstances in which a trial by jury is and is not permitted. He then set out the legislative history surrounding jury remuneration and civil jury fees in British Columbia, and the present legislation

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empowering the Lieutenant Governor in Council (the "LGIC") to make rules governing the conduct of proceedings in British Columbia courts.

[10] The Chief Justice then outlined the background to the present case, which included the Deposit Notice and Staff Sergeant Jervis' evidence regarding the role of civil jury fees in the process and Sheriff Services' requirements for collecting jury fees.

[11] Before the Chief Justice the Association argued that (a) the language of s. 17(1)(a) of the *Act* and Rule 12-6(3)(b) — namely, a "sum sufficient to pay for the jury and the jury process" — is too vague to meet the requirements of the *Charter*; (b) the Deposit Notice was *ultra vires* the power of the sheriffs since the power to make regulations is given to the LGIC, not the sheriffs; and (c) that the legislative scheme wrongfully impedes access to justice, thereby offending the rule of law and the court's s. 96 *Constitution Act, 1867* jurisdiction.

[12] The Chief Justice prefaced his discussion of these arguments with the point that there is no unqualified right to trial by jury. He set out a number of appellate authorities from British Columbia and Ontario establishing this to be the case. He refused to draw the inference that the decline in the number of civil jury trials in British Columbia was due to the unaffordability of the jury fees for large numbers of people in the province. However, he accepted the evidence of an economist (Mr. Robert Carson) that outlined the proportion of households likely to be deterred by civil jury fees, and the fact that those households are more likely to include younger or older people living in one- or two-person households, those living in First Nations households, recent immigrants and those living in households in which there is a disabled member (at para. 85). He then addressed the Association's arguments specifically.

[13] On vagueness, the Chief Justice analyzed in detail *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 ("*Nova Scotia*"). He rejected the invitation of the Attorney General of British Columbia and Director of Sheriff Services (collectively, the "Province") to dismiss the action on the basis that the Association

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failed to show a deprivation of life, liberty or security of the person so as to engage s. 7 of the *Charter*. However, he found that the language of "a sum sufficient to pay for the jury and jury process" was sufficiently precise to provide an intelligible standard and an adequate basis for legal debate. It plainly met the standard set out in *Nova Scotia.*

[14] On *vires*, the judge found that s. 17 of the *Act* and Rule 12-6(3) of the *Rules* are the explicit authority for collecting jury fees. He determined that the fees are *intra vires* the *Act* and accepted the Province's argument that the notices issued by the sheriffs were not the source of their authority but merely a means of providing notice to litigants and counsel regarding the anticipated costs.

[15] Finally, the Chief Justice also rejected the argument that the fees infringe a right of access to justice and thereby offend the rule of law and s. 96 of the *Constitution Act, 1867*. He distinguished this case from *TLA, 2014* on the basis that requiring civil court fees was not equivalent to requiring civil jury fees. The former would deprive a litigant of access to the courts if they could not pay them while the latter would not. The judge found that it was not a restriction on access to justice for a litigant who cannot or will not sacrifice reasonable expenses to have his or her case determined by a judge. He held that the *Charter* does not confer a right to a jury trial in civil matters and nor should ss. 7 and 15 be interpreted as though they do.

Submissions

[16] On appeal, the Association argues that the Chief Justice erred in his conclusions on all three issues that it raised before him. The Province does not challenge the judge's grant of public interest standing, but notes that by consequence, the case below was decided on a limited factual record and in the absence of an actual litigant before the court asserting that they had been deprived of a trial by jury on account of having to pay the required jury fees.

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[17] During oral submissions, the Association focused it submissions on s. 96 of the *Constitution Act, 1867* and the rule of law, but maintained that the other two grounds of appeal were still important.

a) Infringement of Constitutional Guarantee of Rule of Law and Access to Justice

[18] The Association argues that the Chief Justice erred in finding that the denial of a civil jury trial to persons who desired one and for whom paying jury fees would amount to an undue hardship was justifiable because they could have their cases tried by judge alone. It says his discussion of the absence of a *Charter* guarantee of a trial by jury in civil cases is a red herring. The judge failed to address the fact that juries are an integral part of "the court" as that concept has been defined in the context of s. 96 of the *Constitution Act, 1867*. His interpretation treats that section as a staffing provision and allows the government to determine who can have access to one of the two adjudicative modalities protected by the core of s. 96 based on their financial means. The Chief Justice erred by equating access to justice with access to trial by a judge alone. The Association says the provisions interfere with the rule of law and access to justice by depriving the less wealthy and poor of the right of access to juries. They also threaten the independence of the courts. This interference infringes on the court's core jurisdiction. Where a right to a civil jury trial exists, its exercise cannot be conditioned on inequality; its denial must be based on cogent and legitimate reasons.

[19] In oral submissions, the Association encouraged this Court to consider its submissions under the rule of law both as a freestanding principle underlying the *Constitution Act, 1867* and as a principle encompassed within superior courts' s. 96 jurisdiction. It said *TLA, 2014* can be read as being decided under either of these principled analyses. It also emphasized the notion of fairness in considering the content of the rule of law.

[20] The Province breaks this ground of appeal into two sub-issues: (a) does the core jurisdiction of superior courts under s. 96 of the *Constitution Act, 1867* include

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the right to have a civil claim tried by jury; and (b) is trial by jury a constitutionally protected mode of trial in civil claims? It submits that civil jury trials are not constitutionally protected. The Association has failed to identify the source or nature of the protected constitutional right and instead cites a broad range of principles that do not constitutionally guarantee the right to a civil jury trial. There is no constitutional protection for any particular mode of trial.

[21] In oral submissions, the Province responded to the Association's reliance on fairness concerns by citing portions of the decision in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 ("*Imperial Tobacco*"), which it said established that fairness is not guaranteed either by the principle of judicial independence or the rule of law. Access to the courts means access to a public forum to have one's dispute resolved by an independent and impartial arbiter; it does not guarantee a particular modality of trial for civil claims.

[22] The Province also argues that the Association's proposition would have the effect of undermining rather than promoting access to justice. If accepted, any limitation on the trial process would constitute an impediment to access to justice.

[23] The Province further submits that the *Charter* does not confer a right to trial by jury in civil cases. Jurisprudence from a number of provincial appellate courts have all recognized that there is no constitutionally protected right to a civil jury in Canada. It notes the Association's references to the discriminatory effects of the fees, but says it has not asserted a s. 15 challenge and, in any event, impecuniosity is not an express or analogous ground under s. 15. The Association's attempt to expand its case on appeal highlights the inadequacy of the factual record below.

[24] In reply, the Association argues, *inter alia*, that *TLA, 2014* is a complete answer to the argument that s. 15 must be argued where there are concerns about discrimination.

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b) Vagueness

[25] The Association submits that the Chief Justice erred in not finding unconstitutionally vague the phrase "a sum sufficient to pay for the jury and the jury process". It points to Chief Justice McLachlin's reasons in *TLA, 2014* where she found that it was arbitrary to force a litigant to choose how to proceed in the absence of knowing the financial risk. This is precisely what the *Act* requires here. A litigant does not get a civil jury trial unless it pays an arbitrary amount in advance and agrees to be exposed to further cost if the trial goes longer. This fails to delineate risk, provide fair notice and limit discretion, as the rule of law demands.

[26] The Province submits that vagueness is not a stand-alone ground of constitutional review. It must be raised in the context of an alleged infringement of the right to life, liberty or security of the person. In any event, it says, the impugned provisions of the *Act* meet the required standard of precision. The standard does not require that all sums payable under statute be known in advance; it is enough if there is an adequate basis for legal debate. "A sum sufficient to pay for the jury and jury process" is a fact-based inquiry that can be determined on an objective basis.

c) Ultra Vires

[27] The Association says the trial judge erred in finding that the impugned jury fees in the Deposit Notice are *intra vires*. The delegated authority to set the deposit amount is given to the LGIC under s. 34 of the *Act*, not to the sheriff. And yet the sheriff has and continues to collect jury fees in the amount it has set pursuant to the Deposit Notice and earlier such notices. The LGIC has not expressly sub-delegated its regulation-making power, but that is the effect of it leaving the broad language of the *Act* for the sheriff to figure out. This renders such fees, as presently collected, *ultra vires* s. 17 of the *Act* and Rule 12-6(3) of the *Rules*.

[28] The Province submits that the Association's focus on the Deposit Notice is misplaced. The notice is provided to the public as a matter of administrative convenience. The authority for collecting jury fees is clearly set out in the *Act*. Further, the sheriff is not left the discretion to decide the amount charged; the *Act*

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requires that the amount charged be the total required to administer the jury process.

Analysis

[29] I turn to deal with the issues raised by the Association on this appeal. I will deal with them on the basis of the degree of reliance placed upon them by the Association.

[30] First, I will discuss the constitutional issue; it lies at the centre of the Association's submissions before us. It reduces to this question: do civil jury fees in British Columbia represent an unlawful impediment to access to justice?

[31] Second, I will address the jurisdictional issue: are the "Sheriff's Civil Jury Fees" otherwise *ultra vires* the *Act*?

[32] Finally, I will deal with the vagueness issue: is the phrase "a sum sufficient to pay for the jury and the jury process" in s. 17(1)(a) of the *Act* unconstitutionally vague?

1. An Unlawful Impediment to Access?

[33] There are at least two aspects to the constitutional issue. The first involves the *Charter* and the question of whether it protects the citizen's access to a civil jury at least to the extent of prohibiting civil jury fees as currently set in British Columbia.

[34] The second aspect involves s. 96 of the *Constitution Act, 1867*: do civil jury fees as currently set in British Columbia unlawfully infringe on the core jurisdiction of the superior courts by denying some people access to those courts?

[35] Arguably there is a third aspect; it was mooted before us in oral argument: is there some form of constitutional protection against what we might conclude is an "unfair" law? Here the Association began its written submissions so:

> This appeal is about whether the provincial government may give wealthy persons who pay the fees it sets a choice of how a civil case may be tried –

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> judge-alone or jury trial – and deny that choice to those who cannot afford what the government demands.

[36] The Association has not invoked s. 15 of the *Charter* so that is not in play before the court. Rather, this aspect of the issue rests on some notion of a stand-alone doctrine of fairness in legislative initiatives. The Legislative Assembly is constrained by the *Charter*, the division of powers as broadly set out in the *Constitution Act, 1867*, and an abstract duty to do what is right, just and fair for its citizens.

[37] Chief Justice Hinkson dealt with the *Charter* issue below. He cited and adopted the view in Ontario set out in *Legroulx v. Pitre*, 2009 ONCA 760 at para. 5, leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 34: the *Charter* does not confer a right to a jury trial in civil matters and ss. 7 and 15 of the *Charter* should not be interpreted to confer such a right (at para. 80). I do not understand the Association to take issue with this particular conclusion: it rather says that a focus on the *Charter* misses the thrust of its argument. In its factum, the Association asserts:

> The *Charter* line of thought emphasized by the Trial Judge is, with respect, a red herring. Given that juries are part of the court, the fact that there may be no *Charter* guarantee of a right to choose jury trials in civil matters does not answer the question whether the impugned provisions infringe or impinge upon the court's core jurisdiction. [*TLA, 2014*] did not rely upon the *Charter* to come to its result. Neither does [*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3] or many other cases where interference by the legislative and executive branches of government with the judicial branch is in question. While attaching the rights of a litigant to a *Charter* guarantee, as in criminal cases, provides additional support for arguing against such interference, it is not a *sine qua non*.

[38] In my view, the Chief Justice was correct in adopting *Legroulx* as the law in this province. In particular, I adopt this statement from the Ontario Court of Appeal's endorsement in that case:

> [3] The *Charter* confers a right to a jury trial only in certain criminal matters. The *Charter* does not confer a right to a jury trial in civil matters and we see no merit in the submission that ss. 7 and 15 should be interpreted to confer such a right. In our view, the appellants' claim that their ss. 7 and 15 rights have been denied exceeds by a very significant margin the reach of both the letter and the spirit of those *Charter* provisions.

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[39] This brings us to the critical aspect of the Association's constitutional submission: the s. 96 issue.

[40] The Association complains that Chief Justice Hinkson missed their s. 96 point by focussing on the *Charter*. I disagree. The Chief Justice, in most efficient reasons on this aspect, noted the Association's assertion that civil jury fees infringe a right of access to justice and thereby offend the rule of law and s. 96 of the *Constitution Act, 1867* (at para. 110).

[41] The Chief Justice cited amongst others *TLA, 2014* and *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 ("*Christie*").

[42] Chief Justice Hinkson found that the existence of civil jury fees is not a "restriction on access to justice". This was said in the face of his finding that "a litigant who cannot or will not sacrifice reasonable expenses has his or her case determined by a judge" (para. 116). Accordingly, these fees do not "infringe the right of access to justice and do not offend the rule of law or s. 96 of the *Constitution Act, 1867*" (at para. 117).

[43] Again, in my view, the Chief Justice was correct. I will develop the argument in somewhat more detail but essentially the answer to the s. 96 aspect in respect of civil jury fees largely lies in the court's reasons in *TLA, 2014*.

[44] Before I turn to that case I would note the historical record on the imposition of various restrictions on the freedom to choose a trial by civil jury. These include restrictions imposed in British Columbia and across Canada. That background is fully set out in Chief Justice Hinkson's reasons (at paras. 32-74) and no issue is taken with it on appeal. I will not repeat it. It is sufficient to note the trial judge's conclusion in *Legroulx* in the face of a similar record in Ontario (2008 CarswellOnt 664 at para. 39 (S.C.J.)):

> …access to a jury in a civil trial has been amended and limited many times and in many ways.

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[45] In the face of the many limitations on access to a civil jury in any particular case, *TLA, 2014* instructs us to ask the critical question: do civil jury fees infringe the core jurisdiction of the superior courts and thereby contravene s. 96?

[46] I will concentrate on the majority's reasons in *TLA, 2014* as set out in the judgment of Chief Justice McLachlin.

[47] In the Chief Justice's view, s. 96 is of course much more than a mere staffing provision, it protects the core jurisdiction of the superior courts (at para. 2). While the provinces enjoy authority over the administration of justice under s. 92(14) and that authority is a wide one, "it must be exercised harmoniously with the core jurisdiction of provincial superior courts protected by s. 96" (para. 17). Just what lies at the "core jurisdiction" of the superior courts is a nice question, but it has never been definitively answered.

[48] However, we do have some guidance in the cases. The jurisdiction of the superior courts to judicially review the exercise of jurisdiction by inferior tribunals certainly lies within the "core jurisdiction" protected by s. 96: *Crevier v. Attorney General (Québec)*, [1981] 2 S.C.R. 220 and *TLA, 2014* at para. 33.

[49] According to Chief Justice McLachlin's view, laws denying access to the powers traditionally exercised by superior courts is the theme of much of the jurisprudence on s. 96 violations (para. 33).

[50] The Chief Justice reiterated Chief Justice Lamer's view in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, that *Crevier* "establishes… that powers which are 'hallmarks of superior courts' cannot be removed from those courts" (para. 34). Among the "hallmarks of superior courts" is the essence of what the courts do – decide cases (para. 32):

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the

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> superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[51] What the hearing fees in *TLA, 2014* did was to actually bar access to the superior courts, access to the constitutionally protected dispute resolution tribunals they represent. And they did so by imposing fees "that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction" (para. 35). There is no doubt that the province has jurisdiction to levy hearing fees under s. 92(14) of the *Constitution Act, 1867*, but the power is not unlimited (paras. 23 and 24). It is a matter of striking the proper balance, drawing the appropriate line. Where that line is was described was Chief Justice McLachlin so (para. 36):

> It follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the *Constitution Act, 1867.* Rather, the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.

[52] This is not a case of the province purporting to transfer an aspect of the core jurisdiction of the superior courts to another decision-making body. To succeed here, in my view, the Association must show that the jury fees at issue bar access to the courts; that these fees prevent some individuals from having their disputes resolved by the court.

[53] In my view, the Association has failed to demonstrate an interference with access to the courts of the significant degree contemplated by *TLA, 2014*. As the court in *Christie* said, s. 92(14) of the *Constitution Act, 1867* "implies the power of the province to impose at least some conditions on how and when people have a right of access to the courts" (*Christie* at para. 17). The jury fees here fall into this category of regulation.

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[54] In aid of its submission that the "right" to a civil jury trial lies at the heart of the superior court's jurisdiction, the Association cites a number of decisions underlining the importance of the jury in our common law traditions. These include *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528 (S.C.C.); *R. v. Burke*, 2002 SCC 55; *R. v. White*, 2011 SCC 13; *R. v. Spence*, 2005 SCC 71; and *R. v. Bain*, [1992] 1 S.C.R. 91 (S.C.C.).

[55] More broadly, in a recent decision from the Supreme Court for the United Kingdom, Lord Reed set out the importance of access to justice to the rule of law, and, in turn, the fundamental importance of the rule of law to a democratic society: *Unison, R. (on the application of) v. Lord Chancellor*, [2017] UKSC 51 at paras. 66-78. In doing so, he acknowledged the long tradition of the common law guarantee of access to the courts (at para. 74):

> In English law, the right of access to the courts has long been recognised. The central idea is expressed in chapter 40 of the Magna Carta of 1215 ("Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam"), which remains on the statute book in the closing words of chapter 29 of the version issued by Edward I in 1297:
>
> > "We will sell to no man, we will not deny or defer to any man either Justice or Right."
>
> Those words are not a prohibition on the charging of court fees, but they are a guarantee of access to courts which administer justice promptly and fairly.

[56] The proposition that access to the courts is fundamental and constitutionally protected is undisputed. But none of these cases assist in establishing what the Association must: that a right to a civil jury lies within the core jurisdiction protected by s. 96. The Association is pressed to make the essential submission that because a jury is the court, a right to that modality of trial must lie within the core jurisdiction of the superior courts. It is true that when a jury sits in trial, it is the finder of fact and the judge is the master of the law. In this sense "the jury is the court". But it does not follow that when a jury is not part of the trial process, the court is anything less than "the court". It is just that: a forum within which citizens may have their disputes heard and resolved. Access to the court remains notwithstanding the inability of some to

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fund a jury to hear their case. In my view, the Association cannot prevail on this aspect of the constitutional question.

[57] I turn to the "fairness" point, what I take to be a third aspect of the Association's constitutional argument. It is essentially raised in the Association's over-arching submission that the jury fees in issue give "wealthy persons… a choice of how a civil case may be tried – judge-alone or jury trial – and deny that choice to those who cannot afford what the government demands". As I said above, this submission prompted the Province to cite and rely upon *Imperial Tobacco*. There, the court considered the constitutionality of British Columbia's *Tobacco Damages and Healthcare Costs Recovery Act*, S.B.C. 2000, c. 30. Justice Major, for the court, was considering the argument that this *Act* impermissibly interfered with judicial independence. At para. 54 he stated:

> None of this is to say that legislation, being law, can never unconstitutionally interfere with courts' adjudicative role. But more is required than an allegation that the content of the legislation required to be applied by that adjudicative role is irrational or unfair, or prescribes rules different from those developed at common law. The legislation must interfere, or be reasonably seen to interfere, with the courts' adjudicative role, or with the essential conditions of judicial independence. As McLachlin C.J. stated in *Babcock*, at para. 57:
>
> > It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.

[58] At paras. 63 and 64, in the course of discussing the appellants' arguments on the rule of law, Justice Major continued:

> The appellants' conceptions of the rule of law can fairly be said to fall at one extreme of the spectrum of possible conceptions and to support Strayer J.A.'s thesis. They submit that the rule of law requires that legislation: (1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial. And they argue that the Act breaches each of these requirements, rendering it invalid.
>
> A brief review of this Court's jurisprudence will reveal that none of these requirements enjoy constitutional protection in Canada. But before embarking on that review, it should be said that acknowledging the constitutional force of anything resembling the appellants' conceptions of the rule of law would seriously undermine the legitimacy of judicial review of legislation for constitutionality. That is so for two separate but interrelated reasons.

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[59] Justice Major went on to explain these two reasons: first, that the appellants' proposed requirements of the rule of law were simply broader versions of *Charter* rights; and, second, that other constitutional principles strongly favour upholding legislation that conforms to the terms of the written Constitution (at paras. 65-66). He concluded (at para. 66):

> Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. See *Bacon v. Saskatchewan Crop Insurance Corp.* (1999), 180 Sask. R. 20 (C.A.), at para. 30; Elliot, at pp. 141-42; Hogg and Zwibel, at p. 718; and Newman, at p. 187.

[60] In my view, this riposte answers the Association's "fairness" argument.

2. *Vires*

[61] It is not clear what the thrust of the Association's argument here is. In my view, the *ultra vires* submission is largely answered by the reasoning I have offered under the constitutional head.

[62] The Association under this head of argument also appears to argue that the Deposit Notice represents an improper delegation by the LGIC to the sheriff to set the deposit amount. I disagree that there has been any improper delegation. Regardless of the manner in which the LGIC chooses to administer the *Act*, the source of legal authority remains s. 17 of the *Act*. That provision directly references payment of the required sum "to the sheriff". Section 19 directs the sheriff to pay jurors out of deposited funds, and to notify the judge where there is a deficiency. Jurors' fees are prescribed by regulation. What is clear from the *Act* is that the sheriff is directed to collect the fees. The amount of fees remains the "sum sufficient". In issuing the Deposit Notice, Sheriff Services is merely attempting to provide an estimate of that amount as a matter of administrative assistance to litigants. The source of authority remains the *Act* such that, in collecting the fees, the sheriff is acting *intra vires* the *Act*.

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[63] It follows that I agree with Chief Justice Hinkson's conclusion on this issue set out at paras. 107 and 108 of his reasons.

3. Vagueness

[64] At para. 93 of its factum the Association argues:

> The Trial Judge erred in not finding unconstitutionally vague the phrase "*a sum sufficient to pay for the jury and the jury process*" in s. 17(1)(a) of the *Jury Act*. His findings in paras. 107-108 are inconsistent with his legal conclusion. There, he held that the sum would "*differ from case to case and from jury to jury,*" and that "*the actual amounts required for a specific jury for a specific case can only be determined once the case has been heard…*" Whatever the sum might turn out to be is neither clear, nor a sum certain.

[65] The Province argues that vagueness is not a stand-alone ground on which to challenge legislation but must be raised in the context of an alleged *Charter* infringement.

[66] I need not discuss this issue as, in my view, the "sum sufficient" language set out in s. 17 of the *Act* meets the required standard of precision set out in *Nova Scotia*. In that case Justice Gonthier described an unconstitutionally vague provision as follows (at 639-640):

> A vague provision does not provide an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

[67] I conclude that "a sum sufficient to pay for the jury and the jury process" and any additional prescribed fees meets this standard. As the Province points out, the sum sufficient to pay for the jury and jury process is readily determinable through objective evidence as to the costs of administering the process and amounts paid to

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the jury. Sergeant Jervis' evidence establishes that any amounts a litigant pays over and above the actual expenses incurred are held in trust and returned at the conclusion of trial. To the extent a litigant challenges the amount charged, he or she can make that argument and demand that the Province provide evidence substantiating those charges. While a litigant may not know the precise amount he or she must pay at the outset, his or her lawyer or, in the case of a self-represented litigant, the judge, will be able to give the litigant some idea of how long the trial will likely take and therefore, the amount of money he or she will be liable to pay.

[68] This illustrates that the standard provides fair notice to citizens — the amount required to administer the process — and imposes real limitations on the discretion of those charged with enforcement (*Suresh v. Canada (Minister of Citizenship and Immigration*, 2002 SCC 1 at para. 81) — namely, whether the evidence substantiates that the amount charged is consistent with the actual expenses incurred.

[69] The threshold for vagueness is relatively high (*Nova Scotia* at 632; *R. v. Levkovic*, 2010 ONCA 830 at para. 93). A provision is unconstitutionally vague where it sets a standard that is not intelligible, that cannot provide the basis for coherent judicial interpretation, and that is not capable of guiding legal debate (*Canadian Foundation for Children, Youth & the Law v. Canada Attorney General)*, 2004 SCC 4 at paras. 15-17). What is required is that a court examining the provision can give sensible meaning to its terms (*Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.) at 1160). Both the government agent enforcing its terms and the person who is subject to those terms must be able to determine whether the fees in question are permissible or not under the *Act* and the *Rules* (*Mussani v. College of Physicians and Surgeons of Ontario* (2004), 248 D.L.R. (4th) 632 at para. 63). In my view, the impugned provisions meet this standard.

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Conclusion

[70] In the circumstances, I would not give effect to the Association's alleged errors in the judgment from the Supreme Court and I would dismiss the appeal therefrom.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Madam Justice Fenlon"

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Citation: Ultracuts v Magicuts, 2023 MBCA 71
Date: 20230907
Docket: AI22-30-09729

IN THE COURT OF APPEAL OF MANITOBA

2023 MBCA 71 (CanLII)

Coram: Madam Justice Freda M. Steel
Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella

B E T W E E N :

ULTRACUTS FRANCHISES INCORPORATED	)	***J. B. Kroft, K.C.***
	)	***M. P. Gottlieb,***
	)	***B. C. Ross,***
(Plaintiff) Respondent	)	***A. J. Winton*** *and*
	)	***J. J. Stonehouse***
- and -	)	*for the Appellants*
	)	
CHRISTOPHER R. CAWSTON and BRIAN A. LUBORSKY	)	
	)	
	)	***S. Cepanec*** *and*
(Defendants) Appellants	)	***P. Halamandaris***
	)	*for the Respondent*
- and -	)	
	)	
MAGICUTS INC.	)	
	)	***No appearance***
(Defendant)	)	*for the Defendants*
	)	*Magicuts Inc. and*
(by original action)	)	*Grant Thornton Limited*
	)	
A N D B E T W E E N :	)	
	)	
ULTRACUTS FRANCHISES INCORPORATED	)	*Appeal heard:*
	)	***November 23, 2022***
	)	
(Plaintiff) Respondent	)	*Judgment delivered:*
	)	***September 7, 2023***
- and -	)	

CHRISTOPHER R. CAWSTON and BRIAN A. LUBORSKY	)
	)
(Defendants) Appellants	)
- and -	)
	)
MAGICUTS INC. and GRANT THORNTON LIMITED, as trustee of THE ESTATES OF PREMIER SALONS LTD.	)
	)
(Defendant)	)

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On appeal from 2021 MBQB 250

BEARD JA

I. THE ISSUES

[1] The defendants Magicuts Inc. (Magicuts), Christopher R. Cawston (Mr. Cawston) and Brian A. Luborsky (Mr. Luborsky) (together, the defendants) are appealing a judgment from the Court of Queen's Bench (as it then was) in which the trial judge found that they had intentionally harmed the plaintiff, Ultracuts Franchises Incorporated (Ultracuts), by means of an unlawful act (civil fraud) against a third party, Wal-Mart Canada Inc. (Wal-Mart), by deceiving Wal-Mart regarding assurances that Wal-Mart had given to Magicuts, thereby committing the tort of unlawful interference with economic interests (unlawful means) (see para 37 herein). He awarded damages of $34,575,000 and costs to Ultracuts.

[2] The defendants argue that the trial judge committed a number of errors:

(i) regarding the tort of unlawful means, by failing to find, or even consider, whether Magicuts intended to harm Ultracuts;

(ii) regarding the tort of civil fraud, by failing to consider whether the impugned statements were statements of fact, as opposed to statements of position, opinion or future intentions of a third party;

(iii) regarding the tort of civil fraud, by failing to consider whether Wal-Mart relied on the alleged misrepresentations;

(iv) by finding that Mr. Cawston and Mr. Luborsky, who were directors and corporate officers of Magicuts, were personally liable without any substantive legal analysis of the basis for personal liability;

(v) by finding that Ultracuts had satisfied its obligation to mitigate damages, notwithstanding that it unreasonably rejected Wal-Mart's offers;

(vi) by determining damages based on incorrect considerations; and

(vii) by failing to render an independent and impartial decision due to verbatim copying of key findings and analysis from an earlier decision issued by another judge in an uncontested motion against Magicuts, where that judge said that that decision would not affect this case.

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[3] In my view, the trial judge erred as set out in grounds (ii) and (iii), and it is not necessary to determine the other grounds. I would grant the appeal and dismiss Ultracuts' claim against the defendants. (Note: the citations for the academic authorities referred to herein are set out in the appendix to these reasons.)

II. BACKGROUND

[4] Ultracuts and Magicuts are competitors in the hair salon business. Each operated a chain of hair salons in Canada in 1994 and continues to do so.

[5] Mr. Cawston and Mr. Luborsky were officers of Magicuts at the relevant times, Mr. Cawston being the president and in charge of Canadian operations and Mr. Luborsky being the chief executive officer (CEO) and in charge of operations in the United States. Further, each was a director of Magicuts and indirectly held shares in it. Meril Rivard (Mr. Rivard) was, throughout the relevant period, the owner of Ultracuts.

[6] This claim is one in a series of claims that began in 1994, when Wal-Mart announced its agreement with Woolworth Canada Inc. to buy out 120 of the Woolco department stores throughout Canada (the Woolco stores), with plans to convert them to Wal-Mart stores. At that time, Magicuts operated 170 hair salons across Canada, 59 of which were located in Woolco stores. Of those, 45 were owned by franchisees and 14 were owned by Magicuts (together, the hair salons). When he learned of the announcement, Mr. Cawston began contacting members of the Wal-Mart transition team to determine how the sale would affect the Magicuts hair salons located in Woolco stores.

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[7] Wal-Mart was of the view that it did not have enough space for the hair salons in the Woolco stores, so on March 22, 1994, Woolco notified Magicuts that it was terminating the licence agreements for the hair salons, and most hair salons were given a notice to vacate the Woolco stores within 30 days, that is, by April 21, 1994. The franchisees threatened legal action against Woolco, Wal-Mart and Magicuts.

[8] Mr. Cawston eventually arranged a meeting with Melvin Redman (Mr. Redman), Wal-Mart's senior vice president in charge of the Woolco transition, to discuss the effect of the sale on the hair salons and the threatened legal action by the franchisees. Of particular concern to Magicuts was the effect of the closures on its franchisees.

[9] There were three meetings between Messrs Cawston and Redman on April 12, 1994, May 13, 1994 and May 24, 1994 (the Redman meetings). The first meeting included a Woolco representative, while the others included other Magicuts representatives.

[10] During those meetings, Mr. Redman maintained that the Magicuts hair salons would have to be closed, but he gave Mr. Cawston certain assurances regarding future opportunities to open Magicuts hair salons in existing or new stores, should there be any opportunities (the Redman agreement). It is uncontested that Mr. Redman refused to put any assurances in writing, but he said that "Wal-Mart's words [were] its bond" and he shook hands with Mr. Cawston.

[11] The franchisees and Magicuts filed a class action lawsuit against Woolworth on March 14, 1995, but did not include Wal-Mart as a defendant. Mr. Redman left Wal-Mart in June 1995.

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[12] Some time after the Woolco purchase was completed, Wal-Mart determined that it would put hair salons into some of its stores, and it entered into agreements with Magicuts to open hair salons in a number of stores in Eastern Canada, which were opened during the fall of 1994 and through 1995.

[13] In August 1995, Ultracuts, through a real estate broker, began discussions with Brad Messer (Mr. Messer), the international property manager with Wal-Mart, to open hair salons in some of Wal-Mart's stores in Western Canada, which led to it opening hair salons in Wal-Mart stores in Winnipeg and Calgary in late 1995. Some of these locations were former Woolco stores in which there had been franchise Magicuts hair salons.

[14] In October 1995, Magicuts became aware that Ultracuts was negotiating with Wal-Mart, and Mr. Cawston called Mr. Redman (who was then no longer with Wal-Mart) to voice his concerns about Wal-Mart not upholding its part of their bargain. In January 1996, Mr. Luborsky met with Mr. Messer to explain Magicuts' concerns.

[15] Despite those discussions, Wal-Mart continued to offer further locations to Ultracuts, with the result that Ultracuts would have had 10 hair salons in Wal-Mart stores.

[16] In April or May 1996, Magicuts became aware that Ultracuts was to open two hair salons in Edmonton later that year.

[17] In March 1996, Scott Robertson (Mr. Robertson) replaced Mr. Messer. Shortly thereafter, Messrs Cawston and Luborsky called Mr. Robertson to discuss their position regarding the Ultracuts hair salons. Mr. Robertson discussed the issue with Wal-Mart's senior management team.

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Wal-Mart's in-house counsel, Robert Wasserman (Mr. Wasserman), who was part of that team, told Mr. Robertson to get Magicuts' position in writing. In response, Mr. Cawston sent a letter to Mr. Robertson dated May 14, 1996 (the letter). It is this letter that Ultracuts argues contains the false representations that form the basis of its claim against the defendants.

[18] Mr. Robertson's evidence was that Wal-Mart's senior management reviewed the letter with Mr. Wasserman, and he and Mr. Wasserman undertook an investigation. Following this investigation, Wal-Mart concluded that, while an agreement had been reached in 1994, it was not a legally binding agreement, and that there was a potential that Wal-Mart might get sued by Magicuts franchisees, should Ultracuts open further hair salons in former Woolco stores.

[19] In late June 1996, Mr. Robertson told Mr. Rivard that Wal-Mart could not offer any new locations to Ultracuts due to its agreement with Magicuts.

[20] Wal-Mart then entered into separate discussions with both Magicuts and Ultracuts to find a solution to the competing requests for additional hair salons. Magicuts put forward a proposal to divide the Western Canadian locations between itself and Ultracuts, as set out in Mr. Robertson's internal memo of July 10, 1996, to David Ferguson (Mr. Ferguson), then the president of Wal-Mart Canada, and others.

[21] In a letter to Mr. Ferguson dated July 9, 1996, Ultracuts took the position that it had agreements with Wal-Mart regarding hair salons in Western Canada, and that allowing Magicuts hair salons into any Wal-Mart stores in Western Canada would be an act of bad faith. Mr. Ferguson replied,

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asking for written confirmation of the locations for which there were legally binding agreements. Mr. Ferguson took the position that there were four such locations, and he offered to go ahead with those agreements, together with a commitment to give Ultracuts an exclusive agreement to operate in any municipal market in which it had a hair salon in a Wal-Mart store.

[22] The result, as found by the trial judge, was that Wal-Mart agreed to honour an offer to Ultracuts that would give it seven locations in Wal-Mart stores in Western Canada, with an agreement not to put a competitor in a market where it was operating a hair salon. Ultracuts rejected this offer.

[23] Other discussions followed, but there was no agreement. In a letter dated September 16, 1996, Mr. Wasserman advised Ultracuts that Wal-Mart would only honour its written agreements. On September 18, 1996, Ultracuts sued Wal-Mart in the courts in Arkansas, United States (the Arkansas proceeding), which was the location of Wal-Mart's head office. On November 13, 1996, Ultracuts advised Wal-Mart that it would proceed with the remaining hair salons in the written agreements only if Wal-Mart would agree that it was without prejudice to its rights in the litigation. Wal-Mart refused, so Ultracuts chose not to proceed with any further hair salons, and none were constructed.

[24] There has been a significant amount of litigation arising from these events. Ultracuts' claims against Wal-Mart in both Arkansas and Manitoba alleging breach of contract and fraud have all been dismissed or lapsed and all litigation between those parties has concluded. Depositions taken from several people in the Arkansas proceeding have been admitted as evidence in this trial by agreement.

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[25] In the current action, Ultracuts' claim alleging unlawful interference with economic relations was dismissed on summary judgment against all defendants except for Magicuts, Mr. Cawston and Mr. Luborsky (see *Ultracuts Franchises Incorporated v Magicuts Inc et al*, 2005 MBQB 294, aff'd 2010 MBCA 34). Ultracuts' claim in this matter, alleging interference with contractual relations, related to two alleged contracts with Wal-Mart dated January 22, 1996, and April 11, 1996. That claim was dismissed against all defendants on summary judgment, with the judge finding that Ultracuts had failed to establish triable issues with respect to either alleged contract. Regarding the earlier contract, he found that there had been no breach and that the later document was not a contract but only an agreement to agree (see *Ultracuts Franchises Incorporated v Magicuts Inc et al*, 2009 MBQB 23 at paras 3, 26).

The Redman Meetings and the Redman Agreement

[26] One of the keys to this case is the Redman meetings and the resulting Redman agreement. The trial judge explained this as follows (at paras 23-26):

> There were three meetings between Magicuts representatives and [Mr.] Redman during which the parties discussed an arrangement for Magicuts' cooperation in vacating the Woolco salons and to effectively manage the impact of the transition on Magicuts and its franchisees. . . .
>
> . . .
>
> During the course of these meetings, there were essentially three key points discussed:
>
> i) Magicuts agreed to dissuade its franchisees from litigating against Wal-Mart.

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> ii) Wal-Mart agreed to allow Magicuts an additional two months to vacate Woolco stores.
>
> iii) Wal-Mart told Magicuts that it would have an opportunity to open salons in former Woolco stores or new Wal-Marts in Canada, if Wal-Mart were to open hair salons in these stores, provided Magicuts met Wal-Mart's requirements.
>
> In at least two of the three meetings, [Mr.] Redman made it clear that Wal-Mart would not enter into any formal agreement in that regard and that any relationship between Magicuts and Wal-Mart would be dependent on performance.
>
> With respect to the May 13, 1994 meeting, [Mr.] Redman did not offer any evidence in his deposition about this meeting. Both [Mr.] Cawston and [Mr.] Luborsky testified in their direct examinations that at that meeting [Mr.] Redman told them that if there were ever any opportunity to put hair salons in Wal-Mart stores in Canada, Magicuts would get the first opportunity.

[27] Although Mr. Redman did not specifically reference the May 13, 1994 date, he did, contrary to the trial judge's finding, explain the meetings in his deposition on December 14, 1996, as follows:

> . . .
> [MR. REDMAN] In [the Redman meetings], I said, "[Mr. Cawston], [not putting Magicuts hair salons in Wal-Mart stores] has nothing to do with you operating and the way you operate. It's a space problem, and we don't have any space for you."
>
> And at that time, we shook hands, and I said, "Let me tell you this. If there's ever an opportunity that we would consider putting a haircutting company back in, as long as you meet our requirements" -- and I said, "look, I don't handle that, but as long as you meet our requirements, and as long as you're competitive, you all have the right to come back in, and I'll let you come back in."

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> And that was basically the verbiage that's in the [May 14, 1996] letter, the way I recollected the conversation. And that's exactly -- I mean, I'm very clear on what we said, and that's exactly what we said.
>
> [COUNSEL FOR MAGICUTS] Did you say anything else? Is that the agreement that you made with [Mr.] Cawston?
>
> [MR. REDMAN] I, in turn, called [Mr.] Messer, with [Mr. Cawston] on the phone, and said, "[Mr. Messer], let me tell you, these guys are going to lose a whole bunch of stores. And what I have agreed to with [Mr. Cawston] is that if we build a new store, or if [for ever] any reason there's space available in existing stores, as long as they're competitive, and as long as they meet our requirements that you set, they ought to have the right to come back in these stores." And that was -- That's all of that conversation.
> . . .

[28] Mr. Redman was also questioned about who, at Wal-Mart, was involved in or aware of the decisions made to keep or remove independent businesses from the former Woolco stores. He referenced a number of Wal-Mart executives, including David Glass, Bobby Martin (Mr. Martin), Carl Ownbey (Mr. Ownbey) and Mr. Messer, and stated that "there [were] a lot of people involved in that."

[29] Mr. Redman was then asked the following questions and gave the following answers:

> . . .
> [COUNSEL FOR MAGICUTS] Okay. And that would include, I assume, the meeting you had with Mr. Cawston where you agreed to put him back in the stores?
>
> [MR. REDMAN] There was no misunderstanding on anybody's part at Wal-Mart, in my opinion -- that's my personal opinion, based on being the guy that was in charge of the operation

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> -- about what the intention was about removing Magicuts, and then what the agreement was when we went back in with Magicuts.
>
> [COUNSEL FOR MAGICUTS] And you told Mr. Martin that in 1994, in that early time period in 1994?
> [MR. REDMAN] I would have had to tell Mr. Martin that. I mean that was -- that's a huge move. I would have had to tell Mr. Martin that.
> . . .
> [COUNSEL FOR MAGICUTS] Is it fair to say that the only licensee type user that you, on behalf of Wal-Mart, agreed to go back in these stores, supposedly, was Magicuts?
>
> [MR. REDMAN] No, I did agree to that, and yes, that's the one that I made an absolute commitment to, yes.
> . . .
> [COUNSEL FOR MAGICUTS] All right. Why didn't you put this, as you've described, absolute commitment in writing to Mr. Cawston?
>
> [MR. REDMAN] I didn't feel a need to, [Counsel for Magicuts].
>
> [COUNSEL FOR MAGICUTS] Is Wal-Mart's word its bond?
>
> [MR. REDMAN] Well --
>
> [COUNSEL FOR MAGICUTS] Is that right?
>
> [MR. REDMAN] In my opinion, that's what it is. I mean, in my experience at Wal-Mart, that's what it was. I will tell you that I shook hands with [Mr.] Cawston and told him that that's what we would do, and that's what my intention was.
> . . .

[30] During the deposition, Mr. Redman testified to receiving a call from Mr. Cawston in 1995 that Wal-Mart was giving locations to someone else contrary to the agreement, so Mr. Redman called Mr. Ownbey to explain the

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situation to him and remind him of the agreement with Magicuts. He said that Mr. Ownbey left him a message that he had spoken to Mr. Messer.

[31] Finally, Mr. Redman confirmed that he had a conversation with Mr. Cawston about the contents of the letter:

> . . .
> [COUNSEL FOR MAGICUTS] And [Mr. Cawston] said, "I'm going to send you a letter" concerning what supposedly you and he had agreed to?
>
> [MR. REDMAN] What happened exactly was, he called me first and said, "I am contemplating writing a letter, and let me run by you what our agreement was in Canada. Let me make sure that there's not anything that's not accurate."
>
> And we had a conversation, in chronological order, if you will, about me looking at him and us shaking hands and me telling him that, you know, if there's an opportunity to ever come back in the stores, or if we open a new store, that as long as they met the criteria set up by our licensing department, that they should have the opportunity first to go in the stores.
>
> And I agreed with that summation that he gave me on the telephone. He said, "I'm, in turn, going to write a letter, and I will forward you a copy of it."
> . . .

[32] Mr. Redman said that he received a copy of the letter after that, but he was busy and did not look at it closely.

[33] The trial judge pointed out differences between the evidence of Mr. Redman and Mr. Cawston as to the sequence of their conversation regarding the contents of the letter and Mr. Redman receiving drafts of the letter to review, and he drew a negative inference about the accuracy of Mr. Cawston's evidence (see paras 119-20).

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[34] In my view, given that both Messrs Redman and Cawston were testifying to events that occurred more than 25 years earlier, a discrepancy as to the sequence of the conversation and letters is not material. What is important about this testimony is not whether the conversation occurred before or after Mr. Redman received or read the letter, but the fact that he was advised of the details in the letter regarding the agreement and confirmed to Mr. Cawston then, and repeated at the deposition, that they were accurate. That confirmation is the more important credibility factor.

[35] Ultracuts has not pointed to any evidence that disputes that of Mr. Redman, and the trial judge made no adverse credibility findings regarding his evidence. In fact, he accepted Mr. Redman's evidence.

III. THE LAW

[36] This appeal relates to Ultracuts' claim that the defendants unlawfully interfered with its economic relations with Wal-Mart. As I will explain, this tort is premised on the commission by the defendants of an unlawful act in relation to a third party, which Ultracuts alleges was civil fraud. I will begin with a review of the elements of these two torts.

Unlawful Means (Unlawful Interference with Economic Interests)

[37] The leading Canadian decision on the tort of unlawful means is *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 (*Bram SCC*). In that case, Cromwell J, speaking for the Court, noted that the tort was "unsettled and need[ed] clarification" (at para 2), including that it has been referred to in a number of ways: "unlawful interference with economic relations", "interference with a trade or business by unlawful means", "intentional

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interference with economic relations" and "causing loss by unlawful means" (*ibid*). He adopted but did not mandate the name "causing loss by unlawful means", shortened to "unlawful means", and he undertook an extensive review of the jurisprudence to clarify its scope and the applicable legal principles (*ibid*).

[38] Cromwell J described the tort as one that applies in a three-party situation "in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff" (at para 5). He explained that it "creates a type of 'parasitic' liability in a three-party situation" (at para 23) because the defendant's liability to the plaintiff is based not on any direct unlawful act against the plaintiff, but its unlawful act against a third party. He also emphasized that "this is an intentional tort; the focus of the dispute . . . is on the unlawful means element" (*ibid*; see also para 28). He concluded that the rationale for the tort is "liability stretching" (at para 37), in that it does not create a new tort but, rather, "expand[s] the range of persons who may sue for harm intentionally caused by existing actionable wrongs to a third party" (at para 45).

[39] An early example of this tort is found in *Tarleton and Others v M'Gawley* (1794), 170 ER 153 (UK). In that case, the master of a trading ship (the defendant) fired its cannons at a canoe (the third party) that was attempting to trade with the trading ship's competitor (the plaintiff) to prevent the trade. The plaintiff recovered damages for economic loss from the defendant, based on the defendant's wrongful conduct towards the occupants of the canoe, which conduct had been committed with the intention of inflicting economic injury on the plaintiff.

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[40] In *Bram SCC*, Cromwell J also clarified several aspects of the tort. The first issue that he addressed was the type of unlawful means or act that was required. He rejected a wide interpretation that would include any unlawful means that was forbidden by law whatever its source and regardless of whether it was actionable, including criminal offences and breach of a statute (see paras 40, 42, 45). He also pointed out that the common law has traditionally been reluctant to develop rules about fair competition (see para 31). He opted, instead, for a narrow interpretation that would limit the unlawful act or means to "conduct [that would] give rise to a civil cause of action by the third party or would do so if the third party [had] suffered loss as a result of that conduct" (at para 76; see also paras 5A(1), 26, 75, 86) (unlawful act).

[41] Cromwell J concluded that there is no requirement that the unlawful acts be limited to those where the plaintiff has no cause of action against the defendant (see paras 82, 85) and that there is no principled exception that gives a judge discretion to address unanticipated situations (see paras 83-86).

[42] The second issue that Cromwell J addressed was that of the relationship between the plaintiff and the third party, and the defendant's knowledge of that relationship. The Court of Appeal in *Bram* (see *AI Enterprises Ltd and Schelew v Bram Enterprises and Jamb Enterprises*, 2012 NBCA 33) had found that essential elements of the tort included the requirement of a valid business relationship between the plaintiff and the third party and that the defendant had knowledge of that relationship (see para 21). Cromwell J rejected both as elements of the tort. He found that the focus was unlawful conduct that intentionally harmed the plaintiff's economic interests, but that there did not need to have been either a contract or other formal

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dealings between the plaintiff and the third party, so long as the defendant's conduct was unlawful and it intentionally harmed the plaintiff's economic interests. He stated that, in *Bram SCC*, it was sufficient to show that the defendant knew that "various persons were negotiating with the majority of investors" (at para 93) and that the allegedly wrongful acts were committed with the intention of causing economic harm to the plaintiff.

[43] The third issue that Cromwell J addressed was that of the required intention on the part of the defendant. He noted, in reference to *Douglas v Hello! Ltd (No 3)*, [2005] EWCA Civ 595 at para 159, aff'd on other grounds *OBG Ltd v Allan*, [2007] UKHL 21, that five types of intention have been identified (at para 95): (a) an intention to cause economic harm to the plaintiff as an end in itself; (b) an intention to cause economic harm to the plaintiff because it is a necessary means of achieving an end that serves some ulterior motive; (c) knowledge that the course of conduct undertaken will have the inevitable consequence of causing the plaintiff economic harm; (d) knowledge that the course of conduct will probably cause the plaintiff economic harm; and (e) knowledge that the course of conduct undertaken may cause the plaintiff economic harm, coupled with reckless indifference as to whether it does or does not.

[44] Cromwell J concluded that only the first two types of intention "represent the core intention required for the unlawful means tort" (at para 95). He explained (*ibid*):

> . . . It is the intentional targeting of the plaintiff by the defendant that justifies stretching the defendant's liability so as to afford the plaintiff a cause of action. It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant realizes that it is

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> extremely likely that harm to the plaintiff may result. Such incidental economic harm is an accepted part of market competition.

[45] While Cromwell J appears to have rejected the third type of intention, being "knowledge that the course of conduct undertaken will have the inevitable consequence of causing the [plaintiff] economic harm" (at para 95), he does not comment on how that differs from the second type of intention. This may be problematic in practice, because direct evidence of an intention to bring about a result is often not available and resort must be had to inferences that arise where that result is the natural/inevitable consequence of what a person knew would flow from his deliberate actions. (See, for example, *Grand Financial Management Inc v Solemio Transportation Inc*, 2016 ONCA 175, at para 63, leave to appeal to SCC refused, 36982 (8 September 2016); see also *Douglas* at paras 159-60, 223-24. This issue has also been the subject of academic comment. (See Chamberlain at p 1003 n 127, pp 1004, 1006-7; Burns at sections 4.45-4.50; and Carty at pp 83-84.)

[46] In my view, for reasons that will become clear, it is not necessary for this Court to resolve this issue. That said, Cromwell J was careful in his decision to clarify that the law does not accept that the intentional harming of someone else's economic interests is a tort, unless that harm was the result of an unlawful act.

[47] In conclusion, the basic elements of this tort can best be described as follows:

(i) the defendant committed an unlawful act against a third party;

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(ii) the unlawful act caused economic harm to the plaintiff; and

(iii) the defendant intended to cause economic harm to the plaintiff when committing the unlawful act.

Civil Fraud

[48] In this case, Ultracuts alleges that the unlawful act that was committed by the defendants against Wal-Mart was the tort of civil fraud. The elements of civil fraud, also known as deceit and fraudulent misrepresentation (see *Dhillon v Dhillon*, 2006 BCCA 524 at para 77), are settled and have been explained in a number of legal texts and decisions from all levels of court, albeit in somewhat different language. It would be fair to say that all rely, at least to some extent, on the principles set out in Herschell LJ's decision in *Derry and others v Peek* (1889), [1886-90] All ER Rep 1; [1889] UKHL 1 at 374 (HL (Eng)). I am going to list the elements and then explain the principles of each.

(a) The Elements of Civil Fraud

[49] The elements of civil fraud can best be described as follows:

(i) a representation or statement of fact made by the representor that was false;

(ii) the representor knew that the representation was false or was reckless as to its truth or falsity;

(iii) the false representation was made with the intention that the representee would act upon it;

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(iv) the representee relied on the false representation, sometimes stated as the misrepresentation caused (i.e., induced) the representee to act; and

(v) the representee's reliance on the representation caused/resulted in a loss.

(i) There Must Be a False Representation or Statement of Fact

[50] This element requires proof of both a representation of fact and the falsity of that representation.

[51] A representation includes verbal and written statements, but it can also include conduct, such as a nod or active concealment, silence or half-truths, depending on the circumstances (see *Alevizos v Nirula*, 2003 MBCA 148 at paras 19-27). As this case involves written statements (the representations), I will not consider other types of representations.

[52] First, any statement purported to be a false representation for the purpose of civil fraud must be one of fact, which must relate to something in the past or present. (See, for example, *Parna v G & S Properties Ltd*, [1971] SCR 306 at 316; *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8 at para 19; and *York University v Markicevic*, 2018 ONCA 893 at para 21, leave to appeal to SCC refused, 38607 (18 July 2019); *Youyi Group Holdings (Canada) Ltd v Brentwood Lanes Canada Ltd*, 2020 BCCA 130 at para 83, leave to appeal to SCC refused, 39246 (21 January 2021); Chamberlain at p 860; and Burns at section 7.17.)

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[53] Generally speaking, "[o]pinions, predictions as to future events and promises are all statements that, as far as their explicit content is concerned, are neither true nor false" (Burns at section 7.18).

[54] Second, an opinion, estimate, prediction or promise that "may convey factual information by implication, which [could open] up the possibility of liability in civil fraud" (Burns at section 7.18). That is, such a statement may constitute a representation if it implies that facts exist that are consistent with it, in which case, it would be treated as a representation of implied fact. (See, for example, *KRM Construction Ltd v British Columbia Railway*, 1982 CarswellBC 257 (CA); and Burns at section 7.19.)

[55] That said, an "opinion about facts that both parties know equally well will not usually be a statement of fact" (MacDougall at section 2.148). That is, if two parties are privy to the same facts underlying the opinion, that opinion will not be based on implied facts known only to the party giving the opinion, so there will be no representation of implied facts. (See also *Williams v Saanich School District No 63*, 1986 CarswellBC 699 (SC), aff'd on other grounds, 1987 CarswellBC 146 (CA).)

[56] Third, the existence and meaning of a representation should be construed objectively from the perspective of a reasonable recipient of that communication in all of the circumstances of the actual representee. (See *Primus Telecommunications Plc v MCI Worldcom International Inc*, [2004] EWCA Civ 957 at para 30; and MacDougall at section 2.32.)

[57] Fourth, as previously noted, the representation must be false. The onus to prove that falsity is on the plaintiff; there is no onus on the representor to prove that the representation is true. (See MacDougall at section 2.65,

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relying on *Melbourne Banking Corporation v Brougham* (1882), [1881-82] 7 AC 307 (HL (Eng)), as implied in *Queen v Cognos Inc*, [1993] 1 SCR 87 at 109-10.)

[58] Further, the test when determining whether a representation is false is an objective one, by considering the effect of the words on a reasonable person in the circumstances of the representee. (See *2249659 Ontario Ltd v Sparkasse Siegen*, 2018 ONCA 371 at para 35; see also *Toronto-Dominion Bank v Leigh Instruments Ltd (Trustee of)* (1999), 178 DLR (4th) 634 at para 9 (ON CA), leave to appeal to SCC refused (2000), 188 DLR (4th) vi (note) (SCC); and Burns at section 7.32.)

(ii) The Representor Knew That the Representation Was False or Was Reckless as to Its Truth or Falsity

[59] It was established in *Derry* that the tort of deceit (and civil fraud) requires proof that the representor made the representation knowing that it was false, or with reckless disregard for its truth or falsity. In neither case would there be "an honest belief in [the] truth" of the statement (at p 374). Stated otherwise, if the representor had an honest belief in the truthfulness of the statement, then it would not be fraudulent, even if the statement was, in fact, false (see p 370).

[60] *Derry* also established that the representor's honest belief in the truthfulness of the statement should not be judged objectively, on the basis of whether it was reasonable, but subjectively, from the representor's point of view (see pp 358, 363, 370).

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[61] However, a belief is a state of mind and direct evidence of a person's beliefs is not often available, which raises the question of how to determine whether a belief was honestly held. A person's belief, like knowledge or intention, can be determined by inference from the surrounding circumstances. A court should consider the context and surrounding circumstances in which the representation was made. The more unreasonable the belief, when considered in the context and circumstances, the less likely it may be for a court to find that it was honestly held. (See *Derry* at pp 369, 375-76; Burns at section 7.24.) However, the absence of reasonable grounds for a belief does not establish that there was, at law, no honest belief.

[62] Further, if a representation is capable of different meanings, a court must determine whether the representor honestly believed that the representation was true in the sense in which he or she understood it when making it, even if that understanding was objectively wrong. (See Burns at section 7.24; and Hoyano at p 481.)

[63] Finally, while the representor has to know that the representation is false, the motive for making the false statement is irrelevant. As stated in *Derry*, "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 [representee]" (at p 374).

(iii) The False Representation Was Made with the Intention That the Representee Would Act Upon It

[64] It has generally been agreed that an element of civil fraud/fraudulent misrepresentation is that the representor made the representation with the

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intention that the representee would act/rely on it. This was one of the elements set out in the early case of *Pasley v Freeman* (1789), 100 ER 450 (KB UK), as cited in Halsbury's Laws of Canada (online), *Misrepresentation and Fraud*, "Fraudulent Misrepresentation Founded in Tort: The Tort of Fraudulent Misrepresentation: Requisite Elements of the Tort" (IV.1(2)) at HMF-28 "Requisite Elements of the Tort of Fraudulent Misrepresentation" (2019 Reissue), and was recognized as an element by the Supreme Court of Canada in *Redican v Nesbitt*, [1924] SCR 135 at 147; and *Parna* at p 316.

[65] Likewise, it has been recognized as an element of civil fraud in other Canadian secondary sources. See MacDougall at section 5.10; Osborne at p 336; Klar at p 803; and Burns at section 7.1.

[66] In *Bruno*, Karakatsanis J made no mention of this element in her summary of the elements of civil fraud (see paras 18-21). While this omission has been noted and has caused some controversy (see *Singh v Trump*, 2016 ONCA 747 at para 141; and *P(P) v D(D)*, 2017 ONCA 180 at para 41 n 1), it seems unlikely that Karakatsanis J intended to change such long-standing law, given that she neither discussed making this change nor provided any reason for doing so. This is the interpretation suggested by Osborne and Klar, who have continued to recognize it as an element of the tort. Recent decisions from the Ontario Court of Appeal have continued to include it as an element of civil fraud with no mention of its omission in *Bruno*. (See *Midland Resources Holding Ltd v Shtaif*, 2017 ONCA 320 at para 162, leave to appeal to SCC refused, 37653 (21 December 2017); and *Paulus v Fleury*, 2018 ONCA 1072 at para 9.)

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[67] In my view, the weight of the jurisprudence and the academic commentary supports a finding that the elements of civil fraud include the requirement that the representor must have made the false representation with the intention that the representee would act/rely on it, and I would so find.

[68] Proving intention, like proving knowledge or belief, can be difficult because it is a state of mind, and, unless the representor admits to having a particular state of mind, it can only be proven by inference from the surrounding circumstances. This starts with the basic legal premise that the law infers that a person intends the natural consequences of his actions, often called a common sense inference (the common sense inference). (See Burns at section 7.34; Hoyano at p 485; *Jago v Virden Credit Union Ltd*, 1990 CarswellMan 392 (QB) at para 30, aff'd 1993 CarswellMan 411 at para 13 (CA).)

[69] Once it is proven that a representor knowingly made a false representation to the representee about a material fact, it would be open to the court to infer that the representor intended the natural consequences of making that statement, that is, to draw the common sense inference. Here, the common sense inference would be that the representor intended that the representee would rely on the representation.

[70] However, as with any inference, before drawing the common sense inference, it is important to consider the specific circumstances in which the representation was made and the relationship between the parties. Considered in context, a judge may conclude that reliance on the representation, although a common sense inference, was not, in fact, intended.

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[71] For example, circumstances that have been found to negate the common sense inference include where a representation related to matters of law or the construction of a contract and was made when the parties were in an adversarial legal situation, as those are circumstances where a representee would be expected to rely on advice from his or her own lawyer, not on legal advice from an adversarial party. (See *Dorsch et al v City of Weyburn et al* (1985), 23 DLR (4th) 379 at 389 (SK CA); and *Apotex Inc v Sanofi-Aventis*, 2010 FC 182 at para 61.)

[72] Regarding opinions in general, MacDougall stated that "[s]ome opinions do not constitute representations because they are clearly not intended to be relied on by the other party" (at section 2.142). In the Law of Torts, Osborne stated that "[s]tatements of opinion, law and prediction, and vague and boastful sales commendations ('puffs') are not normally sufficient [to be a misrepresentation] because the representation must be of a kind on which a reasonable person would rely" (at p 336).

(iv) The Representee Relied in the False Representation, Sometimes Stated as the False Representation Caused (i.e., Induced) the Representee to Act

[73] Reliance by the representee on the false representation, that is, that the representation caused/induced the representee to act, is a required element of civil fraud and requires proof that the representee, in fact, relied on the representation (see *Parna* at pp 316-17; *Kelemen v El-Homeira*, 1999 ABCA 315 at paras 9-10, leave to appeal to SCC refused, 2000 CarswellAlta 1156; *Bruno* at para 19; *York* at para 21; and Chamberlain at pp 851, 874-75).

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[74] Whether the representee relied on the representation is "a question of fact to be inferred from all the circumstances of the case and [the] evidence at the trial" (Fridman at p 291, as quoted in *York* at para 21; see *LK Oil & Gas Ltd v Canalands Energy Corporation*, 1989 ABCA 153 at paras 31, 36, 38, leave to appeal to SCC refused, [1989] SCCA No 383 (QL). Although this statement was made in the contractual context, it applies equally to tortious misrepresentation.

[75] The jurisprudence has established that an outwardly positive act by the representee, such as entering into a contract, is not required to prove reliance; all that is required is an alteration of position, which can include acts such as forbearance. (See, generally, *XY, LLC v Zhu*, 2013 BCCA 352 at paras 24-27, leave to appeal to SCC refused, 35557 (20 February 2014).)

[76] There is divergent jurisprudence on two aspects of this element of the tort: materiality and the onus of proof. For reasons that will become clear, these issues do not have to be resolved in this case; however, I will provide a brief explanation of each.

[77] One issue that sometimes arises when considering causation relates to the materiality of the representation, in the sense of being a positive inducement for the representee's actions (see Burns at section 7.36; *Derry* at p 361; *LK Oil* at para 24; *Genesis Tower Ltd v Cheung and Chiu*, 2002 BCCA 582 at paras 16, 21-22; see also Klar at p 811; Burns at section 7.38; MacDougall at sections 2.338, 2.343, 2.345). While the representation must be material to the representee's decision, it does not need to be the sole inducing factor (see *Sidhu Estate v Bains*, 1996 CarswellBC 1262 at para 36 (CA); and *Midland* at para 137).

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[78] The first divergence relates to the test to determine materiality—that is, whether it should be determined on a subjective or objective basis. If determined on a subjective basis, the question is whether the representation was material to the representee (see *Kelemen* at paras 9-10). If determined on an objective basis, the question would be whether the representation would be likely to induce a person to act (see *LK Oil* at paras 24-25; *Wang v Shao*, 2019 BCCA 130 at para 48, leave to appeal to SCC refused, 38704 (14 November 2019)).

[79] Some jurisprudence holds that the plaintiff must prove that the representation was objectively material as an element of the tort, with the result that a finding that it was not would dispose of the claim, even if all of the other elements were proven. (See Chamberlain at pp 877-78).

[80] The second divergence relates to a shifting of the onus of proof of reliance. This arises where a court finds that the defendant made an objectively material false representation that was intended to induce the plaintiff to act to his or her detriment, that the plaintiff acted to his detriment and there was a loss. One line of authorities holds that these findings would shift the legal onus to the defendant to prove that the plaintiff (in this case, Wal-Mart) did not rely on the representation, while another line of authorities holds that these findings would lead to an inference of fact that there was reliance and put an evidentiary onus on the defendant to rebut the inference, but there would be no shift of the legal onus (see Chamberlain at p 878).

[81] On these two issues, the conclusion in Chamberlain, is that "[g]iven these confusions and divergences, it cannot be authoritatively determined how materiality interacts with the tort of deceit" (at p 878).

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[82] Reliance is an inference that relates to the representee's state of mind, which must be determined by taking into account the context in which the representation was made and all of the surrounding circumstances (see *Sidhu Estate* at para 41). Aside from whether it is an element of the tort, the objective materiality of the representation is one factor to consider in determining actual reliance, as a finding that the representation was objectively trivial or irrelevant would weigh against a finding that the representee actually relied on it, i.e., that it was an inducement. This was the finding in *Genesis Tower*; see also *Parna* at p 319.

[83] There are a number of circumstances that may indicate that it is unlikely that the representee acted on the false representation, such as:

- where the representee made his own investigations or inquiries into the matter (see *Amertek Inc et al v Canadian Commercial Corp et al* (2005), 256 DLR (4th) 287 (ON CA), leave to appeal to SCC refused, 31141 (16 February 2006); *Abdossamadi v TD Insurance Direct Agency Inc*, 2016 ONSC 1363; and *1348623 Alberta Ltd v Choubal*, 2016 SKQB 129);

- where it can be shown that the misrepresentation played no role in the representee's decision to act (see *Seaver v Winnipeg Regional Health Authority Inc et al*, 2014 MBCA 55 at paras 5, 13-14; and *Patten v Hants Realty Ltd*, 2015 NSSC 349);

- where it can be shown that the representee knew that the misrepresentation was false, or it did not believe the truth of the representation (see *Parna*; and *Brent v Slegg Construction Materials Ltd*, 2007 BCSC 661);

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- where the representee, after initially believing the misrepresentation, learns the truth before actually relying on it (see *Sorensen v Kaye Holdings Ltd*, 1979 CarswellBC 242 (CA)).

(v) The Representee's Actions Resulted in a Loss

[84] While proof that a representee suffered a loss due to relying on a misrepresentation is an element of the tort of civil fraud, it is not required to be proven for the tort of unlawful interference in economic relations (see *Bram SCC* at paras 5A(1), 26, 76). The relevant loss for the tort of unlawful interference in economic relations is that suffered by the plaintiff due to the unlawful interference. As a result, nothing need be said about this element of civil fraud.

(b) Standard of Proof

[85] The standard of proof in civil cases involving particularly grave and serious allegations such as fraud, professional misconduct and criminal conduct was settled by the Supreme Court of Canada in *FH v McDougall*, 2008 SCC 53, being the same standard of proof on a balance of probabilities that applies to all civil cases (see para 40). Rothstein J, for the Court, stated that "in all cases, evidence must be scrutinized with care by the trial judge" (at para 45); that in all cases it "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (at para 46); and that there is "no objective standard to measure sufficiency" (*ibid*). He noted that it would be for the judge to determine whether the evidence was sufficient to meet the standard of proof (*ibid*).

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IV. STANDARD OF REVIEW

[86] The applicable standards of review are those set out in *Housen v Nikolaisen*, 2002 SCC 33, being that questions of law are reviewed on the standard of correctness (see para 8), while questions of fact, inferences of fact and questions of mixed fact and law are reviewed on the standard of palpable and overriding error (see paras 10, 25, 32, 37).

[87] However, where the alleged error can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test or a similar error in principle, this can be characterized as an error of law, which is reviewed on the correctness standard. As stated by the majority, caution must be exercised in finding an extricable question of law because it is often difficult to extricate the legal questions from the factual ones (see para 36).

[88] The classic example of an extricable question of law arises where a legal test requires a trial judge to consider A, B, C and D, but the trial judge only considers A, B and C. The result is that the trial judge has applied the wrong law, which is an error of law (see para 27).

[89] It has been held that the determination as to whether there was causation or reliance is a factual finding (see, for example, *Youyi* at para 83).

V. ANALYSIS–CIVIL FRAUD

(a) The Trial Judge's Decision

[90] The trial judge set out the elements of the tort of unlawful means, including the requirement to prove that the interference was by way of an

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unlawful act (see paras 132, 136), which he found to be civil fraud in relation to the defendants' representations to Wal-Mart (see para 138).

[91] The trial judge's analysis regarding civil fraud was brief (at paras 136-39):

> The only component of the cause of action [of causing loss by unlawful means] that warrants further discussion is whether the interference by the defendants was by way of unlawful means. In this case, pursuant to the definition set out above (at para. 134(b)), the question is whether Wal-Mart had a right of action against the defendants.
>
> With respect to this issue, the evidence establishes the following key points:
>
> a) The defendants alleged that they had a verbal agreement with Wal-Mart for Magicuts to be its exclusive haircare provider in Canada;
>
> b) The defendants advised Wal-Mart that if the plaintiff opened additional salons, in breach of the alleged exclusivity agreement, both Magicuts and Wal-Mart would be sued by Magicuts' franchisees;
>
> c) The [defendants'] allegations caused Wal-Mart to change its position relative to its ongoing business relationship with the plaintiff; and
>
> d) The defendants were aware that Wal-Mart did not grant exclusive rights and they did not actually believe that Magicuts had a binding agreement with Wal-Mart to be its exclusive haircare provider in Canada, but made that allegation to "posture for legal reasons".
>
> [Ultracuts] argued on the basis of these points that the defendants made an allegation that was not factually correct, something which they were aware of at the material time, in an attempt to gain an advantage. Accordingly, the defendants' actions constituted a civil fraud, the requirements of which were set out recently in [*Bruno*] as follows (at para. 21):

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> 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.
>
> I find on a balance of probabilities that the defendants made false statements to Wal-Mart, which led to Wal-Mart's refusal to expand the scope of its business with [Ultracuts] and caused a loss. I also accept that the defendants' conduct was actionable by Wal-Mart.

(b) Grounds of Appeal Regarding Civil Fraud

There Must Be a False Representation or Statement of Fact

[92] This element of the tort requires Ultracuts to prove on a balance of probabilities both that the defendants made a representation of fact and that it was false.

[93] The trial judge did not clearly identify the allegedly false representations; however, he seemed to conclude that the letter contained the following two misrepresentations (at para 137):

> . . .
> a) the defendants alleged that they had a verbal agreement with Wal-Mart for Magicuts to be its exclusive haircare provider in Canada; [and]
>
> b) the defendants advised Wal-Mart that if [Ultracuts] opened additional salons, in breach of the alleged exclusivity agreement, both Magicuts and Wal-Mart would be sued by Magicuts' franchisees.
>
> . . .

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[94] He may also have considered the following statement from the letter to be a misrepresentation (at para 60):

> . . .
> Our real difficulty is that [the franchisees] would, in the opinion of our counsel, easily win the action, as the factual evidence is clearly on their side; a deal was made, and now Wal-Mart has simply decided to change their minds.

[95] The defendants argue that the trial judge erred by failing to set out and apply the correct legal test because he failed to identify the requirement that the representation must be one of fact, and he carried out no analysis and made no finding that any of these statements was one of fact. They argue that this was an error of law that is reviewed on the standard of correctness.

[96] Their position is that none of these statements is a representation of fact, so the tort of civil fraud has not been proven.

[97] Ultracuts does not address the question of whether the trial judge erred as alleged. It argues that this case is "about numerous false statements made to [Wal-Mart] coupled with the threat that if [Wal-Mart] did not stop its relationship with [Ultracuts] and give that opportunity to [Magicuts], [Wal-Mart] would get sued."

[98] Regarding the standard of review, Ultracuts argues that determining whether the defendants' statements support the unlawful act requirement involves applying the facts to the law, and is a question of mixed fact and law.

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Error of Law

[99] The trial judge summarized this element as "a false representation made by the defendant" (at para 138). He made no mention, either here or elsewhere in his reasons, of the requirement that the representation must be one of fact and not "opinions, predictions as to future events [or] promises" (at para 53 herein). Further, he carried out no analysis and made no findings in this regard. Thus, there is no evidence that the trial judge considered the correct legal principles when addressing this element of civil fraud.

[100] While the trial judge did state that "[Ultracuts] argued on the basis of [the points in para 137] that the defendants made an allegation that was not factually correct" (at para 138), there is no indication that he actually considered whether the representations were ones of fact or even that he accepted that part of Ultracuts' argument. He just goes on to find "that the defendants made false statements to Wal-Mart" (at para 139).

[101] In my view, the trial judge erred in law by failing to consider the correct legal principles related to this element of civil fraud. This is an error of law, and this Court need not give deference to his conclusion regarding this element. Rather, it is open to this Court to make its own determination by applying the correct legal principles.

Analysis

[102] I will now consider the three representations that are alleged to have been false.

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(i) The Defendants Alleged That They Had a Verbal Agreement with Wal-Mart to Be Its Exclusive Haircare Provider in Canada

[103] While the trial judge found that the defendants represented that there was an agreement that Magicuts would be the "exclusive haircare provider" (at paras 137(a)-137(b)), these are not the words in the letter, which refers to a guarantee that Magicuts would be the "sole haircare operator" (at para 127).

[104] The distinction is important because, as the trial judge noted, both Messrs Cawston and Luborsky testified that Mr. Redman said that Wal-Mart does not give exclusive rights (see paras 27, 61, 114). A finding that the defendants represented that there was an agreement to be the "exclusive haircare provider" amounts to a finding that they knew that the representation was false and that they intended to make a false representation.

[105] However, both Messrs Cawston and Luborsky testified that Mr. Redman said that Magicuts would have the "first crack" at any haircare salons in Canada if they met Wal-Mart's conditions. Mr. Redman testified in his deposition that he had agreed that "as long as they met the criteria set up by [Wal-Mart's] licensing department, that they should have the opportunity first to go in the stores" (at para 31 herein).

[106] Further, Mr. Cawston explained what being the "sole haircare operator" meant to them. Mr. Cawston testified that he viewed Magicuts as being the sole haircare operator because, if Wal-Mart decided to put salons in any of their stores (which was not guaranteed in 1994) and if Magicuts performed, i.e., did a good job, Magicuts would get the "first crack" at the Canadian locations. He said that "the reason Wal-Mart won't give exclusivity

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is if [Magicuts chooses] not to start taking the sites that they're offering, they're not going to leave empty holes. They will, at that point, look for another operator. So in that sense, we don't have an exclusive." He testified that Magicuts had never turned down a store, and he told Wal-Mart that it would not, and, further, that Magicuts was performing.

[107] Mr. Luborsky testified that Mr. Redman was "quite complimentary about our salons" and said that the reason Wal-Mart never gave exclusives was "they didn't have to." He also testified that Mr. Redman assured them that, if they performed and if Wal-Mart added haircare salons to their stores, Magicuts "would get first crack".

[108] The trial judge did not refer to any of this evidence. In my view, his finding that the defendants represented that there was an agreement to be the "exclusive haircare provider" is not supported by the evidence and is wrong.

[109] The trial judge did not raise or address the question of whether this was a representation of fact or opinion. Reviewing the statement in context, and taking an objective view of the contents of the letter, it is difficult to understand how this could be considered a representation of fact, rather than a representation of opinion.

[110] An objective review of the background reveals that Mr. Robertson requested the letter at the direction of Wal-Mart's legal counsel, Mr. Wasserman, in response to the defendants' concerns that Wal-Mart was not honouring the agreements that Mr. Redman, on behalf of Wal-Mart, had made. Upon receipt of the letter, Mr. Robertson forwarded it to his immediate supervisor, Mario Pilozzi (Mr. Pilozzi), and to Mr. Wasserman and Mr. Ferguson, and the four discussed it.

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[111] The letter set out background details, starting from the 1994 sale of the Woolco stores to Wal-Mart and the effect on Magicuts' franchisees. It explained the discussions with Mr. Redman, the agreements that were concluded on the part of both Magicuts and Wal-Mart, the fact that Mr. Redman assured Mr. Cawston that Wal-Mart's "word [was] its bond", that Wal-Mart could be relied upon to keep its promises and that Mr. Redman and Wal-Mart frequently did business on the basis of trust and a handshake.

[112] The "sole haircare operator" representation in the letter must also be considered in light of the fact that it is found in the same letter where it is opined that the franchisees will sue and easily win if Wal-Mart continues to disregard the agreement. This suggests that the representations in the letter are tied together and should be read together. This results in the letter being objectively seen as a single opinion in which Magicuts is opining that it reached an agreement with Mr. Redman, which was shared with the franchisees, and that the franchisees will sue and easily win if Wal-Mart continues to disregard the agreement.

[113] The context of the representations includes:

- Wal-Mart's apparent disregard of the agreement, in that Mr. Messer, who had been involved by speakerphone in one of the Redman meetings in 1994, refused to acknowledge the agreement when dealing with Ultracuts in 1995, and Mr. Robertson's response in 1996, which was to propose a sharing of the locations;

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- the varied and imprecise language that Mr. Cawston used in the letter to describe the agreement—"guarantee", "personal assurances", "promises", "deal", "bargain"; and

- how the agreement was reached–lawyerless, trust and a handshake, assurances that Wal-Mart's "word [was] its bond".

[114] In my view, a reasonable person in Wal-Mart's circumstances, reading the details in the letter in the above context, would not objectively conclude that the representation that there was an agreement for Magicuts to be Wal-Mart's "sole haircare operator" was one of fact. A reasonable person would be much more likely to judge that representation as an opinion, rather than a fact.

[115] Further, the representations in the letter were all known to Wal-Mart, as explained above. First, they were either made by, or explained to, several members of Wal-Mart's senior management in 1994. Second, they were all based on the facts shared with Wal-Mart in the letter, so Wal-Mart was made aware of the facts underlying these representations in the letter. As a result, Wal-Mart could come to its own conclusion as to whether there had been a legally binding agreement, i.e., a contract, or an agreement that was not legally binding.

[116] In my view, this representation was an expression of opinion, not one of fact.

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(ii) The Defendants Advised Wal-Mart That if Ultracuts Opened Additional Salons, in Breach of the Alleged Exclusivity Agreement, Both Magicuts and Wal-Mart Would Be Sued by Magicuts' Franchisees

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[117] The words "if [Ultracuts] opened additional salons . . . both Magicuts and Wal-Mart would be sued by Magicuts' franchisees" (at para 137(b)), in the context of the letter, strongly suggest that Mr. Cawston was providing an opinion or advice about the future acts of third parties. As noted earlier, the law generally does not treat opinions and predictions about future acts as factual representations unless they imply underlying factual information that is otherwise unknown.

[118] In this case, the opinion that some of the franchisees "will sue" was supplemented with the factual information that some of the franchisees had been threatening to sue and that one of them had already done so, so the factual implication in the statement and the factual statement, itself, were one and the same—there are no unknown implied facts.

[119] Further, Ultracuts had the burden of proving that the representation was false, that is, that the franchisees were not threatening to sue; the defendants did not have to prove that it was true. While Ultracuts argues that the "statement was knowingly false as not one of the 17 franchisees testified at trial that they were threatening litigation", it was Ultracuts' responsibility to call the franchisees to establish that none of them had threatened litigation. It was not for the defendants to produce evidence that the franchisees were threatening to do so.

[120] In my view, this representation was an expression of opinion, not one of fact, and, further, Ultracuts has not proven that the representation was false.

(iii) Our Real Difficulty Is That the Franchisees Would, in the Opinion of Our Counsel, Easily Win the Action, as the Factual Evidence Is Clearly on Their Side; A Deal Was Made and Now Wal-Mart Has Simply Decided to Change Their Minds

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[121] This statement was clearly an expression forecasting the outcome of future litigation, which the law does not treat as a factual representation (see *Williams* at para 32). In *Williams*, the Court held that "[t]he statement [by an employer] about the [outcome of a future] grievance procedure was one of opinion and not fact. It related to a future event" (at para 33).

[122] Ultracuts argues that this statement was knowingly false because "[g]iven the conflicting evidence of Gordon [Luborsky], [Mr.] Cawston and [Mr.] Luborsky, it cannot be concluded that a verbal legal opinion was given." Gordon Luborsky is Mr. Luborsky's brother. He is a lawyer and was Magicuts' general counsel and a vice president from January 1994 to October 1995. He also acted as Mr. Luborsky's counsel for his Arkansas deposition.

[123] As the trial judge found, Gordon's testimony about seeing a draft of the letter was inconsistent (see paras 63, 123). The trial judge stated that, in his deposition, Gordon testified that the letter was written on the advice of counsel, with counsel "assisting" with the wording, while, at trial, Gordon said that he did not recall reviewing it (at para 123). However, Gordon did not deny seeing the letter. Mr. Luborsky's evidence was also inconsistent. In

his examination for discovery, he said that he did not recall discussing the letter with Gordon, while he testified at the trial that he did, in fact, have some discussions with Gordon (see para 65). Mr. Cawston's evidence was that he "believe[d]" that Gordon saw a draft of the letter. While the evidence was inconsistent, there was no evidence that Gordon did not see the letter.

[124] However, whether Gordon saw the letter is not important; what is important is that all three were in agreement that Gordon had given a legal opinion that the Redman agreement was legally binding and that the franchisees could win if they sued Wal-Mart (second legal opinion) (see para 164 herein). There was no evidence to suggest that he did not give this opinion.

[125] As noted, Ultracuts has the burden of proving the elements of civil fraud, including whether a representation was false, by clear, convincing and cogent evidence, albeit on a balance of probabilities; the defendants do not have to prove that it was true. All of the evidence indicates that that opinion was given, and there is no evidence to the contrary.

[126] In my view, this representation was an expression of opinion, not one of fact, and, further, Ultracuts has not proven that the representation was false in the manner argued by Ultracuts.

Conclusion–Representations of Fact

[127] Taking an objective view of the letter in its entirety, as well as the background and context, in my view, it is clear that the three representations were merely opinions, incapable of being judged as true or false. They were not representations of fact. Therefore, Ultracuts has not proven an essential

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element of civil fraud, being that the defendants' impugned representations were representations of fact.

[128] This also means that an essential element of the unlawful means tort, being proof of an unlawful act (civil fraud), has not been proven.

The Representee Must Have Relied on the Representation

[129] The law requires that the representation caused the representee to act, in the sense that the representee actually relied on the representation. The fact of reliance can be inferred from the circumstances and the evidence at trial, keeping in mind that, if there is nothing else but the representation that could have induced the representee to act, then it can be inferred, as a fact, that the representation induced the action. However, where the circumstances suggest other factors could have induced the representee to act, that evidence must be considered.

[130] Whether there was reliance is a finding of fact that must be determined on a subjective assessment of the representee's state of mind, in this case, Wal-Mart.

[131] The trial judge simply concluded that "[t]he defendants' allegations caused Wal-Mart to change its position relative to its ongoing business relationship with [Ultracuts]" (at para 137(c)) and that "the defendants made false statements to Wal-Mart, which led to Wal-Mart's refusal to expand the scope of its business with [Ultracuts] and caused a loss" (at para 139).

[132] The defendants argue that the trial judge erred in law by failing to set out and apply the correct legal test for causation, in that he failed to

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mention or consider whether Ultracuts had proven that Wal-Mart relied on, or was induced by, the representation and acted on it to change its position regarding its business relations with Ultracuts. They argue that this was an error of law that is reviewed on the standard of correctness.

[133] Ultracuts' position is that there was ample evidence to establish that Wal-Mart relied on the defendants' false statements and acted on them.

Error of Law

[134] The trial judge described this element as "the false representation caused [Ultracuts] to act" (at para 138), and he made no mention, here or elsewhere, that causation requires proof that the representee relied on the representation. Further, he carried out no analysis and made no findings regarding reliance; he appears to have jumped to an inference of causation from the finding of a false representation to Wal-Mart without considering key evidence relevant to reliance.

[135] In my view, in failing to turn his mind to the legal requirements for causation, the trial judge failed to consider the correct legal principles related to this element of civil fraud, which is an error of law. This Court need not give deference to the trial judge's conclusions regarding this element; rather, it is open to this Court to conduct its own analysis of causation and reliance.

Analysis

[136] The question of whether there was reliance on the representation is one of fact, so it is necessary to determine what the facts were.

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[137] The letter was sent to Mr. Robertson. Mr. Robertson's evidence was admitted by way of an affidavit, a cross-examination on that affidavit and the 1996 deposition that he gave in the Arkansas proceeding.

[138] In his deposition, Mr. Robertson stated that, on receiving the letter, he provided a copy to Messrs Ferguson, Pilozzi and Wasserman and they and he (the senior management team) first discussed it on or about June 21, 1996. He said in his cross-examination in 2005 that "[t]here was nothing in [the] letter that was contrary [to] or seemed to be inconsistent with what [Wal-Mart] felt took place in 1994."

[139] Mr. Ferguson testified at his deposition that he only became aware of Magicuts' claim when he received a copy of the letter. He told Mr. Robertson to look "for documentation that showed our position; where we are; what's the status"; he did the same when advised of Ultracuts' claim to have a legally binding agreement. He also testified that, in addition to discussing the letter with Messrs Robertson, Pilozzi and Wasserman, he also discussed it with two other Wal-Mart lawyers, Jon Comstock and Charles Wuest, who worked in Wal-Mart's Arkansas office.

[140] Around the time of the letter, Mr. Robertson also received a letter from Mr. Rivard dated May 27,1996, alleging that Ultracuts had an agreement with Mr. Messer regarding the opening of Ultracuts hair salons in all Wal-Mart stores in Western Canada, although he said that he did not appreciate Ultracuts' position until early July.

[141] Over the next weeks, Mr. Robertson had a number of meetings, discussions and written communications with both Mr. Rivard and Mr. Cawston regarding their competing claims, as well discussions with the

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management team, and both Ultracuts and Magicuts were approached to resolve their claims by splitting the cities between them. Magicuts put forward a proposal, but, as the correspondence discloses, Ultracuts refused to negotiate and, eventually, sued Wal-Mart.

[142] In his July 1, 2004 affidavit, Mr. Robertson stated:

> . . .
> Wal-Mart made its own decision in 1996 not to open any other Ultracuts stores other than those covered by certain written agreements with Ultracuts. It [was] also decided for the time being not to open any Magicuts salons in Western Canadian stores.
> . . .
> Wal-Mart had access to its own legal advice and did not rely upon legal advice from any of the Defendants in this action as to the legal effect of the 1994 discussions between Wal-Mart and Magicuts or its legal obligations to either Magicuts or Ultracuts.

[143] In the cross-examination on his affidavit, Mr. Robertson stated as follows:

> . . .
> [COUNSEL FOR ULTRACUTS] . . . But what [Mr. Cawston] was saying to you was that he had a legally enforceable agreement with Wal-Mart which you were in breach of. That's how you read his letter?
>
> [MR. ROBERTSON] I did not read his letter that way.
> . . .

[144] Mr. Robertson testified as follows on redirect:

> . . .
> [COUNSEL FOR MAGICUTS] . . . During the period of time following May 14, 1996 did Wal-Mart believe it had a legally

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> binding agreement with Magicuts in respect of providing stores in Western Canada to Magicuts?
>
> . . .
>
> [MR. ROBERTSON] No, we did not.
>
> . . .
>
> [COUNSEL FOR MAGICUTS] You also testified that a Mr. Wasserman was at certain meetings?
>
> [MR. ROBERTSON] [Mr.] Wasserman is our general counsel and he was [at] all our meetings that we had as a senior management team.
>
> [COUNSEL FOR MAGICUTS] When you used the word agreement in the various depositions and conversations, was it your intention to refer to a legally binding agreement?
>
> [MR. ROBERTSON] No, they were discussions that we had, they were not legally binding. They were not written agreements that we had.
>
> . . .

[145] The trial judge did not refer to any of this evidence in his decision, and he made no credibility findings about it or about Mr. Robertson's testimony in general. While a trial judge does not have to refer to every piece of evidence, he is required to refer to the important or key evidence and to explain how he resolved important inconsistencies in that evidence. (See Brown at section 13:48.)

[146] Mr. Robertson's evidence was key evidence on the element of reliance and causation, but the trial judge failed to either refer to it or to resolve the inconsistency between Mr. Robertson's evidence and his own factual finding of causation.

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[147] There is other evidence that supports that of Mr. Robertson. There is evidence that Wal-Mart's management team did not act in a manner consistent with a belief that Wal-Mart had a binding exclusivity agreement with Magicuts. Mr. Redman testified that he refused to enter into a binding agreement with Magicuts. He was clear that Mr. Messer was aware of the terms of the Redman agreement in May 1994, yet, just over a year later, Mr. Messer was discussing leasing space for hair salons with Ultracuts. When the real estate broker advised him that Magicuts was asserting an exclusivity agreement in Canada, Mr. Messer replied that he would be meeting with Magicuts and if they did not like it, he would "cut them off totally" (at para 54).

[148] Further, after the management team had received the letter, it still offered Ultracuts the locations that had been discussed with it, together with exclusivity in those markets, which would have breached an exclusivity contract with Magicuts.

[149] As well, Mr. Rivard's letters to Wal-Mart do not indicate that Wal-Mart expressed the view that it had a binding agreement with Magicuts. In a letter to Mr. Robertson dated June 27, 1996, Mr. Rivard refers to "Wal-Mart's concern that it may have some liability" to Magicuts (emphasis added). In his letter to Mr. Ferguson of July 10, 1996, Mr. Rivard refers to being told at a meeting the day before that senior management had just recently been told of an "alleged agreement" with Magicuts (emphasis added).

[150] All of this evidence is relevant to the issue of reliance, as it goes to establish the subjective views of Wal-Mart's senior management team regarding the letter.

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[151] Ultracuts' position, as set out in its statement of claim, was that "the defendants . . . represented to Wal-Mart that they had a contract with Wal-Mart to put Magicuts . . . [hair] salons in all of the Wal-Mart stores in Western Canada" (emphasis added) and that Wal-Mart relied on that representation in deciding not to continue its relationship with Ultracuts.

[152] However, Mr. Robertson's evidence, as noted earlier, was clear that Wal-Mart did not accept that the Redman agreement was legally binding—that is, that it was a contract.

[153] Likewise, the correspondence between Mr. Ferguson and Mr. Rivard shows that, contrary to Ultracuts' position, Wal-Mart did not accept that it had any contract with Ultracuts beyond the four locations for which there were written agreements.

[154] Wal-Mart attempted to resolve the competing claims of Ultracuts and the defendants by negotiating an agreement. The defendants made a proposal to divide the store locations between them and Ultracuts, but Ultracuts refused to discuss a settlement.

[155] As Mr. Robertson explained, the senior management team had a "business discussion" based on the information that they had, and in consultation with their legal counsel, and made a "business decision" that they would only open the four Ultracuts hair salons, and that they would not open any additional ones.

[156] The bottom line is that the senior management team made up their own minds regarding the nature of the agreement between Magicuts and Wal-Mart, relying on their own legal counsel to advise them whether the Redman

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agreement was a contract. They came to the conclusion that it was not. Their decision to limit their relationship with Ultracuts to the four salons in the written agreements was a business decision, made for business reasons, and not because they were relying on the defendants' representations of an exclusivity contract.

[157] Mr. Robertson's explanation accords with common sense. The context of Wal-Mart's actions is that Wal-Mart was, and is, one of the largest corporations in the world, with its own legal departments, including in Canada and Arkansas. The response to the competing claims of the defendants and Ultracuts was not a hasty decision, but one that involved many meetings and conversations and the exchange of many letters to determine how to respond to those claims. Common sense dictates that, before the senior management team made a decision, it would consult with and obtain advice from its own legal department, rather than relying on the representations of those companies and their executives. This is more so given that one of Wal-Mart's own lawyers was directly involved in the decisions.

Conclusion–Reliance

[158] Mr. Robertson's evidence was admitted and there were no adverse credibility findings. In my view, that evidence answers and rebuts any inference of reliance; it certainly cannot be said that there is clear, convincing and cogent evidence of reliance or causation.

[159] Thus, in my view, Ultracuts has not proven on a balance of probabilities that Wal-Mart relied on the representation or that the representation caused Wal-Mart to act. Thus, Ultracuts has not proven this element of civil fraud.

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[160] This also means that an essential element of the unlawful means tort, being proof of an unlawful act (civil fraud), has not been proven.

VI. OTHER ISSUES

The Remaining Grounds of Appeal

[161] Ultracuts argues that the defendants have used a shotgun approach in this appeal and are simply attempting to reargue the case by challenging almost every finding that the trial judge made. While that is sometimes the case, in my view, that is not so in this matter.

[162] As the appeal and the claim can be determined by analyzing the two grounds of appeal dealt with above, it is not necessary, in my view, to address the remaining five grounds. That is not to be taken as an indication that they are without merit, as that is not the case; rather, for reasons of judicial economy, there is no need to undertake further lengthy legal analysis.

The Trial Judge's Factual and Credibility Findings

[163] The trial judge made a number of factual findings, some of which he relied on to question the credibility of Mr. Cawston and Mr. Luborsky. Some of these factual findings are not accurate and/or supported by the evidence. Some have already been addressed in these reasons. The rest are not key to the two grounds of appeal that have been analyzed, but they do relate to other grounds of appeal and, generally, undermine the trial judge's credibility findings.

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[164] I will explain a couple of these errors:

- *At para 33, the trial judge states that Mr. Cawston had nothing written in his files about any agreement reached with Mr. Redman, and, at para 110, he uses this as a reason to discredit Mr. Cawston's testimony.*

  Whether or not there was a note in Mr. Cawston's file, the fact is that Mr. Redman testified that there was an "agreement" reached with Mr. Cawston, which refutes the negative credibility inference that the trial judge was drawing.

- *The trial judge noted, at para 34, that Mr. Cawston testified that part of the agreement with Mr. Redman was that Magicuts would not sue Wal-Mart, yet one year later, Magicuts sought a legal opinion from Lang Michener LLP (Lang Michener) on the strength of an action against Wal-Mart. He then states, "[t]his is inconsistent with the allegation that some sort of agreement was reached with [Mr.] Redman" (ibid). He repeats this statement later in his reasons dealing with Mr. Cawston's credibility (see para 111).*

  The evidence shows that Lang Michener had given a preliminary legal opinion in 1994 that an action against Wal-Mart for purchasing Woolco stores without tenants was not likely to be winnable. On February 2, 1995, Lang Michener sent Gordon a 16-page opinion letter, 15 pages of which addressed an action against Woolco and less than one page advised that a claim against Wal-Mart was "not worth pursuing". Given that the

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defendants were trying to persuade the franchisees to sue Woolco but not to sue Wal-Mart, this letter supported Magicuts' strategy. The trial judge's inference is not supported by the underlying facts.

- *Regarding Mr. Luborsky, the trial judge stated that it was clear from his deposition that he and Mr. Cawston "never believed" (at para 122) that there was an agreement between Magicuts and Wal-Mart.*

  However, as the trial judge goes on to note, Mr. Luborsky had received a legal opinion from Gordon shortly before the letter was sent stating that there was an agreement, so that at the time of the letter, he had legal advice, which he accepted, that there was an agreement. Both Gordon and Mr. Cawston testified to Gordon having given that opinion. While Gordon gave a second legal opinion that came to the opposite conclusion, that opinion was given months later, and certainly some time after the letter. Thus, the statement that both Messrs Cawston and Luborsky "never believed" that there was an agreement is not supported by the evidence.

  Further, the important date for determining what Messrs Cawston and Luborsky knew and intended was at the time that the letter was sent, being May 14, 1996, not months later, at the date of the depositions, which were after Gordon's second legal opinion.

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VII. DECISION

[165] In my view, for the above reasons, the trial judge erred in law in his interpretation and application of the elements of civil fraud by failing to consider the correct legal principles. First, he failed to consider that the representation at issue must be one of fact, not one of opinion, estimate or prediction about future events or promise. Second, he failed to consider the requirement for causation that the representee must have relied on the false representation.

[166] In my view, the appropriate remedy is for this Court to determine the issues, rather than ordering a new trial (see section 26 of *The Court of Appeal Act*, CCSM c C240). First, there was a lengthy trial and a full evidentiary record, so this Court is well placed to make the required findings. Second, this matter has been outstanding before the courts in one form or another for more than 25 years, and has been through several hearings. It is not in the interests of either the parties or the administration of justice to order yet another trial.

[167] Applying the facts to the correct legal principles, I would find, for the reasons set out above, that Ultracuts has not proven either of the two elements at issue in grounds (ii) and (iii) on a balance of probabilities. I would find that the representations at issue were opinions, not facts, and that the representee, Wal-Mart, was not proven to have relied on the representations in determining whether to act.

[168] Thus, I would find that Ultracuts has failed to prove that the representations constituted the unlawful act of civil fraud and, therefore, it has

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failed to prove that the defendants committed the tort of unlawful means (unlawful interference with economic interests).

[169] In the result, I would allow the defendants' appeal and dismiss Ultracuts' claim of unlawful means against these defendants.

[170] As costs were not addressed at the hearing, I would give the parties 14 days from the release of these reasons to advise the Court whether they wish to file written arguments in that regard, at which time, the Registrar will contact them to set dates for the filing of those arguments.

[171] If there is no such indication within that time, there will be an order of costs to the defendants both in the appeal and in the Court below.

_____ JA

I agree: _____ JA

I agree: _____ JA

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APPENDIX

Donald JM Brown with the assistance of David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2023) (loose-leaf updated 2023, release 2) vol 2.

Peter T Burns & Joost Blom, *Economic Torts in Canada*, 2nd ed (LexisNexis, 2016).

Hazel Carty, *An Analysis of the Economic Torts*, 2nd ed (Oxford: Oxford University Press, 2010).

Erika Chamberlain & Stephen GA Pitel, eds, *Fridman's The Law of Torts in Canada*, 4th ed (Toronto: Thomson Reuters, 2020).

GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Thomson Reuters, 2011).

Laura CH Hoyano, "Lies, Recklessness and Deception: Disentangling Dishonesty in Civil Fraud" (1996) 75:3 Can Bar Rev 474.

Lewis N Klar & Cameron SG Jefferies, *Tort Law*, 6th ed (Toronto: Thompson Reuters, 2017).

Bruce MacDougall, *Misrepresentation and (Dis)Honest Performance in Contracts*, 2nd ed (Toronto: LexisNexis, 2021).

Philip H Osborne, *The Law of Torts*, 6th ed (Toronto: Irwin Law, 2020).

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2019 CanLII 37485 (SCC)

No. 38507

May 2, 2019

BETWEEN:

Michael Shtaif and Eugene Bokserman

Applicants

- and -

Midland Resources Holding Limited

Respondent

JUDGMENT

The motion to file a lengthy memorandum of argument is granted. The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C58536, 2018 ONCA 743, dated September 11, 2018, is dismissed with costs.

Le 2 mai 2019

ENTRE :

Michael Shtaif et Eugene Bokserman

Demandeurs

- et -

Midland Resources Holding Limited

Intimée

JUGEMENT

La requête pour déposer un mémoire volumineux est accueillie. La demande d'autorisation d'appel de l'arrêt de la Cour d'appel de l'Ontario, numéro C58536, 2018 ONCA 743, daté du 11 septembre 2018, est rejetée avec dépens.

J.S.C.C.
J.C.S.C.

2024 SCC 28 (CanLII)

SUPREME COURT OF CANADA

CITATION: Poonian *v.* British Columbia (Securities Commission), 2024 SCC 28

APPEAL HEARD: December 6, 2023
JUDGMENT RENDERED: July 31, 2024
DOCKET: 40396

BETWEEN:

Thalbinder Singh Poonian and Shailu Poonian
Appellants

and

British Columbia Securities Commission
Respondent

- and -

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Association of Insolvency and Restructuring Professionals, Superintendent of Bankruptcy, Federation of Law Societies of Canada, Alberta Securities Commission, Ontario Securities Commission and Osgoode Investor Protection Clinic
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 116)	Côté J. (Wagner C.J. and Rowe, Jamal and O'Bonsawin JJ. concurring)
REASONS DISSENTING IN PART: (paras. 117 to 142)	Karakatsanis J. (Martin J. concurring)

2024 SCC 28 (CanLII)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Thalbinder Singh Poonian and
Shailu Poonian *Appellants*

v.

British Columbia Securities Commission *Respondent*

and

Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Association of Insolvency
and Restructuring Professionals,
Superintendent of Bankruptcy,
Federation of Law Societies of Canada,
Alberta Securities Commission,
Ontario Securities Commission and
Osgoode Investor Protection Clinic *Interveners*

Indexed as: Poonian *v.* British Columbia (Securities Commission)

2024 SCC 28

File No.: 40396.

2023: December 6; 2024: July 31.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

2024 SCC 28 (CanLII)

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency — Debts not released by order of discharge — Provincial securities commission imposing administrative penalties and disgorgement orders on bankrupts for breach of securities legislation — Commission applying to prevent release of debts by order of discharge on basis of exceptions set out in federal bankruptcy legislation — Whether commission's administrative penalties and disgorgement orders fall within exceptions provided for in bankruptcy legislation such that they are not released by order of discharge and therefore survive bankruptcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178(1)(a), (e).

Between 2007 and 2009, the bankrupts engaged in market manipulation that caused vulnerable investors to lose millions of dollars. The British Columbia Securities Commission found that the bankrupts had contravened the province's *Securities Act*. It ordered the bankrupts to pay $13.5 million in administrative penalties; it also ordered them to disgorge approximately $5.6 million, which represented the amounts they obtained as a result of the market manipulation scheme. These sanctions were registered with the Supreme Court of British Columbia pursuant to the *Securities Act*, which provides that, on being filed in a registry of that court, a decision of the Commission has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of that court.

Section 178(1) of the *Bankruptcy and Insolvency Act* sets out a specific list of debts that are not released by an order of discharge and that therefore survive

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bankruptcy. Relying on some of these exceptions, the Commission applied for a declaration that the amounts owed to it by the bankrupts, who remain undischarged, not be released by any order of discharge. The chambers judge allowed the application, finding that the exceptions in s. 178(1)(a) — "any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail" — and in s. 178(1)(e) — "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" — both applied and that the bankrupts' debts were exempt from and would survive any discharge. The bankrupts appealed. According to the Court of Appeal, the debts were not exempt from discharge pursuant to s. 178(1)(a) because the Commission's decisions could not be said to have been "imposed" by a court as required by the provision. However, the court upheld the chambers judge's conclusion that both the administrative penalties and the disgorgement orders were exempt under s. 178(1)(e). Given that the debts were still exempt, the appeal was dismissed.

Held (Karakatsanis and Martin JJ. dissenting in part): The appeal should be allowed in part.

Per Wagner C.J. and **Côté**, Rowe, Jamal and O'Bonsawin JJ.: Neither the administrative penalties nor the disgorgement orders are exempt from discharge pursuant to s. 178(1)(a). The words "imposed by a court" in s. 178(1)(a) do not capture orders made by administrative tribunals or regulatory agencies, such as the

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Commission, that are subsequently registered as judgments of a court. In addition, the administrative penalties do not come within the exception in s. 178(1)(e), as they did not result directly from the fraudulent scheme; rather, they arose indirectly as a result of the Commission's decision to sanction the bankrupts. The disgorgement orders, however, are captured by the s. 178(1)(e) exception because there is a direct link between them and the bankrupts' fraudulent conduct. Therefore, they will not be released by any possible future order of discharge.

For a debt to survive bankruptcy under s. 178(1)(a), the creditor must establish that the debt is (1) a fine, penalty, restitution order or other order similar in nature, (2) imposed by a court, and (3) imposed in respect of an offence. This provision is not restricted to penalties associated with criminal or quasi-criminal proceedings. However, the word "court" does not capture administrative tribunals or regulatory bodies. If Parliament had wanted fines, penalties, restitution orders or other orders similar in nature imposed by regulatory bodies, administrative tribunals or other administrative decision makers to be exempt from discharge under this section, it could have said so expressly. Moreover, this provision cannot be read so broadly as to include fines imposed by tribunals that are registered in a court. The registration of a decision with a court does not change the fact that it was made and imposed by an administrative decision maker, nor does it overcome the requirement that the exempt debt be imposed by a court. When a decision is registered with a court, the court's involvement is passive, whereas the act of "imposing" a fine, penalty, restitution order or other order similar in nature requires that the court be actively involved in making the decision. In

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the instant case, the administrative penalties and disgorgement orders were imposed by the Commission, not by a court, and therefore are not captured by s. 178(1)(a).

For a debt or liability to survive bankruptcy under s. 178(1)(e), the creditor must establish three elements: (1) false pretences or fraudulent misrepresentation; (2) a passing of property or provision of services; and (3) a link between the debt or liability and the fraud. To establish the first requirement, the onus is on the creditor to prove that the debts or liabilities were obtained as a result of the debtor's false pretences or fraudulent misrepresentation. A court cannot take judicial notice of fraud, nor can it infer fraud in a cursory manner. When a party relies on the findings and conclusions of an administrative decision maker to establish that the debtor made a fraudulent statement, the court must still make its own determination based on a review of the record, even where the administrative findings of fraud are express. The evidence tendered to prove fraud or dishonesty must be clear and cogent and courts must be consistent and rigorous in assessing the evidence presented to them in this regard. Even where all of the required findings for false pretences or fraudulent misrepresentation have been expressly made by an administrative decision maker, a determination of whether the claim falls within one of the categories of non dischargeable claims must be made by a court.

To establish the second requirement, there must be a loss in the form of a transfer of property or delivery of services, as well as a debt or liability corresponding to that loss. Section 178(1)(e) does not require that the bankrupt be the recipient of the

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property of which a person was deprived. The property need not have been obtained, or retained, by the bankrupt and may have passed directly or indirectly from the person to a third party at the bankrupt's direction or on his or her behalf. What is required is that the fraudulent misrepresentation induced a person to give the property to the bankrupt or someone associated with the bankrupt.

To establish the third requirement, the debt or liability must have been created as a result of false pretences or fraudulent misrepresentation. This requires a direct link whereby only the debt or liability that represents the value of the property or services obtained by false pretences or fraudulent misrepresentation qualifies as non dischargeable. While in most cases, the claiming creditor will be the party directly victimized by the false pretences or fraudulent misrepresentation, the wording of s. 178(1)(e) does not import a direct victim requirement. A creditor who is not a direct victim is thus not barred from bringing a claim under this section provided that the claim is the result of a person being deprived of property or services after having detrimentally relied on the debtor's false pretences or fraudulent misrepresentation.

In the instant case, the first s. 178(1)(e) requirement is met. The market manipulation was characterized as fraudulent by both the Commission and the chambers judge, because the bankrupts falsely and knowingly misrepresented the price of shares in order to turn a profit. The second requirement is also met, as the bankrupts obtained property or services as a result of their fraudulent misrepresentation. While some of the amounts obtained as a result of the market manipulation scheme were

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obtained indirectly, it is not necessary that the bankrupt directly obtain or retain the property for the s. 178(1)(e) exception to apply. The property may pass from a person or group of people (the deceived investors) to a third party (another participant) at the direction of the bankrupt.

With respect to the third requirement, it is not met in the case of the administrative penalties, which therefore do not survive a discharge from bankruptcy under s. 178(1)(e). A direct link between the debt or liability and the fraudulent conduct is required and it is only the value of the property or services obtained as a result of that conduct that is not released by an order of discharge. The debt represented by the Commission's administrative penalties did not result directly from the bankrupts' fraudulent misrepresentation, but arose indirectly as a result of the Commission's decision to sanction them for having obtained property through deceitful statements to investors. If the exempt debt or liability is not restricted to the value of the property or services obtained by false pretences or fraudulent misrepresentation, then s. 178(1)(e) has the potential to capture debts or liabilities that are not the direct result of deceit.

However, the Commission's disgorgement orders are captured by the s. 178(1)(e) exception and will not be released by any order of discharge. Where a person has not complied with a provision of the *Securities Act*, the Commission may order that person to pay to it any amount obtained as a result of the failure to comply. The disgorgement orders were made under the *Securities Act* and represent the value of the bankrupts' fraud — the funds that they gained as a result of their market

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manipulation. There is therefore a direct link between the fraudulent conduct of the bankrupts and the Commission's disgorgement orders.

Per **Karakatsanis** and Martin JJ. (dissenting in part): The appeal should be dismissed. Although there is agreement with the majority that the administrative penalties and the disgorgement orders imposed by the Commission do not survive bankruptcy under s. 178(1)(a), both the disgorgement orders and the administrative penalties properly fall within the narrow scope of s. 178(1)(e) and should not be released by any order of discharge. They are both debts that originate from the bankrupts having obtained property by false pretences or fraudulent misrepresentations. Both are monetary sanctions imposed because of, and thus resulting from, deceitful conduct that Parliament specifically sought to address.

There is disagreement with the majority regarding the scope of the causation requirement contemplated by the words "resulting from" in s. 178(1)(e) and the degree of link required between the debt and the deceitful behaviour. Just as s. 178(1)(e) does not require that there be an exact correlation between the person claiming the exemption and the victims of that deceitful conduct, it does not require that the quantum of the debt or liability be limited by the quantum of the property obtained as a result of that deceitful conduct. Such a requirement is unsupported by the jurisprudence, is not found in the text of the provision, and is inconsistent with the provision's central focus. The central focus is the deceitful conduct at the source of the debt or liability, not the exact gain derived thereby.

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A direct causation requirement does not mean that the debt or liability must be limited to the value of the property obtained; rather it means that where only part of a liability can be traced to deceitful conduct, but not the balance, only the part induced by fraudulent conduct will be exempt from discharge. Where a debt or liability is entirely caused by fraudulent conduct, such as punitive damages imposed to sanction the conduct, there is no reason to limit the application of s. 178(1)(e) only to the gain ultimately obtained by the bankrupt. The jurisprudence in fact overwhelmingly shows that punitive damages exceeding the value of the property obtained qualify for the exception as long as they directly result from the deceitful conduct targeted by s. 178(1)(e).

In the instant case, the amounts the Commission submits should survive discharge have as their only source or origin the bankrupts' deceitful conduct. Both the disgorgement orders and the administrative penalties under the *Securities Act* are monetary sanctions for the unlawful conduct. Like punitive damages imposed at private law, the administrative penalties arise directly from the type of conduct that they sanction. To exclude administrative penalties on the basis that they have an element of general deterrence amounts to reading in an additional limitation that is found nowhere in the text of the provision, and is inconsistent with the purpose of the exception.

Parliament has determined that some bankrupts simply do not deserve to be free of particular debts, based on the nature of the conduct giving rise to those debts. It provided for many exceptions to the fresh start principle, in s. 178(1), that are focused

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not on the person claiming the exemption but on categories of specific wrongful conduct that give rise to debts that are not released. Section 178(1)(e) should ultimately be interpreted purposively so as to ensure that dishonest debtors do not benefit from their dishonesty. This purpose would surely extend to a decision of a securities commission, charged with enforcing securities laws in order to protect the interests of the public and promoting the integrity of the capital markets.

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Cases Cited

By Côté J.

Applied: *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53; **considered:** *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, 8 Alta. L.R. (7th) 177, rev'd 2021 ABCA 411, 34 Alta. L.R. (7th) 219; *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 255 Man. R. (2d) 45; *Woolf v. Harrop* (2003), 50 C.B.R. (4th) 309; *Goldstein, Re*, 2011 ONSC 561, 74 C.B.R. (5th) 296; **referred to:** *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Shakell, Re* (1988), 70 C.B.R. (N.S.) 270; *Phenix, Re* (1989), 76 C.B.R. (N.S.) 82; *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197; *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2015 ONCA 465, 126 O.R. (3d) 81; *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 925, 160 O.R. (3d) 205; *Martin v. Martin*, 2005 NBCA 32, 282 N.B.R. (2d) 61; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710; *Air Canada, Re* (2006), 28 C.B.R. (5th)

317; *Chaytor, Re*, 2006 BCSC 1742, 26 C.B.R. (5th) 574; *Belair v. Gottschlich*, 2008 ABQB 47, 89 Alta. L.R. (4th) 268; *R. v. Manzioros*, 2004 MBQB 121, 183 Man. R. (2d) 279; *Chambre des notaires du Québec v. Dugas*, [2003] R.J.Q. 1; *Simone v. Daley* (1999), 43 O.R. (3d) 511; *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.* (1999), 123 O.A.C. 288; *Vancouver (City) v. Alliston*, 2003 BCPC 105, 47 C.B.R. (4th) 142; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *J.R.B. v. Jimenez*, 2018 ABQB 847; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555; *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143; *Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82; *Bryant v. Benjamin*, 2023 QCCA 1021; *H.Y. Louie Co. v. Bowick*, 2015 BCCA 256, 386 D.L.R. (4th) 117; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261; *Iroquois Falls Community Credit Union Ltd. (Liquidator of) v. Miljours* (2009), 52 C.B.R (5th) 231; *Derry v. Peek* (1889), 14 App. Cas. 337; *Morris Bureau v. Darde*, 2013 NSCA 121, 335 N.S.R. (2d) 378; *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109, aff'd 2016 ONCA 875; *Canada (Attorney General) v. Bourassa (Trustee of)*, 2002 ABCA 205, 6 Alta. L.R. (4th) 223; *Lawyers' Professional Indemnity Co. v. Rodriguez*, 2018 ONCA 171, 139 O.R. (3d) 641; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164; *Sharma v. Sandhu*, 2019 MBQB

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160; *McAteer v. Billes*, 2006 ABCA 312, 397 A.R. 365; *Morgan v. Demers* (1986), 71 A.R. 244; *Varvis (Bankrupt), Re*, 1999 ABQB 853, 254 A.R. 197; *Molloy v. Janes & Noseworthy Ltd.* (1998), 164 Nfld. & P.E.I.R. 176; *The Workers' Compensation Board v. Petkau*, 2018 SKCA 85, 429 D.L.R. (4th) 92; *Pietrzak, Re* (2016), 39 C.B.R. (6th) 145; *Groupe Unigesco inc. v. Michaud*, 2021 QCCQ 10330; *Dead End Survival, LLC v. Marhasin*, 2020 ONSC 766, 77 C.B.R. (6th) 299.

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By Karakatsanis J. (dissenting in part)

Varvis (Bankrupt), Re, 1999 ABQB 853, 254 A.R. 197; *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 925, 160 O.R. (3d) 205; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710; *The Workers' Compensation Board v. Petkau*, 2018 SKCA 85, 429 D.L.R. (4th) 92; *Pietrzak, Re* (2016), 39 C.B.R. (6th) 145; *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143; *Groupe Unigesco inc. v. Michaud*, 2021 QCCQ 10330; *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109; *Dead End Survival, LLC v. Marhasin*, 2020 ONSC 766, 77 C.B.R. (6th) 299; *Grewal v. Brar*, 2015 MBQB 3, 313 Man. R. (2d) 94; *Bank of Montreal v. 1886758 Ontario Inc.*, 2022 ONSC 4642, 1 C.B.R. (7th) 213; *A.J. Lanzarotta Fruits & Vegetables Ltd. v. United Farmers*, 2024 ONSC 1780, 12 C.B.R. (7th) 371; *Celanese Canada Inc. v. Murray Demolition Corp.*, 2010 CanLII 29089; *Horth v. Lalonde-Rousseau*, 2021 QCCQ 3668; *Maison des jeunes de Contrecœur v. Bourdon*, 2011 QCCQ 3476; *Vivacqua v. Contino*, 2009 CanLII 14574; *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R.

(5th) 301; *Copper Cliff Community Credit Union Ltd. v. Parker* (1977), 18 O.R. (2d) 49; *Goldstein, Re*, 2011 ONSC 561, 74 C.B.R. (5th) 296; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197; *Simone v. Daley* (1999), 43 O.R. (3d) 511; *Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82; *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 255 Man. R. (2d) 45; *McAteer v. Billes*, 2006 ABCA 312, 397 A.R. 365; *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, 8 Alta. L.R. (7th) 177, rev'd 2021 ABCA 411, 34 Alta. L.R. (7th) 219.

Statutes and Regulations Cited

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 64(1).

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 "court", 69.6, 172, 173, 178(1), (2), 183(1), (1.1).

Criminal Code, R.S.C. 1985, c. C-46, s. 361(1).

Securities Act, R.S.B.C. 1996, c. 418, ss. 15, 15.1, 57(1)(a) [rep. & sub. 2019, c. 38, s. 25], 161(1)(g), 162(1), 163.

Securities Regulation, B.C. Reg. 196/97.

Authors Cited

Bennett, Frank. *Bennett on Bankruptcy*, 26th ed. Toronto: LexisNexis, 2024.

2024 SCC 28 (CanLII)

Black's Law Dictionary, 11th ed., by Bryan A. Garner. St. Paul, Minn.: Thomson Reuters, 2019, "administrative tribunal", "court", "regulatory agency".

Brochu, Denis. *Précis de la faillite et de l'insolvabilité*, 6th ed. Montréal: LexisNexis, 2022.

Durnford, Ben. "Recent Developments under Section 178(1)(a) and (e) of the *Bankruptcy and Insolvency Act*: A Case Study of *Poonian v. British Columbia (Securities Commission)*" (2023), 12 *J.I.I.C.* 107.

Girgis, Jassmine, and Thomas G. W. Telfer, "Do Securities Commission Debts Survive a Bankruptcy Discharge? An Analysis of *Poonian v. British Columbia (Securities Commission) (BCCA)*" (2023), 67 *Can. Bus. L.J.* 438.

Girgis, Jassmine, and Thomas G. W. Telfer, "The Fraudulent Misrepresentation and False Pretences Exception to the Bankruptcy Discharge: Balancing the Debtor's Fresh Start with Confidence in the Credit System", in Jill Corraini and D. Blair Nixon, eds., *Annual Review of Insolvency Law 2022*. Toronto: Thomson Reuters, 2023, 143.

Honsberger, John D., and Vern W. DaRe. *Honsberger's Bankruptcy in Canada*, 5th ed. Toronto: Thomson Reuters, 2017.

Macaulay, Robert W., and James L. H. Sprague. *Practice and Procedure Before Administrative Tribunals*, by Lorne Sossin. Toronto: Carswell, 2004 (loose-leaf updated July 2024, release 7).

Murray, Haddon, and Heather Fisher. "You're Hot and You're Cold, You're Yes and You're No: Conflicting Appellate Decisions Regarding Whether Regulators' Fines, Penalties or Restitution Orders Survive Bankruptcy", in Jill Corraini and D. Blair Nixon, eds., *Annual Review of Insolvency Law 2022*. Toronto: Thomson Reuters, 2023, 569.

Nocilla, Alfonso. "Comment on *Shaver-Kudell Manufacturing Inc. v Knight Manufacturing Inc.*" (2022), 45:2 *Man. L.J.* 177.

Sarra, Janis, Geoffrey B. Morawetz and L. W. Houlden. *The 2024 Annotated Bankruptcy and Insolvency Act*. Toronto: Carswell, 2024.

Sullivan, Ruth. *The Construction of Statutes*, 7th ed. Toronto: LexisNexis, 2022.

Swaigen, John, and Susan McRory. *Regulatory Offences In Canada: Liability and Defences*, 2nd ed. Toronto: Carswell, 2018.

Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed. Toronto: Irwin Law, 2015.

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APPEAL from a judgment of the British Columbia Court of Appeal (Harris, Willcock and Fenlon JJ.A.), 2022 BCCA 274, 65 B.C.L.R. (6th) 213, 100 C.B.R. (6th) 182, 472 D.L.R. (4th) 115, [2022] 10 W.W.R. 375, [2022] B.C.J. No. 1417 (Lexis), 2022 CarswellBC 2124 (WL), affirming a decision of Crerar J., 2021 BCSC 555, [2021] B.C.J. No. 609 (Lexis), 2021 CarswellBC 888 (WL). Appeal allowed in part, Karakatsanis and Martin JJ. dissenting in part.

Cody G. Reedman, for the appellants.

William L. Roberts, *Laura L. Bevan* and *Sarah B. Hannigan*, for the respondent.

Susan Keenan and *Jake Eidinger*, for the intervener the Attorney General of Ontario.

Aaron Welch and *Heather Wellman*, for the intervener the Attorney General of British Columbia.

Jared G. Biden, for the intervener the Attorney General of Saskatchewan.

C. Haddon Murray, *Heather Fisher* and *James Aston*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

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Zoe Oxaal and *Roy Lee*, for the intervener the Superintendent of Bankruptcy.

Devin Eeg and *Claire Hunter, K.C.*, for the intervener the Federation of Law Societies of Canada.

Michael Beeforth, *Raphael T. Eghan* and *Brandon Barnes Trickett*, for the intervener the Alberta Securities Commission.

Erin Hoult and *Khrystina McMillan*, for the intervener the Ontario Securities Commission.

Stephen Aylward and *Karen Bernofsky*, for the intervener the Osgoode Investor Protection Clinic.

The judgment of Wagner C.J. and Côté, Rowe, Jamal and O'Bonsawin JJ. was delivered by

CÔTÉ J. —

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I. Introduction

[1] The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), furthers two important purposes: the equitable distribution of a bankrupt's assets among creditors and the bankrupt's financial rehabilitation. Financial rehabilitation means that a debtor will be afforded a "fresh start" when appropriate. The fresh start principle is codified in s. 178(2) of the *BIA*; it allows a bankrupt to be released from outstanding debts at the end of the bankruptcy process. Thus, subject to reasonable conditions, the *BIA* permits an honest but unfortunate debtor to be freed from the burdens of indebtedness and to reintegrate into economic life.

[2] Financial rehabilitation operates as the general rule, such that every provable claim is presumptively swept into the bankruptcy. However, it has its limits. Through s. 178(1) of the *BIA*, Parliament has enacted specific exceptions to this general rule. An order of discharge does not release the bankrupt from a claim captured by a s. 178(1) exception. Indeed, where an exception applies, the fresh start principle yields to certain overriding policy objectives which demand that such a claim survive a discharge from bankruptcy.

[3] This appeal requires our Court to interpret two of these exceptions, codified in s. 178(1)(a) and (e) of the *BIA*. It arises in the context of the application of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418. Our Court must determine whether the administrative financial penalties and/or the disgorgement orders imposed

by the respondent, the British Columbia Securities Commission ("Commission"), survive a discharge from bankruptcy under one of these exceptions.

[4] The appellants, Thalbinder Singh Poonian and Shailu Poonian, are undischarged bankrupts. Between 2007 and 2009, the Poonians engaged in market manipulation that caused vulnerable investors to lose millions of dollars. The Commission found that the Poonians had contravened s. 57(a) (now s. 57(1)(a)) of the *Securities Act*. It ordered the payment of administrative penalties by both Mr. Poonian ($10 million) and Ms. Poonian ($3.5 million). The Commission also issued orders pursuant to s. 161(1)(g) of the *Securities Act* requiring Mr. Poonian to disgorge $1,319,167 as well as $1,126,260 jointly and severally with another participant, and requiring Ms. Poonian to disgorge $3,149,935. The disgorgement orders represent the amounts the Poonians obtained as a result of the market manipulation scheme.

[5] Relying on the exceptions set out in s. 178(1) of the *BIA*, the Commission applied for a declaration that the amounts owed to it by the Poonians not be released by any order of discharge. The question before our Court is whether the administrative penalties and/or the disgorgement orders imposed by the Commission can be characterized as either "any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail" (s. 178(1)(a)) or "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim"

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(s. 178(1)(e)). If so, they will not be released by any order of discharge and will survive bankruptcy.

[6] For the reasons I explain below, I conclude that the administrative penalties imposed by the Commission do not fall within the exceptions set out in either s. 178(1)(a) or (e) and therefore do not survive a discharge from bankruptcy on those bases. I also conclude that the disgorgement orders imposed by the Commission do not fall within the s. 178(1)(a) exception and do not survive a discharge from bankruptcy on that basis. However, they are captured by s. 178(1)(e) and therefore will not be released by any possible future order of discharge.

II. Facts

[7] On August 29, 2014, the Commission found that the Poonians, together with a number of relatives, friends and acquaintances, had engaged in market manipulation, contrary to s. 57(a) of the *Securities Act*. The Poonians had acquired a majority position in a public oil and gas company called OSE Corp. ("OSE") and had then increased the price of OSE's shares by various manipulations, including trades between themselves. Using pseudonyms and multiple nominee accounts, they had artificially inflated the share price from $0.10 to $0.17 per share to a high of near $2.00.

[8] The Commission found that the Poonians, and those working with them in this scheme, had sold the overpriced OSE shares to investors with the assistance of an entity called the Phoenix Group. The Poonians had paid commissions to the Phoenix

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Group, which had in turn encouraged its clients, generally unsophisticated investors seeking to escape personal debt through investment in higher-yield vehicles, to purchase OSE shares at the artificially inflated prices.

[9] The Commission described the scheme as "serious misconduct" and as "elaborate, involving layers of deception to conceal the . . . participation [of the Poonians and their associates] in the manipulation" (2015 BCSECCOM 96 ("Sanctions Decision"), at para. 17 (CanLII)). The Commission ordered the payment of administrative penalties by Mr. Poonian ($10 million) and Ms. Poonian ($3.5 million) (para. 96). The Commission later issued orders pursuant to s. 161(1)(g) of the *Securities Act*, which are commonly referred to as disgorgement orders. Mr. Poonian was ordered to disgorge $1,319,167 to the Commission and an additional $1,126,260 on a joint and several basis with another participant in the scheme, and Ms. Poonian was ordered to disgorge $3,149,935 (2018 BCSECCOM 160 ("Reassessment Decision"), at para. 85 (CanLII)). As a result, the Poonians together owe $19,095,362 (plus interest) to the Commission. These sanctions were registered with the Supreme Court of British Columbia pursuant to s. 163 of the *Securities Act*, which provides that, on being filed in a registry of that court, a decision of the Commission has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of that court. The Poonians owe $4,335,252.60 to their next largest creditor, the Canada Revenue Agency.

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[10] On April 20, 2018, the Poonians made a voluntary assignment in bankruptcy. On February 13, 2020, they applied for discharge from bankruptcy, which the Commission and the Canada Revenue Agency opposed. The Supreme Court of British Columbia dismissed the Poonians' application on April 8, 2020, and they remain undischarged bankrupts.

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III. Judicial History

A. *Supreme Court of British Columbia, 2021 BCSC 555 (Crerar J.)*

[11] The Commission applied to the Supreme Court of British Columbia for a declaration that the debts represented by the administrative penalties and disgorgement orders not be released by any order of discharge, pursuant to s. 178(1)(a), (d) and (e) of the *BIA*. The chambers judge allowed the Commission's application, finding that the debts were exempt from and would survive any discharge. While only one exception had to apply for the debts not to be released, the chambers judge found that the exceptions in s. 178(1)(a) and (e) both applied.

[12] With respect to s. 178(1)(a), the chambers judge rejected the Poonians' argument that it applies only to fines, penalties or restitution orders imposed in criminal or quasi-criminal proceedings. He noted that the inclusion of the words "restitution order" in s. 178(1)(a) implies that the scope of this provision extends beyond monetary orders imposed in a criminal or quasi-criminal context. The chambers judge also rejected the Poonians' argument that an order of the Commission that is subsequently

registered with a court is not an order "imposed by a court", as required by s. 178(1)(a). According to the chambers judge, both the administrative penalties and the disgorgement orders could be characterized as fines, penalties, restitution orders or other orders similar in nature that had been imposed by a court in respect of an offence. On this basis, he ordered that they not be released on discharge from bankruptcy.

[13] As for s. 178(1)(e), the chambers judge agreed with the Commission that the Poonians' market manipulation, particularly the multi-party elaborate scheme they had orchestrated, was at its core a fraudulent misrepresentation and false pretence. He held that, through that scheme, the Poonians had "obtained property" in the form of millions of dollars and that, in doing so, they had engaged in deceitful conduct, which he deemed "the essence of s 178(1)(e)" (para. 105 (CanLII)). The chambers judge concluded that the Poonians' market manipulation and knowing exploitation of vulnerable investors, which corrodes public confidence in securities markets, were evidence of the deceit lying at the heart of s. 178(1)(e). As a result, the administrative penalties and disgorgement orders were also exempt from discharge under s. 178(1)(e).

[14] The Commission argued in the alternative that the disgorgement orders (but not the administrative penalties) should be exempt under s. 178(1)(d). However, in light of his conclusion that both the disgorgement orders and the administrative penalties were exempt under s. 178(1)(a) and (e), the chambers judge declined to consider this alternative ground. No further arguments were made in respect of s. 178(1)(d), either before the British Columbia Court of Appeal or before our Court.

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B. *British Columbia Court of Appeal, 2022 BCCA 274, 65 B.C.L.R. (6th) 213 (Harris, Willcock and Fenlon JJ.A.)*

[15] The Poonians appealed to the British Columbia Court of Appeal, challenging the chambers judge's interpretation of the *BIA*. They also argued that the chambers judge had erred in adopting and following the rationale in *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, 8 Alta. L.R. (7th) 177, a decision later reversed by the Alberta Court of Appeal (2021 ABCA 411, 34 Alta. L.R. (7th) 219). Justice Willcock, writing for the British Columbia Court of Appeal, held that the chambers judge had erred in concluding that the debts were exempt from discharge pursuant to s. 178(1)(a) of the *BIA*. However, he upheld the chambers judge's conclusion that the debts were exempt under s. 178(1)(e). Given that the debts were exempt, albeit only under s. 178(1)(e), the appeal was dismissed.

[16] Justice Willcock agreed with the chambers judge that s. 178(1)(a) is not limited to monetary orders imposed in criminal or quasi-criminal proceedings. However, he disagreed that a decision of the Commission that is merely registered with the Supreme Court of British Columbia can be considered an order "imposed by a court". Once the Commission's decisions are registered with the court, they can be enforced as if they were judgments of the court, but they cannot be said to be "imposed" by the court. The Commission's penalties and disgorgement orders therefore did not fall within the s. 178(1)(a) exception.

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[17] Justice Willcock upheld the chambers judge's conclusion that the Commission's administrative penalties and disgorgement orders came within the s. 178(1)(e) exception. He held that the Poonians' debts had arisen from obtaining property, in the form of millions of dollars, by fraudulent misrepresentation, that is, through their market manipulation.

[18] In *Hennig*, the Alberta Court of Appeal held that "[t]he required link between the fraudulent statement and the debt is established only if the debtor makes the fraudulent statement to the creditor relying on s 178(1)(e)" (para. 78). Under this approach, the Poonians would have had to make their fraudulent misrepresentation to the Commission itself. The s. 178(1)(e) exception would not be applicable, because the Poonians' fraudulent misrepresentation was made not to the Commission but rather to the victim investors.

[19] Justice Willcock rejected the narrow approach adopted by the Alberta Court of Appeal in *Hennig*. Instead, he concluded that s. 178(1)(e) is not restricted to cases in which the bankrupt made a fraudulent statement to the specific creditor relying on this provision. The Commission was therefore permitted to invoke s. 178(1)(e). Justice Willcock concluded that both the administrative penalties and the disgorgement orders imposed by the Commission were non-dischargeable debts under s. 178(1)(e), because they had arisen from the Poonians having obtained property by false pretences or fraudulent misrepresentation.

IV. Issues

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[20] This appeal raises two issues:

1. Do the Commission's administrative penalties and disgorgement orders against the Poonians constitute debts falling within s. 178(1)(a) of the *BIA*, such that they are not released by an order of discharge and therefore survive bankruptcy?

2. Do the Commission's administrative penalties and disgorgement orders against the Poonians constitute debts or liabilities falling within s. 178(1)(e) of the *BIA*, such that they are not released by an order of discharge and therefore survive bankruptcy?

V. Analysis

A. *General Principles Governing the Discharge of a Bankrupt*

[21] The proper interpretation of the *BIA* "requires the acceptance of the principle that every claim is swept into the bankruptcy and that the bankrupt is released from all of them upon being discharged unless the law sets out a clear exclusion or exemption" (*Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, at para. 20). This general rule is codified in s. 178(2), which states that "[s]ubject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy." The purpose of s. 178(2) "is to give effect to one of the goals underlying the *BIA*

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regime — the financial rehabilitation of the debtor — by releasing 'the bankrupt from all claims provable in bankruptcy'" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 77). Through discharge, the "honest but unfortunate" debtor is given a fresh start and is provided "with relief from the weight of oppressive indebtedness" (*Moloney*, at para. 77, citing L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf), at p. 1-2.1; J. D. Honsberger and V. W. DaRe, *Honsberger's Bankruptcy in Canada* (5th ed. 2017), at p. 478). This process also allows "the discharged bankrupt to reintegrate into economic life so he or she can become a productive member of society" (*Moloney*, at para. 36).

[22] While financial rehabilitation is an important goal of the *BIA*, it has its limits. These limits are set out in both ss. 172 and 178(1) of the *BIA* (*Moloney*, at para. 37). Section 172 provides that an order of discharge may be granted, refused, its operation may be suspended, or it may be granted subject to conditions. Section 178(1) lists specific debts that are not released by discharge and that survive bankruptcy. "These provisions demonstrate Parliament's attempt to balance financial rehabilitation with other policy objectives, such as confidence in the credit system, that require certain debts to survive bankruptcy" (*Moloney*, at para. 37, citing R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at pp. 273 and 289). Both of these sections play a distinct and crucial role in the discharge process. I address each of them in turn.

(1) Section 172: Court May Grant or Refuse Discharge

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[23] Section 172 of the *BIA* addresses the discharge of a bankrupt. It establishes that, on the hearing of a bankrupt's application for discharge, a bankruptcy court retains broad discretion to grant or refuse an absolute order of discharge, to suspend the operation of such an order for a specified time or to grant a conditional order of discharge. The *BIA* provides no guidance for the exercise of this discretion, aside from stating that a court must refuse an absolute discharge if any fact referred to in s. 173 is proven against the debtor (J. Sarra, G. B. Morawetz and L. W. Houlden, *The 2024 Annotated Bankruptcy and Insolvency Act* (2024), at § 7:69). If a court finds that any fact referred to in s. 173 is proven, the bankrupt's discharge must be refused, suspended or granted conditionally (s. 172(2)). Many of those facts bear directly on the bankrupt's conduct and culpability, while others reflect standards of commercial morality (s. 173(1)(a) to (o); R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 297-98). For example, ss. 172(2) and 173(1)(k) establish that a bankrupt who is guilty of any fraud or fraudulent breach of trust is not entitled to an absolute discharge.

[24] A court has broad discretion under s. 172(1). In exercising that discretion, the court considers three factors: the interests of the creditors in obtaining payment of their claims, the interests of the bankrupt in obtaining relief from his or her financial obligations, and the integrity of the bankruptcy process (F. Bennett, *Bennett on Bankruptcy* (26th ed. 2024), at p. 737, citing *Shakell, Re* (1988), 70 C.B.R. (N.S.) 270 (Ont. S.C.J.); *Phenix, Re* (1989), 76 C.B.R. (N.S.) 82 (Sask. Q.B.)).

(2) Section 178(1): Debts Not Released by Order of Discharge

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[25] Section 178(1) sets out a specific list of debts that are not released by an order of discharge and that therefore survive bankruptcy (*Moloney*, at para. 37). These debts are non-discretionary exceptions to the general rule and represent "the kind of claims that society, through Parliament, considers to be of a quality that outweighs any possible benefit in the bankrupt being relieved of them" (Sarra, Morawetz and Houlden, at § 7:185, citing *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197 (Q.B.)).

[26] The exceptions in s. 178(1)(a) through (h) must be interpreted narrowly and applied only in clear cases (*Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53, at para. 25; *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2015 ONCA 465, 126 O.R. (3d) 81, at para. 63). A narrow interpretation is required partly because courts have no discretion respecting their application: ". . . the policy objective protected by the exception must, in all circumstances, trump the discharge of the bankrupt" (H. Murray and H. Fisher, "You're Hot and You're Cold, You're Yes and You're No: Conflicting Appellate Decisions Regarding Whether Regulators' Fines, Penalties or Restitution Orders Survive Bankruptcy", in J. Corraini and D. B. Nixon, eds., *Annual Review of Insolvency Law 2022* (2023), 569, at p. 618; J. Girgis and T. G. W. Telfer, "Do Securities Commission Debts Survive a Bankruptcy Discharge? An Analysis of *Poonian v. British Columbia (Securities Commission) (BCCA)*" (2023), 67 *Can. Bus. L.J.* 438 ("Girgis and Telfer (2023)"), at pp. 453-54). Section 178(1) is not "a catchall of debts arising from morally objectionable conduct", but rather sets out "categories of specific wrongful conduct that give rise to debts that are not released, and specifies the criteria to be applied" (*Shaver-Kudell Manufacturing*

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Inc. v. Knight Manufacturing Inc., 2021 ONCA 925, 160 O.R. (3d) 205, at para. 39; see also A. Nocilla, "Comment on *Shaver-Kudell Manufacturing Inc. v Knight Manufacturing Inc.*" (2022), 45:2 *Man. L.J.* 177, at p. 187).

[27] The s. 178(1) exceptions must also be interpreted narrowly because of the fact that "the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate" (*Moloney*, at para. 79; see also *Schreyer*, at para. 19; *Martin v. Martin*, 2005 NBCA 32, 282 N.B.R. (2d) 61, at para. 11). As a result, "[w]here there is doubt as to whether a creditor falls within an exemption, the benefit should go to the bankrupt" (Murray and Fisher, at p. 576, citing *Jerrard*, at p. 206).

(3) The Poonians' Application for Discharge Was Refused Under Section 172

[28] In 2020, the Poonians applied for discharge under s. 172 (2020 BCSC 547, 78 C.B.R. (6th) 135 ("Discharge Application reasons"), aff'd 2021 BCSC 222, 86 C.B.R. (6th) 263, aff'd 2021 BCCA 417, 58 B.C.L.R. (6th) 276). Their application was opposed by the Commission and the Minister of National Revenue primarily on the basis that the fact referred to in s. 173(1)(a) was proven: the Poonians' assets were not of a value equal to $0.50 on the dollar of the amount of their unsecured liabilities. The Commission and the Minister alleged that the Poonians' precarious financial situation had arisen from circumstances for which the Poonians could justly be held responsible (para. 29).

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[29] The Supreme Court of British Columbia refused the Poonians' application for an absolute discharge and held that it was impossible "to conclude on these facts that the vast disparity between the Poonians' assets and liabilities arose from circumstances for which they cannot justly be held responsible" (Discharge Application reasons, at para. 53). The court also refused the Poonians' application for a suspended discharge on the basis that granting such a discharge "would be contrary to the public interest" (para. 60). The court concluded that the "circumstances of this case are extreme and that the pre-bankruptcy conduct of the Poonians requires the court to distance itself from their efforts to use the bankruptcy process to absolve themselves of the financial consequences of their actions" (para. 69). As of the date of the hearing before our Court, the Poonians remained undischarged bankrupts. As demonstrated by their unsuccessful application for discharge, even if a claim does not fall within a s. 178(1) exception, a bankruptcy court still retains the discretion to refuse an order of discharge under s. 172.

[30] The question before our Court is whether the Commission's administrative penalties and disgorgement orders can be characterized as debts not released by an order of discharge under one of the exceptions in s. 178(1). As the creditor, the Commission bears the onus of proving that its claims fall within one of the listed exceptions (*Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24). While the Poonians' application for discharge under s. 172 failed, if the Commission succeeds in proving that its claims come under a s. 178(1) exception,

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this will mean that those claims cannot be released notwithstanding any future order of discharge the Poonians may seek.

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B. *Do the Commission's Claims Fall Within the Section 178(1) Exceptions?*

(1) Section 178(1)(a)

[31] For a debt to survive bankruptcy under s. 178(1)(a), the creditor must establish that the debt is (1) a fine, penalty, restitution order or other order similar in nature, (2) imposed by a court, and (3) imposed in respect of an offence:

> **178 (1)** An order of discharge does not release the bankrupt from
>
> > **(a)** any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

[32] This appeal raises two questions with respect to the proper interpretation of s. 178(1)(a). First, must the fines, penalties and orders referred to in this section be imposed in either a criminal or quasi-criminal context? Second, do the words "imposed by a court" capture orders that are initially imposed by an administrative tribunal but that are subsequently registered as judgments of a superior court?

(a) *Section 178(1)(a) Is Not Limited to Orders Imposed in a Criminal or Quasi-Criminal Context*

[33] It is clear that the terms "fine" and "penalty" in s. 178(1)(a) include at least monetary penalties imposed as punishment for offences in criminal or quasi-criminal proceedings (see *Hennig* (C.A.), at paras. 46-51; *Air Canada, Re* (2006), 28 C.B.R. (5th) 317 (Ont. S.C.J.), at para. 42; *Chaytor, Re*, 2006 BCSC 1742, 26 C.B.R. (5th) 574, at para. 38; *Belair v. Gottschlich*, 2008 ABQB 47, 89 Alta. L.R. (4th) 268, at para. 25; *R. v. Manzioros*, 2004 MBQB 121, 183 Man. R. (2d) 279, at para. 40; *Chambre des notaires du Québec v. Dugas*, [2003] R.J.Q. 1, at para. 22; *Simone v. Daley* (1999), 43 O.R. (3d) 511, at p. 522; *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.* (1999), 123 O.A.C. 288, at para. 19; D. Brochu, *Précis de la faillite et de l'insolvabilité* (6th ed. 2022), at ¶31-5).

[34] The chambers judge and Willcock J.A. both agreed that penalties imposed in a criminal or quasi-criminal context are clearly captured by s. 178(1)(a), but they found that this section is not limited to fines, penalties and restitution orders imposed in such a context. The chambers judge held that the inclusion of restitution orders, which do not seek to punish but rather to compensate and restore, "implies a broader scope to s 178(1)(a) than criminal or quasi-criminal offences" (para. 85). Justice Willcock agreed, holding that "s. 178(1)(a) has occasionally been interpreted too narrowly in that respect" (para. 39).

[35] Like the chambers judge and Willcock J.A., I am of the view that s. 178(1)(a) is not restricted to penalties associated with criminal or quasi-criminal proceedings. The plain and ordinary meaning of s. 178(1)(a), a comparative reading of

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the English and French versions of this section, and the legislative history of the section all support this interpretation. While I have explained that the s. 178(1) exceptions must be interpreted narrowly, this interpretive principle does not have primacy over other principles of statutory interpretation that clearly support a particular meaning.

[36] As a first remark, I note that the plain and ordinary meaning of s. 178(1)(a) quite simply does not limit this section to penalties imposed in a criminal or quasi-criminal context (see *Vancouver (City) v. Alliston*, 2003 BCPC 105, 47 C.B.R. (4th) 142, at paras. 19-20 and 22). In fact, this section employs very broad language. The English version of s. 178(1)(a) merely requires that the fine, penalty, restitution order or other order be "in respect of an offence". The words "in respect of" are of "the widest possible scope" in conveying a link between related subject matters (*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, at para. 26).

[37] The English and French versions of s. 178(1)(a) are slightly different. Importantly, the words "in respect of an offence" in the English version are absent from the French version. "The shared meaning rule for the interpretation of bilingual legislation dictates that the common meaning between the English and French legislative texts should be accepted" (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 203, citing R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 99 et seq., and M. Bastarache et al., *The Law of Bilingual Interpretation* (2008), at pp. 32 et seq.). The shared meaning rule

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points to a broader reading of s. 178(1)(a) that encompasses any fine, penalty, restitution order or other order that is imposed by a court. Under this interpretation, there is no indication that such an order needs to be imposed in a criminal or quasi-criminal context.

[38] Notwithstanding this difference between the English and French versions of s. 178(1)(a), I note that, in any event, the unqualified term "offence" is not necessarily restricted to a criminal or quasi-criminal context. Offences can also exist in a regulatory context; statutes outside of the criminal or quasi-criminal context frequently deem certain contraventions of their provisions to be offences (J. Swaigen and S. McRory, *Regulatory Offences In Canada: Liability and Defences* (2nd ed. 2018), at p. 9). Indeed, in this case, a contravention of s. 57 of the *Securities Act* is deemed to be an offence under s. 155(1)(b) of that Act.

[39] Furthermore, the legislative history of s. 178(1)(a) demonstrates that Parliament's intention has been to expand the scope of this section, not to restrict it. A previous version of this section, as it appeared from 1985 until 1992, read as follows:

> **178** (1) An order of discharge does not release the bankrupt from
>
> (*a*) any fine or penalty imposed by a court or any debt arising out of a recognizance or bail bond;

[40] In 1992, *An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 64, widened the scope of s. 178(1)(a):

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> **64. (1) Paragraph 178(1)(*a*) of the said Act is repealed and the following substituted therefor:**
>
> > **(a)** any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

[41] Parliament intentionally added this more expansive language to s. 178(1)(a). Interpreting this broad language as capturing only penalties imposed in a criminal or quasi-criminal context would run counter to Parliament's intent and would also render the words or "other order similar in nature" surplusage (C.A. reasons, at para. 41). It is a well-accepted principle that such an interpretation is to be avoided (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28; see further, R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 8.03).

[42] Ultimately, if Parliament had intended to limit the application of this section to criminal or quasi-criminal proceedings, it could have done so more clearly. The fines, penalties, restitution orders and other orders that it exempts are not restricted to those imposed in a criminal or quasi-criminal context.

(b) *The Words "Imposed by a Court" Do Not Capture Orders Made by Administrative Tribunals That Are Subsequently Registered as Judgments of a Court*

[43] For a debt to survive bankruptcy pursuant to s. 178(1)(a), the creditor must establish that the debt is a fine, penalty, restitution order or other order similar in nature

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that was "imposed by a court". There is some uncertainty about what constitutes a "court" for the purposes of s. 178(1)(a) and about what is meant by the term "imposed".

[44] The word "court" as it appears in s. 178(1)(a) is undefined. While this word is defined in s. 2 of the *BIA*, the definition specifically excludes s. 178(1)(a):

> **2** In this Act,
>
> . . .
>
> ***court***, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act;

[45] Subsections 183(1) and (1.1) of the *BIA* refer to the superior courts of each province and territory. The exclusion of s. 178(1)(a) from the definition in s. 2 suggests that Parliament did not intend to limit the application of s. 178(1)(a) to fines, penalties or restitution orders made by superior courts (C.A. reasons, at para. 42). In this way, the s. 2 definition draws a distinction between a court administering the *BIA* process and other courts that may impose fines, penalties or restitution orders for the purposes of s. 178(1)(a) (*J.R.B. v. Jimenez*, 2018 ABQB 847, at para. 23 (CanLII)). Provincial courts, federal courts, appellate courts and this Court all fall within the meaning of "court" for the purposes of s. 178(1)(a) (see Sarra, Morawetz and Houlden, at § 1:26).

[46] However, the word "court" in s. 178(1)(a) does not capture administrative tribunals or regulatory bodies. The term "court" implies that a dispute will be

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adjudicated by a judge or judges (*Black's Law Dictionary* (11th ed. 2019), at p. 444). By comparison, an "administrative tribunal" is "[a] court-like decision-making authority that resolves disputes [or] an administrative agency exercising a quasi-judicial function" (p. 1814). A "regulatory agency" can be defined as "[a]n official body, esp. within the government, with the authority to implement and administer particular legislation" (pp. 77-78 and 1538). "Court" refers to the judiciary, whereas administrative bodies are hybrid entities "falling between the judiciary and government departments created to perform as separate bodies functions transferred from both" (L. Sossin, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), at § 2:1).

[47] Moreover, for the purposes of s. 69.6 of the *BIA*, Parliament saw it fit to define the term "regulatory body".[1] While the definition is limited to that section and does not apply to s. 178(1)(a), the decision to set out a specific definition of "regulatory body" further confirms that Parliament intended these different terms — "court" and "regulatory body" — to be understood as having different meanings (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 81; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 53). Thus, the word "court" in s. 178(1)(a) does not include administrative bodies. If Parliament had wanted fines,

[1] Section 69.6(1) of the *BIA* reads as follows:

> **69.6 (1)** In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

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penalties, restitution orders or other orders similar in nature imposed by regulatory bodies, administrative tribunals or other administrative decision makers to be exempt from discharge under s. 178(1)(a), it could have said so expressly.

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[48] Having defined the term "court", I now consider what it means for a fine, penalty or order to be "imposed by a court". The Commission argues that this language captures orders that are imposed by an administrative tribunal and that, once registered with a court, are deemed by statute to be enforceable as orders of that court (R.F., at para. 93). It argues that its disgorgement orders and administrative penalties fall within the ambit of s. 178(1)(a) of the *BIA* because, under s. 163(2) of the *Securities Act*, once a decision it has made is filed with the Supreme Court of British Columbia, the decision has the same force and effect as if it were a judgment of that court:

> **163** (1) If the commission has made a decision under section 161 or 162, or if the executive director has made a decision under section 161, the commission or the executive director, as applicable, may file the decision at any time in a Supreme Court registry by filing a certified copy of the decision.
>
> . . .
>
> (2) Upon filing, a decision referred to in subsection (1), (1.1) or (1.2) or a notice, order or decision referred to in subsection (1.01) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

[49] The effect of an administrative decision being registered with a court is that the creditor is able to use civil methods to enforce the decision as if it were a judgment of that court. The registration of the decision does not change the fact that it

was made and imposed by an administrative decision maker, nor does it overcome the *BIA*'s requirement that the exempt debt be imposed by a court (C.A. reasons, at para. 48; *Hennig* (C.A.), at para. 52). When a decision is registered with a court, the court's involvement is passive, whereas the act of "imposing" a fine, penalty, restitution order or other order similar in nature requires that the court be actively involved in making the decision (see *Hennig* (C.A.), at para. 52).

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[50] Justice Willcock correctly concluded in this case that s. 178(1)(a) "is broad enough to include at least fines, penalties and restitution orders imposed by courts other than the superior courts of the provinces, but cannot be read so broadly as to include fines imposed by tribunals that are registered in a court" (para. 44).

(c) *Application of Section 178(1)(a) to the Commission's Orders*

(i) The Commission's Administrative Penalties Are Not Exempt From Discharge Under Section 178(1)(a)

[51] In light of the foregoing, the Commission's argument that the administrative penalties it imposed on the Poonians are captured by the s. 178(1)(a) exception must fail. While the administrative penalties were imposed in respect of a statutory offence (*Securities Act*, ss. 57(a) and 155(1)(b)), they were not imposed by a court. They were imposed by the Commission — a regulatory agency.

(ii) The Commission's Disgorgement Orders Are Not Exempt From Discharge Under Section 178(1)(a)

[52] In the same way, the Commission's disgorgement orders are not captured by s. 178(1)(a). The disgorgement orders were imposed by the Commission, not by a court.

(2) Section 178(1)(e)

[53] The Commission also relies on the s. 178(1)(e) exception:

> **178 (1)** An order of discharge does not release the bankrupt from
>
> . . .
>
> **(e)** any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

[54] For a debt or liability to survive bankruptcy pursuant to s. 178(1)(e), the creditor must establish three elements: (1) false pretences or fraudulent misrepresentation; (2) a passing of property or provision of services; and (3) a link between the debt or liability and the fraud (*Hennig* (C.A.), at para. 57, citing *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143, at para. 16).

[55] My colleague Karakatsanis J. and certain courts have held that s. 178(1)(e) embodies a "morality concep[t]" which "ensures that a deceitful wrongdoer will not be able to use the court system and the state's bankruptcy provisions as a mechanism for avoiding the consequence of his or her actions" (*Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82, at para. 15; see also *Jerrard*, at p. 206; *Bryant*

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v. Benjamin, 2023 QCCA 1021, at para. 42 (CanLII); see Karakatsanis J.'s reasons, at paras. 138-39). While I essentially agree that s. 178(1)(e) targets morally blameworthy conduct, I share the view stated by Professors Girgis and Telfer:

> . . . the common feature that underlies most cases interpreting section 178(1)(e), though sometimes imperfectly expressed, is the protection of creditors who have been victimized by deceitful statements. The case law in this area interprets this provision to target morally blameworthy conduct that gave rise to debt, not simply morally blameworthy conduct. [Emphasis added.]
>
> ((2023), at p. 452; see also *Shaver-Kudell*, at para. 23.)

[56] The Superintendent of Bankruptcy takes a similar view. Intervening on appeal, the Superintendent explains that s. 178(1)(e) "is aimed at making fraud victims whole, rather than at preserving penalties imposed for deterrence purposes" (I.F., at para. 18). By not releasing debts or liabilities that resulted directly from deceit, s. 178(1)(e) prevents debtors "from profiting as a result of their wrongdoing" (*H.Y. Louie Co. v. Bowick*, 2015 BCCA 256, 386 D.L.R. (4th) 117, at para. 47, per Newbury J.A., dissenting, but not on this point). I therefore disagree with my colleague that the "central focus" of s. 178(1)(e) is "deceitful conduct", not the "gain derived" from that conduct (para. 126 (emphasis deleted)). I am of the view that in the interpretation of s. 178(1)(e), "deceitful conduct" and "gain derived" are two inextricably linked concepts.

[57] Furthermore, it is through s. 172 of the *BIA* that Parliament has entrusted bankruptcy courts with broad discretion to decide whether morally reprehensible

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conduct should prevent a bankrupt from being discharged. Bankrupts who are not "honest but unfortunate" are not discharged or only discharged if certain conditions are met. In contrast, the s. 178(1) exceptions are focused on "excluding specific debts from being released by the order of discharge" (*Moloney*, at para. 85). I therefore do not agree with my colleague that s. 178(1)(e)'s "intention [is] to preclude dishonest debtors from benefitting from their dishonesty" (para. 139 (emphasis added)). As I have explained above, the "intention" behind this provision is more nuanced.

[58] In *Deloitte Restructuring*, our Court interpreted s. 19(2)(d) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which "is analogous in every respect to" s. 178(1)(e) of the *BIA* (para. 24; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 74; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 78). Articulating the section's elements in a four-part test, our Court held as follows:

> To discharge its burden of proving that its claim relates to a debt "resulting from obtaining property or services by false pretences or fraudulent misrepresentation", a creditor must establish on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service . . . .
>
> (*Deloitte Restructuring*, at para. 25)

[59] This test applies in determining whether the administrative penalties and disgorgement orders are exempt from discharge under s. 178(1)(e). Prior to applying this test to the Commission's administrative penalties and disgorgement orders, I

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provide some guidance on each of s. 178(1)(e)'s three elements, which are reflected in, and form the basis of, the four-part *Deloitte Restructuring* test.

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[60] At the outset, I note that the first step of the *Deloitte Restructuring* test may appear to stand for the proposition that only the creditor who was directly victimized by the false pretences or fraudulent misrepresentation may bring a claim under s. 178(1)(e). As I explain below, that is not the case.

(a) *False Pretences or Fraudulent Misrepresentation*

[61] The terms "false pretences" and "fraudulent misrepresentation" are not defined in the *BIA*, but the case law has been unanimous in finding that deceitful statements are at the core of both (*Shaver-Kudell*, at paras. 5 and 42; see also C.A. reasons, at paras. 55 and 58-60; *Hennig* (C.A.), at para. 58; *Cruise Connections*, at para. 13; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261, at para. 29 (CanLII); *Buland Empire*, at para. 14). For both concepts, the "essential test . . . is that the property was obtained by 'deceit', whether by positive act or failure to disclose material facts" (Sarra, Morawetz and Houlden, at § 7:199; see also *Hennig* (C.A.), at para. 112, per Pentelechuck J.A., concurring; *Iroquois Falls Community Credit Union Ltd. (Liquidator of) v. Miljours* (2009), 52 C.B.R (5th) 231 (Ont. S.C.J.), at para. 18).

[62] To establish "fraudulent misrepresentation" for the purposes of s. 178(1)(e), courts have relied on the classic elements from the House of Lords' decision in *Derry v. Peek* (1889), 14 App. Cas. 337, at p. 374 (Sarra, Morawetz and

Houlden, at § 7:203; Wood, at p. 317; J. Girgis and T. G. W. Telfer, "The Fraudulent Misrepresentation and False Pretences Exception to the Bankruptcy Discharge: Balancing the Debtor's Fresh Start with Confidence in the Credit System", in Corraini and Nixon, eds., *Annual Review of Insolvency Law 2022*, 143 ("Girgis and Telfer (2022)"), at p. 154; *Hennig* (C.A.), at para. 58; *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 255 Man. R. (2d) 45; *Morris Bureau v. Darde*, 2013 NSCA 121, 335 N.S.R. (2d) 378; *Woolf v. Harrop* (2003), 50 C.B.R. (4th) 309 (Ont. S.C.J.), at para. 71). These elements are as follows: (i) a representation was made; (ii) the representation was false; (iii) the representation was made knowingly, without belief in its truth (including with willful blindness or recklessness); and (iv) the creditor relied on the representation and turned over property to the debtor.

[63] As for "false pretences" in s. 178(1)(e), courts have relied on s. 361(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, for a definition of this term (*Shaver-Kudell*, at paras. 26-28; *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109, at para. 63, aff'd 2016 ONCA 875). Section 361(1) states:

> **361 (1)** A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

[64] Therefore, it appears that the elements of fraudulent misrepresentation and false pretences are substantively the same, except that the definition of "false pretence" in s. 361(1) of the *Criminal Code* does not require detrimental reliance. However, given

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that s. 178(1)(e) of the *BIA* requires that property or services be obtained as a result of the fraudulent misrepresentation or false pretences, "that difference is immaterial in this context" (Girgis and Telfer (2022), at p. 154, citing *Hennig* (C.A.), at para. 58).

[65] Justice van Rensburg came to this same conclusion in *Gray*, noting that "[i]rrespective of whether one considers fraudulent misrepresentation or false pretences, s. 178(1)(*e*) requires a finding that the bankrupt 'obtained property by' such conduct" (para. 31; see also *Shaver-Kudell*, at paras. 30 and 35; *Hennig* (C.A.), at para. 58). "Most cases, when discussing s. 178(1)(*e*), treat fraudulent misrepresentation and false pretences as closely connected terms with the same requirements" (*Shaver-Kudell*, at para. 35). As a result, the *Deloitte Restructuring* test does not distinguish between the terms "false pretences" and "fraudulent misrepresentation". The overlap between the two terms ensures that debts or liabilities obtained by deceit that otherwise fulfill the s. 178(1)(e) elements are not discharged.

[66] The onus is on the creditor to prove that the debts or liabilities were obtained as a result of the debtor's false pretences or fraudulent misrepresentation. A court cannot take judicial notice of fraud (B. Durnford, "Recent Developments under Section 178(1)(a) and (e) of the *Bankruptcy and Insolvency Act*: A Case Study of *Poonian v. British Columbia (Securities Commission)*" (2023), 12 *J.I.I.C.* 107, at p. 128; see also p. 123, citing *Hennig* (C.A.), at para. 70, citing *Canada (Attorney General) v. Bourassa (Trustee of)*, 2002 ABCA 205, 6 Alta. L.R. (4th) 223), nor can a court infer fraud in a cursory manner (*Deloitte Restructuring*, at para. 21). A party

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cannot simply presume or assume that a claim resulted from a deceitful statement without proving the required elements (*Deloitte Restructuring*, at para. 26).

[67] There are a number of ways in which a claimant can establish false pretences or fraudulent misrepresentation for the purposes of s. 178(1)(e). The most straightforward is via a prior judgment that contains findings of fact to the effect that a debt resulted from false pretences or fraudulent misrepresentation (Wood, at p. 313; *Hennig* (C.A.), at para. 62). Where a claimant has obtained a judgment that contains sufficient findings of fact, "nothing else need be done" (Wood, at p. 313; see also *Bryant*, at para. 69). If a judgment does not make express findings as to the necessary elements, it is open to the bankruptcy court to consider the pleadings that were available to the court that rendered a prior judgment, as well as the proceedings before that other court, in order to determine whether the elements can be established on the basis of those documents. A bankruptcy court can therefore look to the entire context of the proceedings in a previous action to determine whether the judgment debt can be characterized as one falling within the ambit of s. 178(1)(e) (*Cruise Connections*, at para. 29, citing *H.Y. Louie*, at paras. 87-88; see also *Lawyers' Professional Indemnity Co. v. Rodriguez*, 2018 ONCA 171, 139 O.R. (3d) 641, at para. 33; *Hennig* (C.A.), at para. 62).

[68] However, "even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings", a court must generally make its own findings of fact in

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applying s. 178(1)(e) of the *BIA* (*Deloitte Restructuring*, at para. 29). Courts must be "consistent and rigorous in assessing the evidence presented to them in this regard" (para. 29; see also *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164, at paras. 13-19 (CanLII)). It follows that "the evidence tendered to prove fraud or dishonesty must be 'clear and cogent'" (*Sharma v. Sandhu*, 2019 MBQB 160, at para. 26 (CanLII)).

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[69] In the case of a debt or liability resulting from a finding by an administrative tribunal, an application judge must make his or her own determination, based on a review of the record, as to whether the debt or liability falls within a s. 178(1) exception (*Hennig* (C.A.), at para. 63). Thus, even where all of the required findings for false pretences or fraudulent misrepresentation have been expressly made by an administrative decision maker, "[a] determination of whether the claim falls within one of the categories of non-dischargeable claims must be made by a court" (Wood, at p. 314). In sum, for a creditor to be able to pursue its claim against a bankrupt under s. 178(1)(e), a court order declaring fraud must be obtained, whether "before, during or after a discharge from bankruptcy" (*Bourassa*, at para. 5).

(b) *Passing of Property or Provision of Services*

[70] The second requirement for a debt or liability to survive bankruptcy under s. 178(1)(e) is that there must have been a passing of property or provision of services. This requirement is reflected in the final element of the *Deloitte Restructuring* test, which is that "the false representation was made to obtain property or a service"

(para. 25). There must be a loss in the form of a transfer of property or delivery of services, as well as a debt or liability corresponding to that loss.

[71] The Poonians argue that s. 178(1)(e) should apply only when the debtor, and not a third party, obtains the property or services (A.F., at paras. 72-75). I disagree.

[72] This argument was also made and rejected in *McAteer v. Billes*, 2006 ABCA 312, 397 A.R. 365. The bankrupt argued that "property must pass to the bankrupt in order for s. 178(1)(e) to apply" (para. 8). The Alberta Court of Appeal held that "s. 178(1)(e) does not require property to pass to the tortfeasor in cases of fraudulent misrepresentation" (para. 7, citing *Morgan v. Demers* (1986), 71 A.R. 244 (C.A.)). I agree. The section does not specify that the "person perpetrating the fraud must be the person who obtained the property" (*Varvis (Bankrupt), Re*, 1999 ABQB 853, 254 A.R. 197, at para. 8).

[73] Section 178(1)(e) does not require that the bankrupt be the recipient of the property of which a person was deprived. The property need not have been obtained, or retained, by the bankrupt. It may have passed directly or indirectly from the person to a third party at the bankrupt's direction or on his or her behalf (*Merenick*, at para. 18). What is required is that the fraudulent misrepresentation induced a person to give the property to some other person (see Wood, at p. 317, citing *McAteer* (2006), and *Merenick*). That other person may be the bankrupt or someone associated with the bankrupt.

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(c) *Link Required Between the Debt or Liability and the Fraud*

[74] Section 178(1)(e), in using the expression "resulting from", requires a causal link between the creation of the debt or liability and the debtor's deceit. In other words, to come within s. 178(1)(e), the debt or liability must have been created as a result of false pretences or fraudulent misrepresentation (Sarra, Morawetz and Houlden, at § 7:198). Section 178(1)(e) therefore requires detrimental reliance by a person (*Shaver-Kudell*, at para. 30). However, as I explain in the next section, that person need not be the creditor.

[75] The words "resulting from" in s. 178(1)(e) connote a strict causation requirement. This is especially so given that the s. 178(1) exceptions must be interpreted narrowly. It is not sufficient that "the debt or liability 'arose out of' a fraudulent scheme'" (*Gray*, at para. 31). Nor is it sufficient for a debt or liability to be "in respect of", "in connection with" or "in relation to" a fraudulent scheme. Indeed, Parliament's intention to impose a strict causation requirement by choosing the words "resulting from" becomes clear when s. 178(1)(e) is compared with s. 178(1)(a), which employs the term "in respect of". As noted by Dickson J. (as he then was), "[t]he phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters" (*Nowegijick*, at p. 39; *Markevich*, at para. 26; see also Sullivan (7th ed.), at § 4.05). The same cannot be said of the phrase "resulting from", which requires a causal link: a debt or liability was caused by the

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debtor (or someone associated with the debtor) having obtained property or services by false pretences or fraudulent misrepresentation.

[76] Section 178(1)(e) thus requires a "direct link". The direct link approach holds that only the debt or liability that represents the "value of the property [or services] obtained by false pretences or fraudulent misrepresentation" qualifies as non-dischargeable (*Molloy v. Janes & Noseworthy Ltd.* (1998), 164 Nfld. & P.E.I.R. 176 (Nfld. C.A.), at para. 8; see also Sarra, Morawetz and Houlden, at § 7:202). This approach "is more consistent with the fresh start policy underlying bankruptcy law, since it limits the exception to the value obtained by the debtor as a result of her dishonesty" (Wood, at p. 318).

[77] The direct link requirement has been recognized and applied by several courts across Canada. In *Gray*, van Rensburg J.A. held that "[a] causal connection between the bankrupt's wrongdoing and the creation of the debt or liability is required" (para. 31). In *Shaver-Kudell*, Zarnett J.A. held that a deceitful statement by the debtor "must be the source of the debt or liability to the creditor" (para. 35). In *The Workers' Compensation Board v. Petkau*, 2018 SKCA 85, 429 D.L.R. (4th) 92, Schwann J.A. held that "there has to be evidence of a causal connection between the alleged fraud and the debt or liability said to have resulted from it" (para. 45). In *Pietrzak, Re* (2016), 39 C.B.R. (6th) 145 (Ont. S.C.J.), Master Mills concluded that "[i]t is not sufficient to show that a fraudulent misrepresentation or false pretence was made unless it is also shown that the property or service was obtained directly as a result thereof" (para. 9).

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In *McAteer* (2007), the Alberta Court of Appeal held that s. 178(1)(e) requires "a finding of fraud, misrepresentation, or other reprehensible conduct that is clearly linked to the bankrupt's debt" (para. 28; see also *Groupe Unigesco inc. v. Michaud*, 2021 QCCQ 10330, at paras. 18-20 (CanLII); *Water Matrix Inc.*, at para. 61; *Dead End Survival, LLC v. Marhasin*, 2020 ONSC 766, 77 C.B.R. (6th) 299, at para. 22).

[78] While the direct link requirement is rooted in ample authority, some courts have applied a less stringent standard. For example, the standard has been described as a "but-for" test: "But for the fraudulent misrepresentation by the [debtor], [the] Corporation would not have loaned him [the money]" (*Woolf*, at para. 72). The requisite link has also been described as "a material connection": "The false statement made by the defendant need only be materially connected to the actions of the plaintiff that resulted in damage" (*Morris Bureau*, at para. 18). Respectfully, I am not convinced that a debt or liability that is not directly linked to a deceitful statement by the debtor, or someone associated with the debtor, can survive a discharge from bankruptcy on the basis of the s. 178(1)(e) exception. The proper scope of s. 178(1)(e) "requires a deceitful statement by which the debtor obtained property or services, causing the debt or liability of the creditor to arise" (*Shaver-Kudell*, at para. 44).

[79] *Goldstein, Re*, 2011 ONSC 561, 74 C.B.R. (5th) 296, provides an illustration of the direct link requirement. In that case, a hearing panel of the Law Society of Upper Canada ruled that Mr. Goldstein had participated in dishonest or fraudulent conduct to obtain mortgage funds under false pretences, and it disbarred

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him. Mr. Goldstein was ordered to pay the Law Society $60,000 in costs in relation to the disbarment hearing. Mr. Goldstein subsequently made an assignment in bankruptcy. The Law Society sought a declaration under s. 178(1) of the *BIA* that the costs award would not be released by any discharge. Justice Morawetz concluded that the costs award resulted not from the fraud but rather from the Law Society disbarment hearing (para. 10). The costs award was therefore not directly linked to the fraud committed by Mr. Goldstein.

[80] My colleague would apply a less stringent causal link, one that does not limit the non-dischargeable debt or liability under s. 178(1)(e) to the value of the property or services obtained by deceit (paras. 118 and 125). She cites cases where courts have deemed punitive damages to be non-dischargeable debts under s. 178(1)(e) even though they exceed the value of the property or services obtained by deceit (para. 128). Punitive damages do not represent the value of property or services obtained by false pretences or fraudulent misrepresentation and therefore do not come within the s. 178(1)(e) exception. This does not mean, however, that such a debt will be released by an order of discharge. Punitive damages may be captured by another applicable s. 178(1) exception or by s. 172 of the *BIA*.

[81] I reiterate that s. 178(1) is not a "catchall of debts arising from morally objectionable conduct" (*Shaver-Kudell*, at para. 39). With respect, I disagree with my colleague that s. 178(1)(e) "should ultimately be interpreted purposively" (para. 138). My colleague's use of the word "purposively" is simply inconsistent with our Court's

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jurisprudence, which clearly establishes that s. 178(1)(e) "must be interpreted narrowly" (*Deloitte Restructuring*, at paras. 24-25). Through s. 178(1), Parliament "identifies categories of specific wrongful conduct that give rise to debts that are not released, and specifies the criteria to be applied" (*Shaver-Kudell*, at para. 39). "[E]ven though other forms of morally objectionable conduct giving rise to debts can easily be imagined", s. 178(1)(e) must be interpreted narrowly on the basis of "the specific terms identified" (*ibid.*). A narrow interpretation favours a direct link that limits the non-dischargeable debt or liability to the value of the property or services obtained by deceit.

[82] Thus, for a s. 178(1)(e) claim to succeed, there must be a direct link between the fraudulent statement in issue and the debt or liability the creditor is claiming.

(d) *There Is No "Direct Victim" Requirement*

[83] There is a final point I wish to address before determining whether the Commission's administrative penalties or disgorgement orders survive a discharge from bankruptcy under the s. 178(1)(e) exception. As I previously mentioned, the first step of the *Deloitte Restructuring* test may appear to stand for the proposition that only the creditor who was the victim of the false pretences or fraudulent misrepresentation may bring a claim under s. 178(1)(e). That is not the case.

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[84] In *Hennig*, Khullar J.A. (as she then was) held that "[a] creditor should only fall within s 178(1)(e) if he or she has been directly *victimized* by the fraudulent behaviour of the debtor" (para. 81 (emphasis in original)). Under this approach, "[t]he required link between the fraudulent statement and the debt is established only if the debtor makes the fraudulent statement to the creditor relying on s 178(1)(e)" (para. 78). She held that this is because "creditors deserve the preferential treatment given by s 178(1)(e) only if they are the victims of the debtor's fraudulent behaviour" (para. 92; see also Durnford, at p. 125).

[85] In the Court of Appeal below, Willcock J.A. expressly rejected this direct victim requirement and held that "the plain language of s. 178(1)(e) of the *BIA* does not restrict this exception to only those claims where the bankrupt made a deceitful statement to the creditor" (para. 70).

[86] Like Willcock J.A., I am not convinced that s. 178(1)(e) requires that the claiming creditor be the direct recipient of the deceitful statement. That being said, since s. 178(1)(e) requires detrimental reliance, there will always be a person who has been deprived of property or services as a result of a deceitful statement made by the debtor or someone associated with the debtor. More often than not, the person to whom the deceitful statement was made will be the claiming creditor. However, the jurisprudence reveals circumstances in which, even though the claiming creditor was not the direct recipient of the deceitful statement, all of the s. 178(1)(e) elements were met and the debt or liability properly survived bankruptcy.

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[87] For example, in *Woolf*, the creditor bank sought a declaration that its judgment debt against the bankrupt, Mr. Harrop, had not been released by the order of discharge granted. The bank was the assignee of a mortgage that Mr. Harrop had originally executed in favour of another company. When Mr. Harrop took out the mortgage, he provided a statutory declaration to the original mortgagee indicating that he did not owe any income tax arrears. That declaration was false, and Mr. Harrop knew it was false. After the original mortgagee assigned the mortgage to the bank, Mr. Harrop defaulted and the bank obtained a judgment against him for the outstanding amount. Mr. Harrop made an assignment in bankruptcy, and following his discharge the bank sought a declaration that its default judgment survived under s. 178(1)(e) because Mr. Harrop had made a fraudulent misrepresentation to the original mortgagee. Mr. Harrop argued that the bank could not rely on s. 178(1)(e) because the fraudulent misrepresentation had been made not to it but rather to the original mortgagee. He also argued that the bank had not relied on his fraudulent misrepresentation.

[88] Justice Trafford rejected Mr. Harrop's arguments. He found that the bank had acquired all the legal rights and entitlements of the original mortgagee, including the right to sue Mr. Harrop. Further, he inferred that, had the bank known of the fraudulent misrepresentation, it would not have acquired the original mortgagee's legal interest. The bank's entitlement to relief under s. 178(1)(e) was no different than what the original mortgagee's entitlement would have been.

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[89] Even though the bank was not the direct victim of Mr. Harrop's fraudulent misrepresentation, the outstanding debt on the mortgage was the direct result of Mr. Harrop having obtained property by fraudulent misrepresentation. I agree with Trafford J.'s conclusion that the bank's entitlement to relief under s. 178(1)(e) was no different than that of the original mortgagee (para. 75). The bank was entitled to a declaration that its judgment debt had not been released by the order of discharge, and Mr. Harrop could not protect himself against the legal consequences of his fraudulent misrepresentation on the basis that the bank was not the direct victim (para. 75; Girgis and Telfer (2023), at p. 452; see also *Shaver-Kudell*, at para. 5).

[90] In *Ste. Rose*, the Manitoba Court of Appeal found that a liability had not been released on discharge because it fell within s. 178(1)(e), even though the creditor was not the direct victim of the false pretences. The Ste. Rose & District Cattle Feeders Co-op and the debtor had entered into an agreement providing that Co-op would authorize funding so that the debtor could purchase cattle. The agreement also required the debtor to notify Co-op when the cattle were to be sold and to ensure that the proceeds of that sale were paid directly to Co-op. The debtor and his son devised a plan whereby the son sold the cattle in his own name. The son deceitfully held out to a transport driver and an auctioneer that he owned the cattle. The proceeds of sale were deposited in the son's credit union account, in accordance with the plan. However, the son was indebted to the credit union. When the funds were deposited in the son's account, the credit union seized the amount and applied it to his debt. The debtor defaulted on repaying Co-op's loan, and Co-op suffered a corresponding loss. The

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debtor and his son consented to judgment in favour of Co-op. Both the debtor and his son then made assignments in bankruptcy and were later discharged. Co-op filed an application seeking a declaration under s. 178(1)(e) that the liability of the debtor and his son arising from the judgment had not been released by the discharge.

[91] Justice Freedman held that the debtor and his son had obtained "property", in the form of the proceeds of sale, by false pretences. This had created a liability toward Co-op, which had resulted in the judgment. The debtor had withheld relevant information from Co-op by not telling it that the proceeds of sale would be kept by his son. Co-op had relied on the debtor's fraudulent misrepresentation to its detriment. Further, by participating in the fraudulent sale of the cattle, the debtor had kept up the false pretence that his son was entitled to the proceeds. On this basis, the debtor's liability to Co-op survived the discharge from bankruptcy.

[92] With respect to the son's liability to Co-op, his false statements had been made to the auction house and the truck driver, not to the creditor, Co-op. However, this third-party involvement did not change the fact that Co-op had been deprived of its property because of the son's false statements. For this reason, the court found under s. 178(1)(e) that the debt had not been discharged.

[93] In most cases, the claiming creditor will be the party directly victimized by the false pretences or fraudulent misrepresentation. This is especially so given that the creditor bears the onus of proving that a debt or liability falls within one of the listed exceptions.

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[94] In fact, it is on this basis that the *Deloitte Restructuring* test appears to endorse the direct victim requirement: "To discharge its burden of proving that its claim relates to a debt 'resulting from obtaining property or services by false pretences or fraudulent misrepresentation', a creditor must establish [that] the debtor made a representation to the creditor . . ." (para. 25 (emphasis added)). *Deloitte Restructuring* was a "typical" case in the sense that the City of Montréal was both the victim of the alleged fraud and the creditor invoking s. 19(2)(d) of the *Companies' Creditors Arrangement Act*. However, the wording of s. 178(1)(e) of the *BIA* does not import a direct victim requirement. A creditor who is not a direct victim is thus not barred from bringing a claim under s. 178(1)(e) provided that the claim is the result of a person being deprived of property or services after having detrimentally relied on the debtor's false pretences or fraudulent misrepresentation.

[95] I reject a direct victim requirement on the basis that it would read an additional requirement into s. 178(1)(e): that the statements that resulted in a person being deprived of property or services must have been made directly to the creditor, not to a third party (Girgis and Telfer (2022), at p. 183). However, the absence of a direct victim requirement does not change the fact that s. 178(1)(e) is limited to the value of the property or services obtained by false pretences or fraudulent misrepresentation.

(e) *Application of Section 178(1)(e) to the Commission's Orders*

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[96] To discharge its burden of proving that its claims relate to a debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, the Commission must establish that the Poonians knowingly made a false representation in order to obtain property or services (*Deloitte Restructuring*, at para. 25). The debt or liability being claimed must be directly linked to the Poonians' false representation.

[97] In assessing whether the Poonians knowingly made false statements, the chambers judge considered the Commission's decisions. As noted above, when a party relies on the findings and conclusions of an administrative decision maker to establish that the debtor made a fraudulent statement, the court must still make its own determination based on a review of the record, even where the administrative findings of fraud are express.

[98] On review of the Commission's Reassessment Decision, the chambers judge concluded that because the Poonians' deceitful scheme had deliberately misled the public and investors as to the true value of the OSE shares, it was "at its core a fraudulent misrepresentation and false pretense" (para. 103). In the Reassessment Decision, the Commission held that the Poonians had breached s. 57(a) of the *Securities Act* "by engaging in, or participating in, conduct that they knew, or reasonably should have known, would result in, or contribute to, a misleading appearance of trading activity in, or an artificial price for, shares of OSE Corp." (para. 6). The Poonians'

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market manipulation was thus characterized as fraudulent by both the Commission and the chambers judge.

[99] Like Willcock J.A., I see no error in the chambers judge's conclusion that the Poonians' scheme to mislead and exploit investors amounted to fraudulent misrepresentation (para. 56). The Poonians falsely and knowingly misrepresented the price of the OSE shares in order to turn a profit. The first s. 178(1)(e) requirement is therefore met.

[100] The Poonians obtained property or services as a result of their fraudulent misrepresentation. As the chambers judge noted, "[t]hrough that scheme the Poonians 'obtained property', in the form of millions of dollars" (para. 103). Mr. Poonian obtained $746,676 directly and $572,491 indirectly through the accounts of secondary participants in the scheme. In addition, he obtained $1,126,260 through the account of another participant and was ordered to pay that amount on a joint and several basis. Ms. Poonian obtained $3,149,935 (Reassessment Decision, at paras. 77-79). While Mr. Poonian obtained some amounts indirectly through the accounts of other participants in the scheme, I have concluded that it is not necessary that the bankrupt directly obtain or retain the property for the s. 178(1)(e) exception to apply. As is the case here, the property may pass from a person or group of people (the deceived investors) to a third party (another participant) at the direction of the bankrupt (Mr. Poonian). The second s. 178(1)(e) requirement is therefore met.

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[101] The Commission claims that both its administrative penalties and its disgorgement orders will survive any discharge from bankruptcy by operation of the exception in s. 178(1)(e) because they are debts resulting from the Poonians having obtained millions of dollars because of their fraudulent misrepresentation. To determine whether this is the case, I must consider separately whether the administrative penalties and the disgorgement orders meet the third s. 178(1)(e) requirement.

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(i) The Commission's Administrative Penalties Did Not Result From the Fraudulent Scheme

[102] As noted above, a claim under s. 178(1)(e) must result from the debtor (or someone associated with the debtor) having obtained property or services by false pretences or fraudulent misrepresentation. A direct link between the debt or liability and the fraudulent conduct is required. It is only the value of the property or services obtained as a result of that conduct that is not released by an order of discharge (*Molloy*, at para. 8). On this basis, the Commission's administrative penalties do not come within the purview of s. 178(1)(e).

[103] The debt represented by the Commission's administrative penalties did not result directly from the Poonians' fraudulent misrepresentation. Rather, it arose indirectly as a result of the Commission's decision to sanction the Poonians for having obtained property through deceitful statements to investors (Girgis and Telfer (2023), at p. 448; Nocilla, at p. 186).

[104] As I explained above, *Goldstein* helps to illustrate the direct link requirement. In that case, Morawetz J. concluded that the costs award at issue resulted not from the bankrupt's fraud but rather from a Law Society disbarment hearing. Even though the Law Society found that Mr. Goldstein "had knowingly assisted or participated in dishonest or fraudulent conduct to obtain mortgage funds under false pretenses", the costs award itself did not result directly from the fraud committed by Mr. Goldstein and therefore did not fall within s. 178(1)(e) (*Goldstein*, at paras. 3 and 10-11). My colleague acknowledges that the "costs award *was* a step removed from and thus not 'directly caused' by the fraudulent conduct" and that the source of the liability was the disbarment hearing, not the deceit (para. 133 (emphasis in original)). However, she distinguishes *Goldstein* on the basis that, in the instant case, the Commission does not claim that the costs of its proceeding against the Poonians are non-dischargeable and that "the purpose of the Commission's hearing was to create such a debt or liability resulting directly from the false pretences" (para. 134). With respect, this distinction is untenable.

[105] Both a costs award and a penalty imposed by a regulator arise indirectly from deceitful conduct. Without the occurrence and sanctioning of that conduct, neither a penalty nor a costs award would exist. Fundamentally, however, both a costs award and an administrative penalty result from the regulator's choice to sanction the impugned conduct. Neither is the *direct result* of the deceit. In other words, but for Mr. Goldstein's fraud, there would have been no costs award. Similarly, but for the Poonians' fraud, there would be no administrative penalty. However, as I have

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explained, and as my colleague acknowledges at para. 124 of her reasons, a but-for connection is not the appropriate link under s. 178(1)(e). A direct causal link is required. I therefore respectfully disagree with my colleague that the Commission's administrative penalties "have as their *only* source or origin the Poonians' deceitful conduct" (para. 134 (emphasis in original)). Rather, their only source is the Sanctions Decision: "Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that . . . a) [Thalbinder] Poonian pay to the Commission an administrative penalty of $10 million; b) [Shailu] Poonian pay to the Commission an administrative penalty of $3.5 million" (para. 96).

[106] If the exempt debt or liability is not restricted to the value of the property or services obtained by false pretences or fraudulent misrepresentation — regardless of whether the claimant is the direct victim or a party like the Commission — then s. 178(1)(e) has the potential to capture debts or liabilities that are not the direct result of deceit. My colleague relies on Justice Romaine's interpretation of s. 178(1)(e) in *Hennig* (Q.B.) to find that the Commission's administrative penalties are captured by this section (para. 139). That decision was reversed on appeal. Justice Khullar (as she then was) held that Romaine J. had "incorrectly identified the purpose of s 178(1)" and engaged in "a bit of reverse engineering", and that her "purposive and remedial approach . . . resulted in shifting the delicate balance achieved by Parliament" (*Hennig* (C.A.), para. 26). I agree. As professors Girgis and Telfer note, if such other debts or liabilities, including administrative penalties, "are to survive bankruptcy discharge, it should be through a clear and intentional exemption provided by Parliament, not

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because of a court's overly broad interpretation of an exception to the discharge" ((2023), at p. 454; see also Nocilla, at p. 187; *Hennig* (C.A.), at para. 102).

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[107] The administrative penalties are not the direct result of the Poonians' fraudulent misrepresentation. They do not survive a discharge from bankruptcy under s. 178(1)(e).

(ii) The Commission's Disgorgement Orders Did Result From the Fraudulent Scheme

[108] While the administrative penalties did not result from the Poonians having obtained property by fraudulent misrepresentation, the situation is different for the disgorgement orders.

[109] The disgorgement orders were made under s. 161(1)(g) of the *Securities Act* and represent the value of the Poonians' fraud — the funds that the Poonians gained as a result of their market manipulation. Section 161(1)(g) states:

> **161** (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:
>
> . . .
>
> (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;

Thus, where a person has not complied with a provision of the *Securities Act*, the Commission may order that person to pay to the Commission any amount obtained as a result of the failure to comply.

[110] The purpose of this section "is to compel a wrongdoer to give up any ill-gotten amounts" (2017 BCCA 207, 95 B.C.L.R. (5th) 319 ("*Poonian* (2017)"), at para. 81). By taking away the amounts obtained as a result of a contravention of the *Securities Act*, the section "deprives a person who fails to comply of any benefit" (para. 82; see also para. 100).

[111] Sections 15 and 15.1 of the *Securities Act* address what the Commission must do with the funds received from s. 161(1)(g) disgorgement orders. Section 15.1 and the *Securities Regulation*, B.C. Reg. 196/97, set out a notice and claims procedure for persons who have suffered a pecuniary loss as a direct result of misconduct that resulted in an order under s. 161(1)(g). The Commission must publish a notice if it receives money from an order under s. 161(1)(g) (s. 15.1(1)). A person may make a claim to the money by submitting an application (s. 15.1(2)). If the Commission receives such an application, it will administer the claim in accordance with the regulations, and pay to the applicant all or part of the amount claimed (s. 15.1(3)).

[112] As noted by the British Columbia Court of Appeal, s. 161(1)(g) deters persons from contravening the *Securities Act* by removing the incentive to contravene, because it strips them of the benefit of their wrongdoing (*Poonian* (2017), at para. 88). When issuing an order under s. 161(1)(g), the Commission may deduct any amounts

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already returned to the victim or victims (para. 143). The amounts owed under disgorgement orders thus represent the amounts the debtor obtained as a result of his or her wrongful conduct. Furthermore, though compensation is not the *purpose* of this section, compensation is a possible effect of a s. 161(1)(g) order, because restitution may occur via the s. 15.1 claims procedure (paras. 75-76).

[113] The amounts that the Poonians have been ordered to pay under s. 161(1)(g) represent the amounts they obtained as a result of their fraudulent market manipulation. There is therefore a direct link between their fraudulent conduct and the Commission's disgorgement orders. While I have concluded that the Commission need not have been directly victimized by the Poonians' conduct in order to claim that the disgorgement orders are non-dischargeable under s. 178(1)(e), the victim investors may very well be the ultimate recipients of the sums of which they were deprived, provided that they submit appropriate claims in accordance with the s. 15.1 procedure.

[114] The Commission's disgorgement orders are captured by the s. 178(1)(e) exception and will not be released by any order of discharge.

VI. Conclusion

[115] I would overturn the Court of Appeal's conclusion that the Commission's administrative penalties are debts not released by any order of discharge because they fall within s. 178(1)(e) of the *BIA*. I would affirm the Court of Appeal's conclusion that the Commission's disgorgement orders come within the purview of s. 178(1)(e). The

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disgorgement orders thus remain enforceable against the Poonians and survive any order of discharge under the *BIA*. I would also uphold the Court of Appeal's conclusion that neither the administrative penalties nor the disgorgement orders are exempt from discharge pursuant to s. 178(1)(a).

[116] Therefore, the appeal is allowed in part and the chambers judge's order is set aside in part. The Commission's application for a declaration that the amounts the Poonians owe to the Commission pursuant to the Sanctions Decision (i.e. the administrative penalties) shall not be released by any order of discharge is dismissed. For clarity, the chambers judge's order that the amounts the Poonians owe to the Commission pursuant to the Reassessment Decision (i.e. the disgorgement orders) shall not be released by any order of discharge is upheld. In the particular circumstance of this appeal, I would not award costs.

The reasons of Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

[117] I agree with Justice Côté, for the reasons she gives, that the administrative penalties and the disgorgement orders imposed by the British Columbia Securities Commission do not survive bankruptcy under s. 178(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

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[118] We part company, however, on interpreting the scope of the causation requirement contemplated by the words "resulting from" in s. 178(1)(e) of the *BIA*. I do not accept that "any debt or liability" is limited to the *value* of the property obtained by deceit (s. 178(1)(e)). I conclude, as did the British Columbia Court of Appeal (2022 BCCA 274, 65 B.C.L.R. (6th) 213), that both the disgorgement orders and the administrative penalties fall within s. 178(1)(e) as "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation". Thus, both orders survive bankruptcy. I would dismiss the appeal.

[119] The bankrupts, Thalbinder Singh Poonian and Shailu Poonian, engaged in a "complex, predatory and highly deceptive . . . scheme that targeted unsophisticated investors" facing financial distress (2021 BCSC 555, at para. 31 (CanLII); see also 2015 BCSECCOM 96 (Sanctions Decision), at para. 18 (CanLII)). The Commission found that the bankrupts manipulated the market, contravening s. 57(a) (now s. 57(1)(a)) of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, a deemed offence under that Act. Based on this, the Commission sanctioned the Poonians in the public interest, with disgorgement orders under s. 161(1)(g) of the *Securities Act* of about $5.6 million; and administrative penalties under s. 162(1) totalling $13.5 million.

[120] The Poonians' market manipulation scheme satisfied the condition of s. 178(1)(e) of the *BIA* that property be obtained as a result of their false pretences or fraudulent misrepresentations. They obtained about $5.6 million through their scheme

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(Côté J.'s reasons, at paras. 99-100; see also 2018 BCSECCOM 160, at paras. 77-79 (CanLII)).

[121] Thus, the only remaining question is whether the debts or liabilities at issue "result from" the Poonians' deceitful conduct. Are the different monetary sanctions the Commission imposed "resulting from" the fact that property was obtained by false pretences or fraudulent misrepresentation?

[122] In answering this question, I share a number of Côté J.'s conclusions, for the reasons she gives. The property need not directly pass to the bankrupt; the "person perpetrating the fraud" need not be the person who obtained the property (para. 72, citing *Varvis (Bankrupt), Re*, 1999 ABQB 853, 254 A.R. 197, at para. 8). It is enough if someone associated with the bankrupt benefits (Côté J.'s reasons, at paras. 71-73). Further, s. 178(1)(e) does not require that the person claiming the exemption be the person who has directly sustained the loss as a result of the false pretences or fraudulent misrepresentation (paras. 83-95).

[123] Rather, what is required is simply that the deceitful conduct be that of the bankrupt, as long as someone associated with them has obtained property or services by pretences that the bankrupt knew to be false. The passing of property or services ensures that abstract fraudulent statements do not trigger the application of the exception when they have not resulted in detrimental reliance (see Côté J.'s reasons, at para. 74, citing *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 925, 160 O.R. (3d) 205, at para. 30).

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[124] The more difficult issue, however, is the degree of link required between the debt and the deceitful behaviour. Given the scheme of the *BIA* and its broader purpose of financial rehabilitation, the non-discretionary exception in s. 178(1)(e) must be interpreted narrowly. It is common ground that there must be a direct link between the debt or liability claimed and the fraudulent statement (Côté J.'s reasons, at para. 77, citing *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 31; *Shaver-Kudell*, at para. 35; *The Workers' Compensation Board v. Petkau*, 2018 SKCA 85, 429 D.L.R. (4th) 92, at para. 45; *Pietrzak, Re* (2016), 39 C.B.R. (6th) 145 (Ont. S.C.J.), at para. 9; *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143, at para. 28; *Groupe Unigesco inc. v. Michaud*, 2021 QCCQ 10330, at paras. 18-20 (CanLII); *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109, at para. 61; *Dead End Survival, LLC v. Marhasin*, 2020 ONSC 766, 77 C.B.R. (6th) 299, at para. 22). I too would reject a weak link such as "in respect of", "in connection with", "in relation to" or "but for" (Côté J.'s reasons, at paras. 75 and 78). A direct causal link between the creation of the debt or liability and the debtor's deceit is required by the language "resulting from", in an exception that must be narrowly construed (paras. 74-75).

[125] But I would not go further and require that there must be a direct correspondence between the *value* of the debt or liability and the *gain* made by the bankrupt or the person associated with the bankrupt. My colleague reasons that because there must be detrimental reliance in the form of a transfer of property or service, the quantum of the non-dischargeable debt or liability must be limited to "only the value"

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obtained as a result of the deceit (para. 102; see also para. 76). I disagree. While the exception must be interpreted narrowly, it must be tethered to the provision fashioned by Parliament.

[126] Just as s. 178(1)(e) does not require that there be an exact correlation between the person claiming the exemption and the victims of that deceitful conduct, it does not require that the *quantum* of the debt or liability be limited by the *quantum* of the property obtained as a result of that deceitful conduct. Such a requirement is unsupported by the jurisprudence, is not found in the text of the provision, and is inconsistent with the provision's central focus. The central focus is the deceitful *conduct* at the source of the debt or liability, not the exact *gain* derived thereby.

[127] Section 178(1)(e) has been applied by courts to permit the exemption of debts or liabilities that exceed the value of the bankrupt's gain. If the quantum of the debt or liability under s. 178(1)(e) was limited to the value of property obtained, neither compensatory damages exceeding the value of the gain nor punitive damages awarded at private law would ever be exempt from discharge under s. 178(1)(e).

[128] Unsurprisingly, it is hard to find a single instance when courts have limited the recovery of punitive damages against a bankrupt, under s. 178(1)(e), on the basis that it would exceed the value of the property obtained by the bankrupt. On the contrary, the jurisprudence overwhelmingly shows that if punitive damages directly result from the deceitful conduct targeted by s. 178(1)(e), they qualify for the exception (see, e.g., *Grewal v. Brar*, 2015 MBQB 3, 313 Man. R. (2d) 94, at para. 30; *Bank of Montreal v.*

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1886758 Ontario Inc., 2022 ONSC 4642, 1 C.B.R. (7th) 213, at paras. 38 and 45; *A.J. Lanzarotta Fruits & Vegetables Ltd. v. United Farmers*, 2024 ONSC 1780, 12 C.B.R. (7th) 371, at paras. 79 and 82; *Celanese Canada Inc. v. Murray Demolition Corp.*, 2010 CanLII 29089 (Ont. S.C.J.), at paras. 14 and 22; *Horth v. Lalonde-Rousseau*, 2021 QCCQ 3668, at paras. 102 and 119-21 (CanLII); *Maison des jeunes de Contrecœur v. Bourdon*, 2011 QCCQ 3476, at paras. 103-7 (CanLII); *Vivacqua v. Contino*, 2009 CanLII 14574 (Ont. S.C.J.), at paras. 18-23; *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301, at paras. 3 and 24; see also *Dead End Survival*, at paras. 28-30).

[129] The cases my colleague relies on, as noted above, help show that a weak link is not enough to satisfy the requirements of s. 178(1)(e). An overly broad causation threshold would stray from a narrow reading of s. 178(1)(e). For the threshold to be met, the conduct must be at the source, or origin, of the debt or liability. The deceitful conduct must have directly created it. But none of those cases stand for the proposition that a strict causation test requires the debt or liability to be limited to the value of the property obtained.

[130] Instead, as Roderick J. Wood notes, a direct causation requirement means that where only part of a liability can be traced to deceitful conduct, but not the balance, only the part induced by fraudulent conduct will be exempt from discharge (*Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 317-18). Courts can and should undertake an apportionment exercise to determine the part of a debt or liability that can be

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attributed to fraudulent conduct. This exercise is "consistent with the fresh start policy underlying bankruptcy law" (p. 318), as it ensures bankrupts can obtain the benefit of a discharge for the part of the total debt that was incurred honestly (*Copper Cliff Community Credit Union Ltd. v. Parker* (1977), 18 O.R. (2d) 49 (C.A.), at p. 54; see also J. Sarra, G. B. Morawetz and L. W. Houlden, *The 2024 Annotated Bankruptcy and Insolvency Act* (2024), at § 7:202).

[131] But where a debt or liability is *entirely* caused by fraudulent conduct, such as punitive damages imposed to sanction the conduct, there is no reason to limit the application of s. 178(1)(e) only to the gain ultimately obtained by the bankrupt (or someone associated with the bankrupt).

[132] In *Goldstein, Re*, 2011 ONSC 561, 74 C.B.R. (5th) 296, a lawyer, Mr. Goldstein, obtained mortgage funds as a result of false pretences. Given this fraudulent conduct, the Law Society of Upper Canada held a hearing to disbar him. The costs award Mr. Goldstein was ordered to pay in relation to the disbarment hearing was found not to "result from" the underlying fraud for the purposes of s. 178(1)(e).

[133] The circumstances in *Goldstein* differ from those in this case. The costs award *was* a step removed from and thus not "directly caused" by the fraudulent conduct. The source or origin of the liability was the disbarment hearing, not the false pretences (paras. 10-11). It cannot be said that the debt resulted from the fraudulent conduct itself. The purpose of a disbarment hearing is not to impose or recover payment on "any debt or liability" envisaged by s. 178(1)(e).

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[134] Here, by contrast, the purpose of the Commission's hearing was to create such a debt or liability resulting directly from the false pretences. The amounts the Commission submits should survive discharge (which do not include costs) thus have as their *only* source or origin the Poonians' deceitful conduct. Both the disgorgement orders and the administrative penalties under the *Securities Act* are monetary sanctions for the unlawful conduct. This is not a step removed. As my colleague notes, the breach of the *Securities Act* is factually based on obtaining property by false pretences or fraudulent misrepresentation within the meaning of s. 178(1)(e) of the *BIA* (paras. 99-100).

[135] Granted, the administrative penalties include an element of general deterrence for the "egregious" nature of the conduct and the magnitude of the scale on which it took place (Sanctions Decision, at paras. 18 and 92). Administrative penalties imposed under the *Securities Act* deter particular conduct and induce compliance (*British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 59; *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672, at paras. 58-62). But like punitive damages imposed at private law, the administrative penalties arise directly from the type of conduct that they sanction. Nothing in s. 178(1)(e) excludes a debt or liability that has an element of general deterrence (or compensatory damages that exceed the gain), provided it directly results from obtaining a financial benefit through false pretences or fraudulent misrepresentations. To exclude administrative penalties on that basis amounts to reading in an additional limitation that is found nowhere in the text of the provision.

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[136] Limiting the debt or liability based on the value of the gain derived by the bankrupt is not only absent from the text, it is also inconsistent with the purpose of the exception set out in s. 178(1)(e). As this court has acknowledged, the financial rehabilitation of the bankrupt has its limits (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 37). The general availability of a discharge — a fresh start — is limited by the exceptions in s. 178(1), which reflect policy choices that some debts or liabilities should survive bankruptcy. They are "the kind of claims that society, through Parliament, considers to be of a quality that outweighs any possible benefit in the bankrupt being relieved of them" (Sarra, Morawetz and Houlden, at § 7:185; *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197 (Q.B.), at p. 206).

[137] Many exceptions provided for in s. 178(1) ensure that only "honest but unfortunate" debtors can benefit from a discharge (Sarra, Morawetz and Houlden, at § 7:69). They are based on society's view, reflected by Parliament, that a bankrupt should not be free of some types of debts or liabilities where they are the direct consequences of an undesirable conduct. Parliament has determined that some bankrupts simply do not deserve to be free of particular debts, based on the nature of the conduct giving rise to those debts. These exceptions are focused not on the person claiming the exemption but on "categories of specific wrongful conduct that give rise to debts that are not released" (*Shaver-Kudell*, at para. 39). For example, the following all survive bankruptcy because the principle of financial rehabilitation gives way to society's denunciation of these kinds of conduct: fines or penalties imposed by a court in respect of an offence (s. 178(1)(a)); damages awarded in respect of intentional

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infliction of bodily harm or sexual assault (s. 178(1)(a.1)); and debts or liabilities arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity (s. 178(1)(d)). The objective is to prevent abuse of the fresh start principle, and the focus is the nature of the wrongful conduct.

[138] A similar objective animates s. 178(1)(e). It is a "moral sanction" aimed at preventing the bankrupt from being rewarded by a release of liability because of their undeserving conduct that has resulted in detrimental reliance (*Shaver-Kudell*, at para. 40; *Simone v. Daley* (1999), 43 O.R. (3d) 511 (C.A.), at pp. 521-22; *Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82, at para. 15; *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 255 Man. R. (2d) 45, at paras. 109-16). Section 178(1)(e) should ultimately be interpreted purposively so as to "ensure that dishonest debtors do not benefit from their dishonesty" (*McAteer v. Billes*, 2006 ABCA 312, 397 A.R. 365, at para. 10; see also *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, 8 Alta. L.R. (7th) 177, at para. 66, rev'd 2021 ABCA 411, 34 Alta. L.R. (7th) 219).

[139] I agree with Romaine J. in *Hennig* (Q.B.) that an interpretation of s. 178(1)(e) that considers the provision's intention to preclude dishonest debtors from benefitting from their dishonesty "would surely extend to a decision of a securities commission, charged with enforcing securities laws in order to protect the [interests of the] public and promoting the integrity of the capital markets" (para. 76). The Commission is "a regulatory authority representing the interests of those affected by

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the fraudulent misrepresentations and/or false pretences" (para. 76) and as a result, its administrative penalties should not be treated as if they were a debt stemming from an unrelated creditor seeking to unduly invoke s. 178(1)(e).

[140] Focusing only on the gain derived in the abstract would circumvent the precise mischief s. 178(1)(e) was meant to address, as it would permit bankrupts to benefit from their dishonesty through a release of liability, even when the debt directly results from the specific misconduct targeted by Parliament. Rehabilitation of the bankrupt is not best served if the bankrupt can obtain a discharge for liabilities directly resulting from fraudulent conduct.

[141] In conclusion, both the disgorgement orders and the administrative penalties are monetary sanctions imposed because of, and thus resulting from, deceitful conduct that Parliament specifically sought to address. They are both debts that originate from the Poonians having obtained property by false pretences or fraudulent misrepresentations. Accordingly, both properly fall within the narrow scope of s. 178(1)(e) and should not be released by any order of discharge.

[142] I would dismiss the appeal.

Appeal allowed in part without costs, KARAKATSANIS *and* MARTIN JJ. *dissenting in part.*

Solicitors for the appellants: Reedman Law, Vancouver.

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Solicitors for the respondent: Lawson Lundell, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Crown Law Office — Civil, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General, Legal Services Branch, Victoria.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan — Legal Services Division, Civil Law Branch, Regina.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: Gowling WLG (Canada), Toronto.

Solicitor for the intervener the Superintendent of Bankruptcy: Attorney General of Canada, Department of Justice Canada — Civil Litigation Section, Ottawa.

Solicitors for the intervener the Federation of Law Societies of Canada: Hunter Litigation Chambers, Vancouver.

Solicitors for the intervener the Alberta Securities Commission: Dentons Canada, Toronto.

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Solicitor for the intervener the Ontario Securities Commission: Ontario Securities Commission, Toronto.

Solicitors for the intervener the Osgoode Investor Protection Clinic: Stockwoods, Toronto.

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Ville de Montréal *Appellant*

v.

Deloitte Restructuring Inc. *Respondent*

and

Alaris Royalty Corp.,
Integrated Private Debt Fund V LP,
Thornhill Investments Inc.,
Ville de Laval and
Union des municipalités du Québec
Interveners

Indexed as: Montréal (City) *v.* Deloitte Restructuring Inc.

2021 SCC 53

File No.: 39186.

2021: May 20; 2021: December 10.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Stay of creditors' rights and remedies — Claims that may be dealt with by compromise or arrangement — Compensation between debt arising before and debt arising after initial order — Quebec Voluntary Reimbursement Program — Whether claim arising from agreement entered into under Quebec Voluntary Reimbursement Program is necessarily claim that relates to debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d) of Companies' Creditors Arrangement Act — Whether supervising judge's discretion in restructuring context allows judge to stay right invoked by creditor to effect compensation between debt arising before and debt arising after initial order — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.02, 19(2)(d), 21 — Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR,

Ville de Montréal *Appelante*

c.

Restructuration Deloitte Inc. *Intimée*

et

Alaris Royalty Corp.,
Integrated Private Debt Fund V LP,
Thornhill Investments Inc.,
Ville de Laval et
Union des municipalités du Québec
Intervenantes

Répertorié : Montréal (Ville) *c.* Restructuration Deloitte Inc.

2021 CSC 53

N° du greffe : 39186.

2021 : 20 mai; 2021 : 10 décembre.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Suspension des droits et recours des créanciers — Réclamations considérées dans le cadre des transactions ou arrangements — Compensation entre une dette née avant et une dette née après l'ordonnance initiale — Programme québécois de remboursement volontaire — Une créance découlant d'une entente conclue dans le cadre du Programme québécois de remboursement volontaire constitue-t-elle nécessairement une réclamation se rapportant à une dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d) de la Loi sur les arrangements avec les créanciers des compagnies? — Le pouvoir discrétionnaire dont dispose le juge surveillant dans le contexte d'une restructuration lui permet-il de suspendre le droit d'opérer compensation entre une dette née avant et une dette née après l'émission d'une ordonnance initiale qu'invoque un créancier? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.02,

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BOA COMPEER000606

c. R-2.2.0.0.3 — Voluntary Reimbursement Program, CQLR, c. R-2.2.0.0.3, r. 1.

In August 2018, the Superior Court made an initial order by which SM Group, a consulting engineering firm, became subject to proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). The order stayed the rights and remedies of creditors, among other things, and appointed a monitor. Following that order, SM Group continued to perform work for Ville de Montréal ("City"). However, the City refused to pay for that work and invoked its right to effect compensation between what it owed SM Group and two claims it allegedly had against SM Group that arose before the initial order. Those claims are related to the application of the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts* ("Bill 26") and, according to the City, result from fraud on SM Group's part. The first claim arises from a settlement agreement entered into under the Voluntary Reimbursement Program ("VRP") that resulted from Bill 26 ("VRP claim"). The second claim is based on a proceeding brought by the City against SM Group, in which it claimed money from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract.

In response to the City's refusal to pay for the work done by SM Group after the initial order, the monitor applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group. The supervising judge granted the application. The Court of Appeal reached the same conclusion as the supervising judge: that the compensation invoked by the City could not be effected. It found that a claim relating to fraud falling within s. 19(2)(d) of the *CCAA* is not an exception to the rule stated in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, whereby compensation between debts arising before and after an initial order ("pre-post compensation") is prohibited. It was also of the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, the Court of Appeal agreed with the supervising judge that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

19(2)d), 21 — Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics, RLRQ, c. R-2.2.0.0.3 — Programme de remboursement volontaire, RLRQ, c. R-2.2.0.0.3, r. 1.

En août 2018, la Cour supérieure rend une ordonnance initiale assujettissant Groupe SM, une firme de génie-conseil, à des procédures déposées en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). L'ordonnance suspend notamment les droits et recours des créanciers et nomme un contrôleur. Postérieurement à cette ordonnance, Groupe SM continue à effectuer des travaux dont bénéficie la Ville de Montréal. La Ville refuse toutefois de payer ces travaux et invoque son droit d'opérer compensation entre ce qu'elle doit à Groupe SM et deux créances, nées avant l'ordonnance initiale, qu'elle prétend détenir contre celui-ci. Ces créances sont liées à l'application de la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics* (« Loi 26 ») et, selon la Ville, résulteraient de fraude de Groupe SM. La première créance découle d'une entente de règlement intervenue dans le cadre du Programme de remboursement volontaire (« PRV ») issu de la Loi 26 (« créance PRV »). La seconde créance est fondée sur un recours intenté par la Ville contre Groupe SM dans lequel elle lui réclame de l'argent au motif qu'il aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau.

En réponse au refus de la Ville de payer les travaux effectués par Groupe SM après l'émission de l'ordonnance initiale, le contrôleur demande un jugement déclaratoire portant que les sommes dues à Groupe SM par la Ville ne peuvent faire l'objet de compensation. La juge surveillante accueille la demande. À l'instar de cette dernière, la Cour d'appel conclut que la compensation invoquée par la Ville ne peut s'opérer. Elle estime qu'une créance relative à la fraude visée par l'al. 19(2)d) de la *LACC* ne constitue pas une exception à la règle énoncée dans l'arrêt *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, selon laquelle la compensation entre des dettes nées avant et après l'émission d'une ordonnance initiale (« compensation pré-post ») est interdite. Elle est également d'avis que la Ville n'a pas prouvé que ses créances sont visées par l'al. 19(2)d). Enfin, en ce qui concerne la créance relative au contrat des compteurs d'eau, la Cour d'appel, tout comme la juge surveillante, estime que les conditions de la compensation judiciaire ne sont pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration.

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BOA COMPEER000607

Held (Brown J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Martin JJ.: First, a claim arising from an agreement entered into under the VRP is not necessarily a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. In this case, the City has not shown that the VRP claim relates to a debt resulting from fraud within the meaning of that provision. Second, with regard to pre-post compensation, a supervising judge has the discretion to stay the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law. However, the supervising judge may refuse to stay this right, or may lift such a stay, only in exceptional circumstances, given the high disruptive potential of this form of compensation. In the case at bar, the initial order stayed the City's right to pre-post compensation, and it would not be appropriate to lift the stay in relation to the claims in issue.

To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a "claim that relates to" a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" pursuant to s. 19(2)(d) of the *CCAA*.

The first step in characterizing the VRP claim is to distinguish, for the purposes of the *CCAA*, claims that are subject to a compromise or arrangement from those that are not. Section 19(2) provides, by way of exception, that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud. To prove that its claim relates to a debt resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d), a creditor has the burden of establishing, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service.

In this case, the City did not try to prove or even allege any of these elements. The content of the VRP agreement, Bill 26 and the regulation made under it ("VRP

Arrêt (le juge Brown est dissident) : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Côté, Rowe et Martin : Premièrement, une créance découlant d'une entente conclue dans le cadre du PRV n'est pas nécessairement une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. En l'occurrence, la Ville n'a pas démontré que la créance PRV se rapporte à une dette qui résulte de fraude au sens de cette disposition. Deuxièmement, en ce qui concerne la compensation pré-post, le juge surveillant possède le pouvoir discrétionnaire de suspendre l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law. Toutefois, le juge surveillant peut refuser de suspendre ou lever la suspension du droit à la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. En l'espèce, l'ordonnance initiale a suspendu le droit de la Ville à la compensation pré-post, et il n'est pas indiqué de lever cette suspension pour ce qui est des créances en litige.

Pour trancher la question relative à la compensation dans le contexte du présent pourvoi, la Cour doit d'abord déterminer si une créance découlant d'une entente conclue dans le cadre du PRV constitue nécessairement une « réclamation se rapportant à » une « dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits » aux termes de l'al. 19(2)d) de la *LACC*.

Pour qualifier la créance PRV, il faut d'abord distinguer, au sens de la *LACC*, les réclamations compromises par la transaction ou l'arrangement de celles qui ne le sont pas. Le paragraphe 19(2) prévoit exceptionnellement que certaines réclamations ne peuvent être compromises dans le cadre d'une transaction ou d'un arrangement, notamment celles découlant de fraude. Afin de démontrer que sa créance est une réclamation qui se rapporte à une dette résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d), le créancier intéressé a le fardeau d'établir, par prépondérance des probabilités, les quatre éléments suivants : (i) le débiteur lui a fait une représentation; (ii) cette représentation était fausse; (iii) le débiteur savait que la représentation était fausse; (iv) cette fausse représentation a été faite dans le but d'obtenir un bien ou un service.

En l'espèce, la Ville n'a pas cherché à prouver ni même à alléguer l'un ou l'autre de ces éléments. Il est donc nécessaire d'interpréter le contenu de l'entente PRV, la

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Regulation") must therefore be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. This interpretation exercise confirms that s. 19(2)(d) of the *CCAA* does not apply to the VRP claim.

First, it is clearly stipulated in the VRP agreement entered into by the parties that the amount fixed in the agreement can in no way be considered to constitute an admission of liability. As a result, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the *CCAA*.

Second, Bill 26 and the VRP Regulation do not create a statutory presumption or a presumption of fact that a debtor made fraudulent representations to a public body. The use of the words "may have been" in s. 3 of Bill 26 and in s. 1 of the VRP Regulation to describe the purpose of the VRP indicates that fraud is a possibility rather than a certainty. Section 7 of the VRP Regulation supports this point, since it states that the fact that a natural person or an enterprise participates in the VRP does not constitute an admission of liability or of a fault committed by the natural person or enterprise. The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8.

The City is wrong to say that reading ss. 1, 3 and 10 of Bill 26 together leads to the conclusion that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. Although s. 1 of Bill 26 does not refer to fraud as being hypothetical, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. Finally, the two schemes created by Bill 26 must not be confused. Section 10 states that fraud was committed, but this section is part of the scheme introduced by Chapter III (ss. 10 to 17), which applies to judicial proceedings brought against a natural person or enterprise that allegedly participated in fraud in relation to a public contract, and not part of the VRP scheme introduced by Chapter II (ss. 3 to 9). It is up to the courts to conclude that fraud has been committed, and the existence of fraud will be recognized by a court only under the Chapter III scheme, which did not take effect until the VRP scheme introduced by Chapter II ended. The reference to s. 10 in s. 3 merely serves to specify the natural persons

Loi 26 ainsi que son règlement d'application (« règlement PRV ») pour déterminer si la créance PRV peut être considérée dans le cadre d'une transaction ou d'un arrangement. Cet exercice d'interprétation confirme que la créance PRV n'est pas visée par l'al. 19(2)d) de la *LACC*.

En premier lieu, il est clairement stipulé dans l'entente PRV intervenue entre les parties que la somme convenue dans celle-ci ne peut en aucun cas être assimilée à une admission de responsabilité. On ne saurait donc présumer que la créance PRV constitue une réclamation visée à l'al. 19(2)d) de la *LACC*.

En deuxième lieu, la Loi 26, tout comme le règlement PRV, ne créent pas une présomption légale ou factuelle de l'existence de représentations frauduleuses de la part d'un débiteur à l'endroit d'un organisme public. L'emploi du conditionnel à l'art. 3 de la Loi 26 et à l'art. 1 du règlement PRV pour décrire l'objet du PRV signale que la fraude est une éventualité, par opposition à quelque chose de certain. L'article 7 du règlement PRV appuie ce constat puisqu'il précise que le fait pour une personne physique ou une entreprise de se prévaloir du PRV ne constitue pas une reconnaissance de responsabilité ni une admission qu'elle a commis une faute. La faute dont il est question à l'art. 7 relève de la responsabilité civile et se limite au contrat public visé par l'entente PRV. Lorsque le législateur entend faire référence à des procédures de nature pénale ou criminelle, ou encore à des recours civils se situant hors du champ de l'entente PRV, il le fait expressément. L'article 7 du règlement PRV, lu conjointement avec l'art. 8, confirme cette interprétation.

La Ville a tort de dire qu'une lecture conjointe des art. 1, 3 et 10 de la Loi 26 mène à une conclusion que la personne physique ou l'entreprise qui participe au PRV a nécessairement fraudé un organisme public. Bien que l'art. 1 de la Loi 26 ne traite pas de la fraude à titre hypothétique, l'art. 3 de la Loi 26 et l'art. 1 du règlement PRV sont clairs : les dispositions substantielles de la Loi 26 et du règlement PRV ne considèrent la fraude que de façon hypothétique. Enfin, il ne faut pas confondre les deux régimes créés par la Loi 26. L'article 10 énonce qu'une fraude a été commise, mais celui-ci fait partie du régime introduit par le chapitre III (art. 10 à 17) qui est applicable aux recours judiciaires intentés contre une personne physique ou une entreprise qui aurait participé à une fraude visant un contrat public, et non du régime du PRV, introduit par le chapitre II (art. 3 à 9). Il appartient aux tribunaux de conclure qu'une fraude a été commise, et la reconnaissance judiciaire de l'existence d'une fraude n'intervient que dans le régime propre au chapitre III, lequel entre en vigueur seulement lorsque le régime du

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to whom the VRP applies. Accordingly, the City has not shown that the VRP claim falls within s. 19(2)(d) of the *CCAA*. Neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act.

Furthermore, a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law can be stayed by a court under ss. 11 and 11.02 of the *CCAA*. Under s. 11.02 of the *CCAA*, a court may stay any action, suit or other proceeding that might be brought against the debtor company. While at first glance the language of this provision limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order. A court has the power to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process. This includes a creditor's right to effect pre-post compensation. Such an interpretation advances the *CCAA*'s remedial objectives and is consistent with its scheme.

In the vast majority of cases, an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. However, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. The absolute prohibition against pre-post compensation imposed by the Quebec Court of Appeal in *Kitco* must therefore be tempered. However, a court must be cautious before allowing such a form of compensation, given its high disruptive potential.

Moreover, s. 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the *CCAA*. Read in light of its context, its purpose and the scheme of the *CCAA*, s. 21 is limited to authorizing compensation between debts that arise before an initial order is made ("pre-pre compensation") for the purpose of quantifying creditors' claims on the date of commencement of proceedings. This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the *CCAA* does not prohibit this form of compensation either. It follows that a supervising judge

PRV, introduit par le chapitre II, prend fin. Le renvoi à l'art. 10 dans l'art. 3 ne sert qu'à préciser quelles sont les personnes physiques visées par le PRV. En conséquence, la Ville n'a pas démontré que la créance PRV relevait de l'al. 19(2)d) de la *LACC*. Ni le contenu de l'entente PRV ni le cadre juridique qui lui est propre ne permettent de présumer que Groupe SM a admis avoir commis un acte frauduleux.

Par ailleurs, le droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law peut être suspendu par un tribunal en application des art. 11 et 11.02 de la *LACC*. L'article 11.02 de la *LACC* permet de suspendre toute action, poursuite ou autre procédure pouvant être intentée contre la compagnie débitrice. Bien que le texte de cette disposition limite à première vue aux procédures judiciaires l'application du pouvoir de suspension, la jurisprudence interprète de manière large et libérale l'étendue des droits et recours susceptibles d'être inclus dans une ordonnance de suspension. Le tribunal est habilité à suspendre des droits reconnus aux créanciers mais dont l'exercice serait susceptible de mettre en péril la restructuration, y compris le droit d'opérer compensation pré-post. Une telle interprétation favorise les objectifs réparateurs de la *LACC*, en plus d'être cohérente avec l'économie de cette loi.

Dans la très vaste majorité des cas, l'ordonnance initiale suspendra, et devrait suspendre, le droit d'un créancier d'opposer à la débitrice la compensation pré-post. En revanche, le tribunal peut à sa discrétion refuser d'imposer une telle interdiction ou, si la compensation pré-post a été suspendue par l'ordonnance, lever cette suspension par la suite pour permettre à un créancier intéressé de faire valoir ses droits. L'interdiction absolue énoncée par la Cour d'appel du Québec dans l'arrêt *Kitco* à l'égard de la compensation pré-post doit donc être tempérée. Cependant, le tribunal doit faire preuve de prudence avant de permettre une telle forme de compensation, considérant son fort potentiel perturbateur.

En outre, l'art. 21 de la *LACC* ne confère pas aux créanciers un droit à la compensation pré-post qui serait à l'abri du pouvoir de suspension dont dispose le juge surveillant en vertu des art. 11 et 11.02 de la *LACC*. Lu à la lumière de son contexte, de son objet et de l'esprit de la *LACC*, l'art. 21 se limite à autoriser la compensation entre des dettes nées avant le prononcé de l'ordonnance initiale (« compensation pré-pré ») aux fins de quantification des réclamations des créanciers au jour de l'ouverture. Cette disposition n'a pas pour effet d'autoriser la compensation pré-post. Cela dit, l'art. 21 de la *LACC* n'a pas non plus pour effet d'interdire cette forme de compensation. Il

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retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

In exercising its discretion under the *CCAA*, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part. The first consideration relates both to the order itself and to the means that are employed. It is assessed in light of the *CCAA*'s remedial objectives, which include protecting the public interest. In very specific circumstances, a court could conclude that protection of the public interest and the *CCAA*'s other remedial objectives justify authorizing pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the *CCAA*. However, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors. The second consideration is also important because it discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage.

In the case at bar, the words of the stay order made by the Superior Court are broad enough to stay pre-post compensation, and it would not be appropriate to lift the stay in relation to the VRP claim. Because the City has not proved the alleged fraud and has not relied, in support of its position, on any of the *CCAA*'s remedial objectives other than protecting the public interest, it has not discharged its burden of proving that the order being sought is appropriate. In addition, the City did not act with the diligence expected in *CCAA* proceedings.

With regard to the water meter contract claim, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in that case. That order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of that case would not be appropriate for the same reasons as those relating to the VRP claim.

s'ensuit que le juge surveillant conserve le pouvoir discrétionnaire de suspendre ou d'autoriser l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law.

Dans l'exercice du pouvoir discrétionnaire que lui confère la *LACC*, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur. La première considération vise tout autant l'ordonnance elle-même que les moyens utilisés et s'évalue au regard des objectifs réparateurs de la *LACC*, dont la protection de l'intérêt public. Dans des circonstances bien particulières, le tribunal pourrait conclure que la protection de l'intérêt public, de même que les autres objectifs réparateurs de la *LACC*, justifient d'autoriser la compensation pré-post en faveur d'un créancier qui a démontré avoir été victime de fraude au sens de l'al. 19(2)d) de la *LACC*. Par contre, le tribunal doit se garder de réduire l'intérêt public à l'intérêt d'un créancier ou d'un groupe de créanciers en particulier. La deuxième considération est également importante étant donné qu'elle décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage.

Dans la présente affaire, les termes de l'ordonnance de suspension rendue par la Cour supérieure sont suffisamment larges pour suspendre la compensation pré-post et il n'est pas indiqué de lever cette suspension en ce qui concerne la créance PRV. Puisque la Ville n'a pas apporté la preuve de la fraude alléguée et n'a pas invoqué un objectif réparateur de la *LACC* autre que la protection de l'intérêt public au soutien de sa position, elle ne s'est pas déchargée du fardeau qui lui incombait d'établir le caractère indiqué de l'ordonnance sollicitée. Au surplus, la Ville n'a pas fait montre de la diligence attendue dans le cadre d'une procédure fondée sur la *LACC*.

Pour ce qui est de la créance relative au contrat des compteurs d'eau, la Cour supérieure a accepté de lever la suspension des procédures pour permettre à la Ville d'établir l'existence et le montant de sa créance dans ce dossier. Cette ordonnance n'a pas autorisé la Ville à retenir les sommes dues à Groupe SM pour les travaux postérieurs à l'ordonnance initiale en vue d'opérer compensation dans l'éventualité où elle aurait gain de cause dans le dossier relatif au contrat des compteurs d'eau. Dans les circonstances, une ordonnance permettant à la Ville de retenir les sommes dues à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau ne serait pas indiquée pour les mêmes motifs que ceux relatifs à la créance PRV.

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Per Brown J. (dissenting): The appeal should be allowed solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect pre-post compensation for the VRP claim and whether compensation is available in respect of the water meter claim. There is agreement with the majority that a supervising judge has a discretion under s. 11 of the *CCAA* as to whether to allow a creditor to effect pre-post compensation, or set-off. However, this discretion is not limited solely to the exceptional circumstances the majority describes. The scope of s. 21 of the *CCAA* is not limited to pre-pre compensation; pre-post compensation is permitted, but must be subject to the exercise of a supervising judge's discretion. Moreover, nothing in s. 21 of the *CCAA* prohibits judicial compensation.

The approach taken by the Quebec Court of Appeal in *Kitco*, according to which pre-post compensation will never be authorized under the *CCAA*, involves several errors and must be rejected. To begin with, the Court of Appeal erred in relying on a judgment rendered by the Court in the context of a bankruptcy under the *Bankruptcy and Insolvency Act* ("*BIA*"). Although the scheme established by the *CCAA* and the one established by the *BIA* must be viewed as an integrated body of insolvency law, there remain many differences between them, including two that are fundamental. First, when an insolvent company has recourse to the *CCAA*, it continues its business activities and is not divested of its property in favour of a third party, unlike with the measures put in place under the *BIA* that vest the bankrupt's property in a trustee. There is thus no loss of mutuality under the *CCAA*. This mutuality, which survives the initial order, is what makes compensation possible under the *CCAA*, unlike under the *BIA*. Secondly, the scheme established by the *CCAA* is flexible and allows creative solutions to be put forward to achieve the objective of restructuring a financially distressed company, in contrast to the *BIA*, which provides a set of pre-established rules. The *CCAA*'s provisions must be interpreted expansively to enable its remedial objectives to be achieved. Because of these objectives, a broad discretion is also conferred on supervising judges by s. 11 of the *CCAA*. This discretion has no equivalent in the *BIA*.

Next, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the *CCAA*, subject to a supervising judge's discretion to stay such set-off having

Le juge Brown (dissident) : L'appel devrait être accueilli à seule fin de retourner le dossier devant la Cour supérieure pour qu'il soit décidé, d'une part, si la Ville peut opérer compensation pré-post à l'égard de la créance PRV et, d'autre part, si la réclamation à l'égard des compteurs d'eau donne ouverture à compensation. Il y a accord avec l'avis de la majorité portant que le juge surveillant possède, en vertu de l'art. 11 de la *LACC*, le pouvoir discrétionnaire d'autoriser ou non un créancier à opérer compensation pré-post. Cependant, ce pouvoir n'est pas limité aux seules circonstances exceptionnelles décrites par la majorité. Le champ d'application de l'art. 21 de la *LACC* n'est pas restreint à la compensation pré-pré; la compensation pré-post est permise, mais doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. De plus, rien dans l'art. 21 de la *LACC* n'interdit la compensation judiciaire.

L'approche établie par la Cour d'appel du Québec dans l'arrêt *Kitco*, selon laquelle la compensation pré-post ne sera jamais autorisée en vertu de la *LACC*, contient plusieurs erreurs et doit être rejetée. Tout d'abord, la Cour d'appel s'appuie erronément sur un arrêt de la Cour rendu dans un contexte de faillite sous le régime de la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Or, bien que le régime établi par la *LACC* et celui établi par la *LFI* doivent être perçus comme un ensemble intégré de règles du droit de l'insolvabilité, de nombreuses différences persistent entre ceux-ci, dont deux distinctions fondamentales. Premièrement, lorsque l'entreprise insolvable a recours à la *LACC*, elle continue ses opérations commerciales et n'est pas dessaisie de ses biens au profit d'un tiers, contrairement aux mesures mises en place en vertu de la *LFI*, suivant lesquelles le syndic obtient la saisine des biens du failli. Il n'y a donc pas de perte de réciprocité sous le régime de la *LACC*. Cette réciprocité, qui subsiste au-delà de l'ordonnance initiale, est ce qui rend possible la compensation en vertu de la *LACC*, par opposition à la *LFI*. Deuxièmement, le régime établi par la *LACC* est flexible et permet de mettre de l'avant des solutions créatives afin d'atteindre l'objectif de restructuration d'une entreprise en difficultés financières, par contraste avec la *LFI*, qui prévoit un ensemble de règles préétablies. Les dispositions de la *LACC* doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, en raison desquels un vaste pouvoir discrétionnaire est également conféré au juge surveillant par l'art. 11 de la *LACC*. Ce pouvoir n'a pas d'équivalent dans la *LFI*.

Ensuite, l'état du droit ailleurs au Canada est clair : la compensation pré-post est possible sous le régime de la *LACC*, sous réserve du pouvoir discrétionnaire du juge

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regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the *CCAA*. The approach proposed in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces, which is contrary to the principle of homogenous interpretation of federal statutes.

Lastly, staying the remedies of an insolvent company's creditors under the *CCAA* to allow the company to develop a plan of arrangement is of critical importance. However, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to effect pre-post compensation, since the insolvent company will become an "empty shell" after the sale. Moreover, allowing pre-post compensation will not have the effect of derailing the company's restructuring process, as there is no such process in this situation.

In the instant case, there is no need to decide whether the VRP claim must be characterized as a claim based on "false pretences or fraudulent misrepresentation" within the meaning of s. 19(2)(d) of the *CCAA*. Section 21 of the *CCAA* must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). It is true that proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge's discretion to permit pre-post compensation; however, whether the City's VRP claim results from fraud is a question to be decided by the supervising judge, not by the Court.

Given that the supervising judge did not exercise her discretion under s. 11 of the *CCAA*, believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, it is not for the Court to exercise that discretion in order to determine whether to permit pre-post compensation. Supervising judges are in the best position to decide whether to exercise their discretion in a particular case. In cases involving an exercise of discretion by a court of first

surveillant d'en suspendre l'application pour tenir compte des incidences de la compensation pré-post sur la période de statu quo et de ses objectifs sous-jacents, du bon déroulement des efforts déployés pour réaliser un arrangement et des objectifs réparateurs de la *LACC*. L'approche avancée dans l'arrêt *Kitco* crée une asymétrie entre l'interprétation de l'art. 21 de la *LACC* par les tribunaux du Québec et par les tribunaux d'autres provinces canadiennes, qui va à l'encontre du principe de l'interprétation uniforme des lois fédérales.

Enfin, la suspension, en vertu de la *LACC*, des recours des créanciers d'une entreprise insolvable afin de permettre à celle-ci d'élaborer un plan d'arrangement revêt une importance cruciale. Par contre, lorsqu'un plan d'arrangement n'est pas envisageable et que l'entreprise insolvable sera de toute manière liquidée ou vendue, conclure que la compensation pré-post n'est jamais permise pourrait être injuste pour les créanciers de cette entreprise ayant une créance certaine, liquide et exigible. En effet, dans ces cas, les recours des créanciers seront suspendus indéfiniment et ils ne pourront jamais exercer compensation pré-post, l'entreprise insolvable étant devenue après la vente une « coquille vide ». Par ailleurs, permettre la compensation pré-post n'aura pas comme effet de faire dérailler le processus de restructuration de l'entreprise, ce processus étant alors inexistant.

En l'espèce, il n'est pas nécessaire de trancher la question de savoir si la créance PRV doit être qualifiée de réclamation fondée sur des « faux-semblants ou la présentation erronée et frauduleuse des faits » au sens de l'al. 19(2)d) de la *LACC*. L'article 21 de la *LACC* doit être interprété comme permettant d'opérer compensation pré-post, peu importe qu'il s'agisse ou non d'une réclamation qui découle d'une fraude au sens de l'al. 19(2)d). Certes, la démonstration du caractère frauduleux de la dette à l'origine d'une créance constitue un facteur pertinent dans l'exercice par le juge surveillant de son pouvoir discrétionnaire de permettre la compensation pré-post; cependant, la question de savoir si la créance PRV de la Ville résulte d'une fraude est une question à laquelle il appartient à la juge surveillante de répondre, et non à la Cour.

Étant donné que, s'estimant liée par les conclusions de la Cour d'appel du Québec dans l'arrêt *Kitco*, la juge surveillante n'a pas exercé le pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*, il ne revient pas à la Cour de l'exercer afin de décider s'il y a lieu d'autoriser ou non la compensation pré-post. Les juges surveillants sont les mieux placés pour décider s'ils doivent exercer leur pouvoir discrétionnaire dans une situation donnée.

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BOA COMPEER000613

instance, it is not in the interests of justice for the Court to step into that court's shoes and decide these matters.

Cases Cited

By Wagner C.J. and Côté J.

Overruled: *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268; **considered:** *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, aff'd 2015 BCCA 426, 378 B.C.A.C. 116; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147; *Air Canada, Re* (2003), 45 C.B.R. (4th) 13; **referred to:** *R. v. Fedele*, 2018 QCCA 1901; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522; *Léger v. Ouellet*, 2011 QCCA 1858; *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225; *Lambert v. Macara*, [2004] R.J.Q. 2637; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710; *Terrain DEV Immobilier inc. v. Charron*, 2021 QCCA 417; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164; *Tavan v. Rostami*, 2014 QCCA 304; *Guilbert v. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280; *Sharma v. Sandhu*, 2019 MBQB 160; *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102, aff'd (1985), 53 C.B.R. (N.S.) 275; *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261; *Johnson v. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369; *Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145; *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54; *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1; *Associated Investors of Canada Ltd. (Manager of) v. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Stein v. Blake*, [1996] 1 A.C. 243; *Woodward's*

Dans les affaires qui reposent sur l'exercice d'un pouvoir discrétionnaire par un tribunal de première instance, il n'est pas dans l'intérêt de la justice que la Cour se mette à la place de ce tribunal et tranche ces questions.

Jurisprudence

Citée par le juge en chef Wagner et la juge Côté

Arrêt rejeté : *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173; **arrêts examinés :** *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, conf. par 2015 BCCA 426, 378 B.C.A.C. 116; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147; *Air Canada, Re* (2003), 45 C.B.R. (4th) 13; **arrêts mentionnés :** *R. c. Fedele*, 2018 QCCA 1901; *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522; *Léger c. Ouellet*, 2011 QCCA 1858; *Dupuis c. Cernato Holdings Inc.*, 2019 QCCA 376; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225; *Lambert c. Macara*, [2004] R.J.Q. 2637; *Canada Mortgage and Housing Corp. c. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710; *Terrain DEV Immobilier inc. c. Charron*, 2021 QCCA 417; *Pelletier c. CAE Rive-Nord*, 2019 QCCA 2164; *Tavan c. Rostami*, 2014 QCCA 304; *Guilbert c. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280; *Sharma c. Sandhu*, 2019 MBQB 160; *Royal Bank of Canada c. Hejna*, 2013 ONSC 1719; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102, conf. par (1985), 53 C.B.R. (N.S.) 275; *Agriculture Financial Services Corp. c. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255; *The Toronto-Dominion Bank c. Merenick*, 2007 BCSC 1261; *Johnson c. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369; *Meridian Developments Inc. c. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145; *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54; *Parc industriel Laprade inc. c. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1; *Associated Investors of Canada Ltd. (Manager of) c. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Husky Oil Operations Ltd. c. Ministre*

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Ltd., Re (1993), 79 B.C.L.R. (2d) 257; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11; *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299.

By Brown J. (dissenting)

Quebec (Agence du revenu) v. Kitco Metals Inc., 2017 QCCA 268; *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105; *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, aff'd 2015 BCCA 426, 378 B.C.A.C. 116; *Re Just Energy Corp.*, 2021 ONSC 1793; *Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132; *Air Canada, Re* (2003), 45 C.B.R. (4th) 13; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147; *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, [2021] 2 S.C.R. 704.

Statutes and Regulations Cited

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12.

Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR, c. R-2.2.0.0.3, ss. 1, Chapter II, 3 to 9, Chapter III, 10 to 17.

Act to give effect to the Charbonneau Commission recommendations on political financing, S.Q. 2016, c. 18.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 71, 97(3), 121(1), 178(1)(e).

Civil Code of Québec, art. 2849.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6(1), Part II, 11, 11.01, 11.02, 11.08, 11.1, Part III, 19, 20, 21, 32.

Integrity in Public Contracts Act, S.Q. 2012, c. 25.

Voluntary Reimbursement Program, CQLR, c. R-2.2.0.0.3, r. 1, ss. 1, 4, 7, 8.

du Revenu national, [1995] 3 R.C.S. 453; *Stein c. Blake*, [1996] 1 A.C. 243; *Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11; *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299.

Citée par le juge Brown (dissident)

Québec (Agence du revenu) c. Métaux Kitco inc., 2017 QCCA 268, 46 C.B.R. (6th) 173; *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, 2005 CSC 52, [2005] 2 R.C.S. 564; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105; *Cam-Net Communications c. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, conf. par 2015 BCCA 426, 378 B.C.A.C. 116; *Re Just Energy Corp.*, 2021 ONSC 1793; *Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132; *Air Canada, Re* (2003), 45 C.B.R. (4th) 13; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147; *Société Radio-Canada c. Manitoba*, 2021 CSC 33, [2021] 2 R.C.S. 704.

Lois et règlements cités

Code civil du Québec, art. 2849.

Loi donnant suite aux recommandations de la Commission Charbonneau en matière de financement politique, L.Q. 2016, c. 18.

Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu, L.C. 1997, c. 12.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 71, 97(3), 121(1), 178(1)e).

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 6(1), partie II, 11, 11.01, 11.02, 11.08, 11.1, partie III, 19, 20, 21, 32.

Loi sur les liquidations et les restructurations, L.R.C. 1985, c. W-11, art. 73(1).

Loi sur l'intégrité en matière de contrats publics, L.Q. 2012, c. 25.

Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de

2021 SCC 53 (CanLII)

BOA COMPEER000615

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 73(1).

Authors Cited

Alberta. Court of Queen's Bench. *Alberta Template CCAA Initial Order*, January 2019 (online: https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-(alberta)---jakr-markup65b9d3391b316d6b9fc9ff00001037d2.pdf?sfvrsn=e986ad80_4; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_1_eng.pdf).

Anderson, A. Robert, Thomas Gelbman and Benjamin Pullen. "Recent Developments in the Law of Set-off", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009*. Toronto: Carswell, 2010, 1.

Boucher, Bernard. "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration*, par Stéphane Rousseau, dir. Montréal: LexisNexis, 2010, fascicule 14 (feuilles mobiles mises à jour avril 2021, envoi nº 20).

British Columbia. Supreme Court. *Model CCAA Initial Order*, August 1, 2015 (online: https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/CCAA_Model_Initial_Order.docx; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_2_eng.pdf).

Brochu, Denis. *Précis de la faillite et de l'insolvabilité*, 5e éd. Montréal: LexisNexis, 2016.

Code civil du Québec: Annotations — Commentaires 2020-2021, 5e éd. par Benoît Moore, dir., et autres. Montréal: Yvon Blais, 2020.

Edwards, Stanley E. "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587.

Houlden, L. W., G. B. Morawetz and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 3, 4th ed. rev. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2021, release 3).

Keay, Andrew. "Insolvency Law: A Matter of Public Interest?" (2000), 51 *N. Ir. Legal Q.* 509.

McElcheran, Kevin P. *Commercial Insolvency in Canada*, 4th ed. Toronto: LexisNexis, 2019.

Morin, Luc, and Guillaume-Pierre Michaud. "Set-Off and Compensation in Insolvency Restructuring under the *BIA*/*CCAA*: After the *Kitco* and *Beyond the Rack* Decisions", in Janis P. Sarra and Barbara Romaine,

manœuvres dolosives dans le cadre de contrats publics, RLRQ, c. R-2.2.0.0.3, art. 1, chapitre II, 3 à 9, chapitre III, 10 à 17.

Programme de remboursement volontaire, RLRQ, c. R-2.2.0.0.3, r. 1, art. 1, 4, 7, 8.

Doctrine et autres documents cités

Alberta. Cour du Banc de la Reine. *Alberta Template CCAA Initial Order*, January 2019 (en ligne : https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-(alberta)---jakr-markup65b9d3391b316d6b9fc9ff00001037d2.pdf?sfvrsn=e986ad80_4; version archivée : https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_1_eng.pdf).

Anderson, A. Robert, Thomas Gelbman and Benjamin Pullen. « Recent Developments in the Law of Set-off », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009*, Toronto, Carswell, 2010, 1.

Boucher, Bernard. « Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration*, par Stéphane Rousseau, dir., Montréal, LexisNexis, 2010, fascicule 14 (feuilles mobiles mises à jour avril 2021, envoi nº 20).

Brochu, Denis. *Précis de la faillite et de l'insolvabilité*, 5e éd., Montréal, LexisNexis, 2016.

Code civil du Québec : Annotations — Commentaires 2020-2021, 5e éd. par Benoît Moore, dir., et autres, Montréal, Yvon Blais, 2020.

Colombie-Britannique. Cour suprême. *Model CCAA Initial Order*, August 1, 2015 (en ligne : https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/CCAA_Model_Initial_Order.docx; version archivée : https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_2_eng.pdf).

Edwards, Stanley E. « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587.

Houlden, L. W., G. B. Morawetz and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 3, 4th ed. rev., Toronto, Thomson Reuters, 2019 (loose-leaf updated 2021, release 3).

Keay, Andrew. « Insolvency Law : A Matter of Public Interest? » (2000), 51 *N. Ir. Legal Q.* 509.

McElcheran, Kevin P. *Commercial Insolvency in Canada*, 4th ed., Toronto, LexisNexis, 2019.

Morin, Luc, and Guillaume-Pierre Michaud. « Set-Off and Compensation in Insolvency Restructuring under the *BIA*/*CCAA* : After the *Kitco* and *Beyond the Rack* Decisions », in Janis P. Sarra and Barbara Romaine,

2021 SCC 53 (CanLII)

BOA COMPEER000616

eds., *Annual Review of Insolvency Law 2016*. Toronto: Thomson Reuters, 2017, 311.

Ontario. Superior Court of Justice. Commercial List. *Initial Order*, January 21, 2014 (online: https://www.ontariocourts.ca/scj/files/forms/com/intitial-order-CCAA-EN.doc; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_3_eng.pdf).

Quebec. Superior Court. Commercial Division. *Initial Order*, May 2014 (online: https://www.barreaudemontreal.qc.ca/sites/default/files/frm-ordonnanceinitiale_mai2014.doc; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_4_eng.pdf).

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. Toronto: Carswell, 2013.

Sarra, Janis P. "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2016*. Toronto: Thomson Reuters, 2017, 9.

Sarra, Janis P., Geoffrey B. Morawetz and L. W. Houlden. *The 2020-2021 Annotated Bankruptcy And Insolvency Act*. Toronto: Thomson Reuters, 2020.

Saskatchewan. Court of Queen's Bench. *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (online: https://sasklawcourts.ca/wp-content/uploads/2021/07/QB1.CCAAInitialOrder.docx; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_5_eng.pdf).

Thornton, Robert. "Air Canada and Stelco: Legal Developments and Practical Lessons", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2006*. Toronto: Thomson/Carswell, 2007, 73.

Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed. Toronto: Irwin Law, 2015.

APPEAL from a judgment of the Quebec Court of Appeal (Rochette, Healy and Ruel JJ.A.), 2020 QCCA 438, [2020] J.Q. nº 1852 (QL), 2020 CarswellQue 1987 (WL Can.), affirming a decision of Corriveau J., 2019 QCCS 2316, [2019] J.Q. nº 4840 (QL), 2019 CarswellQue 5032 (WL Can.). Appeal dismissed, Brown J. dissenting.

Raphaël Lescop and *Eleni Yiannakis*, for the appellant.

Guy P. Martel and *Danny Duy Vu*, for the respondent.

eds., *Annual Review of Insolvency Law 2016*, Toronto, Thomson Reuters, 2017, 311.

Ontario. Cour supérieure de justice. Rôle des affaires commerciales. *Ordonnance initiale*, 21 janvier 2014 (en ligne : https://www.ontariocourts.ca/scj/files/forms/com/intitial-order-CCAA-FR.doc; version archivée : https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_3_fra.pdf).

Québec. Cour supérieure. Chambre commerciale. *Ordonnance initiale*, mai 2014 (en ligne : https://www.barreaudemontreal.qc.ca/sites/default/files/frm-ordonnanceinitiale_mai2014.doc; version archivée : https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_4_fra.pdf).

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed., Toronto, Carswell, 2013.

Sarra, Janis P. « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2016*, Toronto, Thomson Reuters, 2017, 9.

Sarra, Janis P., Geoffrey B. Morawetz and L. W. Houlden. *The 2020-2021 Annotated Bankruptcy And Insolvency Act*, Toronto, Thomson Reuters, 2020.

Saskatchewan. Cour du Banc de la Reine. *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (en ligne : https://sasklawcourts.ca/wp-content/uploads/2021/07/QB1.CCAAInitialOrder.docx; version archivée : https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_5_eng.pdf).

Thornton, Robert. « Air Canada and Stelco : Legal Developments and Practical Lessons », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2006*, Toronto, Thomson/Carswell, 2007, 73.

Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed., Toronto, Irwin Law, 2015.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Rochette, Healy et Ruel), 2020 QCCA 438, [2020] J.Q. nº 1852 (QL), 2020 CarswellQue 1987 (WL Can.), qui a confirmé une décision de la juge Corriveau, 2019 QCCS 2316, [2019] J.Q. nº 4840 (QL), 2019 CarswellQue 5032 (WL Can.). Pourvoi rejeté, le juge Brown est dissident.

Raphaël Lescop et *Eleni Yiannakis*, pour l'appelante.

Guy P. Martel et *Danny Duy Vu*, pour l'intimée.

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BOA COMPEER000617

Alain Tardif, for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP.

Luc Béliveau, for the intervener Thornhill Investments Inc.

Elizabeth Ferland, for the intervener Ville de Laval.

Marc Duchesne, for the intervener Union des municipalités du Québec.

English version of the judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Martin JJ. delivered by

THE CHIEF JUSTICE AND CÔTÉ J. —

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Alain Tardif, pour les intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP.

Luc Béliveau, pour l'intervenante Thornhill Investments Inc.

Elizabeth Ferland, pour l'intervenante la Ville de Laval.

Marc Duchesne, pour l'intervenante l'Union des municipalités du Québec.

Le jugement du juge en chef Wagner et des juges Moldaver, Karakatsanis, Côté, Rowe et Martin a été rendu par

LE JUGE EN CHEF ET LA JUGE CÔTÉ —

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I. Introduction

[1] This appeal raises an issue relating to compensation, or set-off in a common law setting, between two debts in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The question is whether compensation is permitted for debts between the same parties: on the one hand, a debt resulting from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3 ("Bill 26"), that predates an initial order made under the *CCAA* and, on the other hand, a debt between the same parties that postdates that order. In these reasons, we will use the expression "pre-post compensation" to refer generally to compensation between debts arising before and after an initial order.

[2] This question thus affords the Court an occasion to interpret, for the first time, certain provisions of Bill 26 as well as the regulation made under it, the *Voluntary Reimbursement Program*, CQLR, c. R-2.2.0.0.3, r. 1 ("VRP Regulation"). In doing so, we will clarify for public bodies the burden of proof that rests on them in seeking to establish that a claim arising from an agreement entered into under the Voluntary Reimbursement Program ("VRP") is fraudulent.

[3] Bill 26 was passed by the Quebec National Assembly in March 2015 in response to a commission

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I. Introduction

[1] Le présent pourvoi soulève un problème de compensation entre deux dettes dans le contexte de procédures engagées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »). Il s'agit de savoir si la compensation est permise entre des dettes entre les mêmes parties, d'une part, une dette résultant de la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3 (« Loi 26 »), antérieure à une ordonnance initiale émise en vertu de la *LACC*, et, d'autre part, une dette postérieure à cette ordonnance encourue entre les mêmes parties. Dans les présents motifs, nous utiliserons l'expression « compensation pré-post » pour désigner de manière générale la compensation entre des dettes nées avant et après l'émission d'une ordonnance initiale.

[2] Cette question fournit ainsi à notre Cour l'occasion d'interpréter pour la première fois certaines dispositions de la Loi 26, ainsi que son règlement d'application, le *Programme de remboursement volontaire*, RLRQ, c. R-2.2.0.0.3, r. 1 (« règlement PRV »). Ce faisant, nous clarifions, à l'intention des organismes publics, le fardeau de preuve qui leur incombe lorsqu'ils tentent d'établir le caractère frauduleux d'une créance résultant d'une entente conclue en vertu du Programme de remboursement volontaire (« PRV »).

[3] La Loi 26 a été adoptée par l'Assemblée nationale du Québec en mars 2015 à la suite d'une

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of inquiry that had brought to light the existence of schemes involving collusion and corruption in the awarding and management of public contracts in the construction industry ("Charbonneau Commission"), and the VRP Regulation was made a few months later. The program resulting from this legislation, which was in effect for two years, allowed enterprises to "reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics" (s. 3 of Bill 26).

[4] To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a "claim that relates to" a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" pursuant to s. 19(2)(d) of the *CCAA*. We would answer this question in the negative. It cannot be presumed that a claim arising from the VRP falls within that provision where no evidence to this effect has been tendered. We also conclude that a court should generally exercise its discretion to stay pre-post compensation, although it may, in rare cases, refuse such a stay. As well, the court may later lift the stay of the right to pre-post compensation in appropriate cases. In the case at bar, however, we conclude that the initial order stayed the right of the appellant, Ville de Montréal ("City"), to pre-post compensation and that it would not be appropriate to lift the stay in relation to the claims in issue.

[5] The appeal should therefore be dismissed.

II. Facts

[6] SM Group, which at the relevant time was a consulting engineering firm, performed a variety of contracts for the City over a period of several years. The Charbonneau Commission's work uncovered a

commission d'enquête qui a mis en lumière l'existence de stratagèmes de collusion et de corruption dans l'octroi et la gestion de contrats publics dans l'industrie de la construction (« Commission Charbonneau »), et le règlement PRV a été pris quelques mois plus tard. Mis en vigueur pour une période de deux ans, le programme issu de cette loi a permis à des entreprises de « rembourser certaines sommes payées injustement dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public et pour lequel il aurait pu y avoir fraude ou manœuvre dolosive » (art. 3 de la Loi 26).

[4] Pour trancher la question relative à la compensation dans le contexte du présent pourvoi, notre Cour doit d'abord déterminer si une créance découlant d'une entente conclue dans le cadre du PRV constitue nécessairement une « réclamation se rapportant à » une « dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits » aux termes de l'al. 19(2)d) de la *LACC*. Nous sommes d'avis de répondre à cette question par la négative. On ne peut présumer qu'une créance issue du PRV est visée par cette disposition lorsqu'aucune preuve n'a été administrée à cet effet. Nous concluons par ailleurs que le tribunal devrait généralement exercer son pouvoir discrétionnaire afin de suspendre la compensation pré-post, bien qu'il puisse, dans de rares cas, refuser de la suspendre. De même, le tribunal peut, par la suite, lever la suspension du droit à la compensation pré-post dans les cas qui s'y prêtent. En l'espèce, toutefois, nous concluons que l'ordonnance initiale a suspendu le droit de l'appelante Ville de Montréal (« Ville ») à la compensation pré-post et qu'il n'est pas indiqué de lever cette suspension pour ce qui est des créances en litige.

[5] En conséquence, l'appel doit être rejeté.

II. Faits

[6] Groupe SM, qui était au moment des faits une firme de génie-conseil, a exécuté divers contrats pour la Ville sur une période de plusieurs années. Les travaux de la Commission Charbonneau ont

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link between SM Group and certain central players in the collusion schemes. Two of its former officers were in fact charged with criminal offences. SM Group subsequently became insolvent.

[7] On August 24, 2018, the Quebec Superior Court made an initial order by which SM Group became subject to proceedings under the *CCAA* and the rights and remedies of creditors were stayed. The respondent, Deloitte Restructuring Inc. ("Deloitte"), was appointed as monitor. Following that order, SM Group continued to perform work for the City, including the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

[8] The City refused to pay for that work. On November 7, 2018, it invoked its right to effect compensation between its debt to SM Group for the work done after the initial order and two claims against SM Group that, according to the City, arose before the order and resulted from fraud on SM Group's part.

[9] On November 12, 2018, the Superior Court approved the sale of some of SM Group's assets to Thornhill Investments Inc. ("Thornhill"). One week later, SM Group's contracts were assigned to Thornhill.

[10] The two claims raised by the City are related to the application of Bill 26. The purpose of that statute, read in conjunction with the *Integrity in Public Contracts Act*, S.Q. 2012, c. 25, enacted in 2012, and the *Act to give effect to the Charbonneau Commission recommendations on political financing*, S.Q. 2016, c. 18, enacted in 2016, is to strengthen public confidence in government institutions by addressing the revelations made by the Charbonneau Commission. Bill 26 has been described as [TRANSLATION] "a statutory benchmark for establishing a lack of ethics and lax (if not criminal) morals in a number of enterprises in relation to the awarding of public contracts in Quebec" (*R. v. Fedele*, 2018 QCCA 1901, at para. 44 (CanLII)).

révélé l'existence d'un lien entre Groupe SM et des acteurs au cœur des stratagèmes de collusion. Deux de ses anciens dirigeants ont d'ailleurs fait l'objet d'accusations criminelles. Par la suite, Groupe SM est devenu insolvable.

[7] Le 24 août 2018, la Cour supérieure du Québec (« Tribunal ») rend une ordonnance initiale assujettissant Groupe SM à des procédures déposées en vertu de la *LACC* et suspendant les droits et recours des créanciers. L'intimée Restructuration Deloitte Inc. (« Deloitte ») est nommée à titre de contrôleur. Postérieurement à cette ordonnance, Groupe SM continue à effectuer des travaux dont bénéficie la Ville, notamment la construction du pont Samuel-De Champlain et la réfection de l'échangeur Turcot.

[8] La Ville refuse de payer ces travaux. Le 7 novembre 2018, elle invoque son droit d'opérer compensation entre sa dette envers Groupe SM résultant des travaux effectués postérieurement à l'ordonnance initiale, et deux créances de Groupe SM qui, soutient-elle, sont nées avant l'ordonnance et résulteraient de fraude de ce dernier.

[9] Le 12 novembre 2018, le Tribunal approuve la vente partielle des actifs de Groupe SM à Thornhill Investments Inc. (« Thornhill »). Une semaine plus tard, les contrats de Groupe SM sont cédés à Thornhill.

[10] Les deux créances invoquées par la Ville sont liées à l'application de la Loi 26. Lue avec la *Loi sur l'intégrité en matière de contrats publics*, L.Q. 2012, c. 25, adoptée en 2012, et la *Loi donnant suite aux recommandations de la Commission Charbonneau en matière de financement politique*, L.Q. 2016, c. 18, adoptée en 2016, la Loi 26 a pour objectif de renforcer la confiance du public dans les institutions publiques en donnant suite aux révélations émanant de la Commission Charbonneau. Elle a été décrite comme « un repère législatif permettant de conclure au manque d'éthique et à la morale laxiste (sinon criminelle) dans plusieurs entreprises en lien avec l'octroi de contrats publics au Québec » (*R. c. Fedele*, 2018 QCCA 1901, par. 44 (CanLII)).

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[11] The first claim the City alleges it has against SM Group arises from a settlement agreement entered into in November 2017 by SM Group and the Minister of Justice, acting on the City's behalf, under the VRP ("VRP claim"). The second is based on a proceeding brought by the City against SM Group in September 2018, in which it claimed more than $14 million from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract ("water meter contract claim").

[12] Because SM Group had failed to repay the VRP claim and because the sale of certain assets to Thornhill was imminent, the City advised SM Group that it intended to effect compensation between what it owed SM Group and the above-mentioned claims, noting that those claims could not be discharged or dealt with by a compromise or arrangement in the planned restructuring process given that they resulted from fraud and from a misappropriation of public funds.

[13] In response, Deloitte applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group for work performed for the City.

III. Judicial History

A. *Quebec Superior Court, 2019 QCCS 2316 (Corriveau J.)*

[14] The supervising judge granted Deloitte's application for a declaratory judgment and held that pre-post compensation could not be effected in favour of the City. Even though, in her view, the VRP claim was linked to an allegation of fraud that had not been refuted by SM Group, she concluded that, according to the principles laid down in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, pre-post compensation was not possible. She also concluded that the water meter contract claim was neither liquid nor exigible, which precluded compensation.

[11] La première créance que la Ville prétend détenir contre Groupe SM résulte d'une entente de règlement intervenue en novembre 2017 entre Groupe SM et la ministre de la Justice, agissant pour le compte de la Ville, dans le cadre du PRV (« créance PRV »). La seconde créance est fondée sur un recours intenté par la Ville contre Groupe SM, en septembre 2018, dans lequel elle lui réclame plus de 14 millions de dollars au motif qu'il aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau (« créance relative au contrat des compteurs d'eau »).

[12] Vu le défaut de Groupe SM de rembourser la créance PRV et l'imminence de la vente de certains actifs à Thornhill, la Ville informe Groupe SM de son intention d'opérer compensation entre ce qu'elle lui doit et les créances ci-haut mentionnées, tout en précisant que ces créances ne peuvent être purgées ou compromises par la restructuration envisagée puisqu'elles découlent de la fraude et d'un détournement de fonds du Trésor public.

[13] En réponse, Deloitte demande un jugement déclaratoire portant que les sommes dues à Groupe SM par la Ville pour des travaux exécutés pour son bénéfice ne peuvent faire l'objet de compensation.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2019 QCCS 2316 (la juge Corriveau)*

[14] La juge surveillante accueille la demande en jugement déclaratoire de Deloitte et décide que la compensation pré-post ne peut s'opérer en faveur de la Ville. Même si, selon elle, la créance PRV est liée à une allégation de fraude non réfutée par Groupe SM, la juge surveillante conclut que, selon les enseignements de l'arrêt *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, la compensation pré-post n'est pas possible. Elle statue par ailleurs que la créance relative au contrat des compteurs d'eau n'est ni liquide ni exigible, de sorte que la compensation ne peut être opérée.

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B. *Quebec Court of Appeal, 2020 QCCA 438 (Rochette and Healy JJ.A., Ruel J.A. Dissenting in Part)*

[15] Rochette J.A., writing for the majority, rejected the City's argument regarding the VRP claim. Relying on *Kitco*, he reached the same conclusion as the supervising judge: that pre-post compensation could not be effected in this case. He also rejected the City's argument that a claim relating to fraud falling within s. 19(2)(d) of the *CCAA* is an exception to the rule stated in that case. In any event, he expressed the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, Rochette J.A. added that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

[16] Ruel J.A., dissenting in part, agreed with his colleagues on the nature of the water meter contract claim. However, he was of the view that the VRP claim had to be presumed to fall within s. 19(2)(d) of the *CCAA* and that *Kitco* had to be distinguished on the basis that it had been rendered in a different context. In the final analysis, Ruel J.A. found that s. 19(2)(d) of the *CCAA* represents an exception to the principle established in that case and that it therefore allowed pre-post compensation between the two parties' respective debts.

IV. Issues

[17] This appeal raises the following three questions:

1. Is the VRP claim a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*?
2. Does the *CCAA* permit compensation between a debt that arises before an initial order and one that arises after that order?
3. If compensation is permitted, should the City be authorized to withhold the payments owed

B. *Cour d'appel du Québec, 2020 QCCA 438 (les juges Rochette et Healy, le juge Ruel, dissident en partie)*

[15] Rédigeant pour la majorité, le juge Rochette rejette la prétention de la Ville relativement à la créance PRV. S'appuyant sur l'arrêt *Kitco*, il conclut, à l'instar de la juge surveillante, que la compensation pré-post ne peut s'opérer en l'espèce. En outre, il rejette l'argument de la Ville selon lequel une créance relative à la fraude visée par l'al. 19(2)d) de la *LACC* constitue une exception à la règle énoncée dans cet arrêt. Quoi qu'il en soit, il se dit d'avis que la Ville n'a pas prouvé que ses créances sont visées par cette disposition. Enfin, en ce qui concerne la créance relative au contrat des compteurs d'eau, le juge Rochette ajoute que les conditions de la compensation judiciaire ne sont pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration.

[16] Dissident en partie, le juge Ruel partage l'avis de ses collègues sur la nature de la créance relative au contrat des compteurs d'eau. Cependant, il est plutôt d'avis qu'il faut présumer que la créance PRV est visée par l'al. 19(2)d) de la *LACC* et que l'arrêt *Kitco* doit être distingué étant donné qu'il a été rendu dans un contexte différent. En dernière analyse, le juge Ruel estime que l'al. 19(2)d) de la *LACC* fait exception au principe établi dans cet arrêt et permet donc la compensation pré-post entre les dettes respectives des deux parties.

IV. Questions en litige

[17] Le présent pourvoi soulève les trois questions suivantes :

1. La créance PRV est-elle une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*?
2. La *LACC* autorise-t-elle la compensation entre une dette née avant une ordonnance initiale et une dette née après cette ordonnance?
3. Si la compensation est permise, la Ville devrait-elle être autorisée à retenir les paiements dus

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to SM Group until judgment is rendered in the case relating to the water meter contract?

[18] We will deal with these questions by considering each of the City's claims separately.

V. Analysis

[19] In essence, the City argues that the VRP claim cannot be dealt with by a compromise or arrangement because it relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. According to the City, such a claim falls outside the absolute prohibition against pre-post compensation imposed by *Kitco*. The City also argues that the absolute nature of the *Kitco* rule is inconsistent with the broad discretion conferred on supervising judges by the *CCAA*. It submits that supervising judges can, in exercising their discretion, authorize pre-post compensation in appropriate circumstances. The exercise of this discretion is particularly appropriate where fraud is involved.

[20] For the reasons that follow, we are of the view that the VRP claim in this case is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. We also conclude that a right to pre-post compensation, or set-off, invoked under the civil law or the common law can be stayed under ss. 11 and 11.02 of the *CCAA*. In our opinion, however, a supervising judge has the discretion to authorize pre-post compensation only in exceptional circumstances, given the high disruptive potential of this form of compensation. In this regard, the fact that the debt underlying a VRP claim is fraudulent, where this is shown, is a relevant factor in the exercise of the supervising judge's discretion. In this case, we find that it would not be appropriate to allow the City to effect compensation with respect to the VRP claim. Nor would it be appropriate to authorize the City to withhold the payments owed to SM Group pending the outcome of the case relating to the water meter contract.

à Groupe SM en attendant que jugement soit rendu dans le dossier relatif au contrat des compteurs d'eau?

[18] Nous traiterons de ces questions en abordant séparément chacune des créances invoquées par la Ville.

V. Analyse

[19] Essentiellement, la Ville soutient que la créance PRV est une réclamation qui ne peut être considérée dans le cadre d'une transaction ou d'un arrangement, puisqu'elle se rapporte à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. Selon la Ville, une telle réclamation échappe à l'interdiction absolue énoncée dans l'arrêt *Kitco* à l'égard de la compensation pré-post. La Ville plaide également que le caractère absolu de la règle de l'arrêt *Kitco* est incompatible avec le large pouvoir discrétionnaire conféré au juge surveillant par la *LACC*. La Ville estime que le juge surveillant peut, dans l'exercice de son pouvoir discrétionnaire, autoriser la compensation pré-post dans des circonstances appropriées. L'exercice de ce pouvoir est d'autant plus indiqué en présence de fraude.

[20] Pour les motifs qui suivent, nous sommes d'avis que la créance PRV visée en l'espèce n'est pas une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. Nous concluons par ailleurs que le droit à la compensation pré-post invoqué en vertu du droit civil ou de la common law peut être suspendu en application des art. 11 et 11.02 de la *LACC*. Toutefois, nous somme d'avis que le juge surveillant possède le pouvoir discrétionnaire d'autoriser la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. À cet égard, le caractère frauduleux de la dette à l'origine d'une créance PRV, lorsque démontré, constitue un facteur pertinent dans l'exercice de la discrétion du juge surveillant. En l'espèce, nous estimons qu'il ne serait pas indiqué de permettre à la Ville d'opérer compensation en ce qui concerne la créance PRV. Il ne serait pas non plus approprié d'autoriser la Ville à retenir les paiements dus à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau.

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A. *Voluntary Reimbursement Program Claim*

(1) Characterization of the Voluntary Reimbursement Program Claim

[21] We must begin by determining whether the VRP claim is a claim that relates to a fraudulent debt, because this is the premise behind the City's reasoning. For the reasons that follow, we conclude that this basic premise is not correct: the VRP claim is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. The mere fact that a debtor company participated in the VRP is not sufficient to infer that the company defrauded a public body. In light of this conclusion, it is not necessary for us to deal with Deloitte's alternative argument that s. 19 of the *CCAA* is inapplicable in this case because there is no plan providing for a compromise or arrangement.

[22] The first step in characterizing the VRP claim is to distinguish, for the purposes of the *CCAA*, claims that are subject to a compromise or arrangement from those that are not. Section 19(1) of the *CCAA* sets out the general scheme governing claims that may be dealt with by a compromise or arrangement:

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of

A. *Créance du Programme de remboursement volontaire*

(1) Qualification de la créance du Programme de remboursement volontaire

[21] Il nous incombe de déterminer, d'entrée de jeu, si la créance PRV est une réclamation se rapportant à une dette frauduleuse, puisque cette prémisse explique le raisonnement de la Ville. Pour les motifs qui suivent, nous concluons que cette prémisse fondamentale n'est pas fondée : la créance PRV n'est pas une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. En effet, la seule participation au PRV par une société débitrice n'est pas suffisante pour inférer la commission d'une fraude par cette dernière à l'endroit d'un organisme public. Considérant cette conclusion, il n'est pas nécessaire de nous prononcer sur l'argument subsidiaire de Deloitte selon lequel l'art. 19 de la *LACC* serait inapplicable en l'espèce, en raison de l'absence de plan prévoyant une transaction ou un arrangement.

[22] Pour qualifier la créance PRV, il faut d'abord distinguer, au sens de la *LACC*, les réclamations compromises par la transaction ou l'arrangement de celles qui ne le sont pas. Le paragraphe 19(1) de cette loi énonce le régime général encadrant les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement :

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le

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the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

[23] As an exception to this scheme, s. 19(2) of the *CCAA* provides that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud:

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

. . .

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; . . .

[24] The burden of proof applicable to this scheme can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which is analogous in every respect to s. 19(2)(d) of the *CCAA*. As this Court noted in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, these two statutes "for[m] part of an integrated body of insolvency law" (para. 78; see also *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522, at para. 74).

[25] To discharge its burden of proving that its claim relates to a debt "resulting from obtaining property or services by false pretences or fraudulent misrepresentation", a creditor must establish, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the

consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l'autre.

[23] À titre d'exception à ce régime, le par. 19(2) de la *LACC* prévoit que certaines réclamations ne peuvent être compromises, notamment celles découlant de fraude :

(2) La réclamation se rapportant à l'une ou l'autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l'arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n'ait voté en faveur de la transaction ou de l'arrangement proposé :

. . .

d) toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation de la compagnie qui découle d'une réclamation relative à des capitaux propres;

[24] Pour déterminer le fardeau de preuve applicable à ce régime, il convient de se référer à la jurisprudence et à la doctrine portant sur l'al. 178(1)e) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »), lequel s'apparente en tous points à l'al. 19(2)d) de la *LACC*. Comme notre Cour l'a souligné dans l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, ces deux lois « [font] partie d'un ensemble intégré de règles du droit de l'insolvabilité » (par. 78; voir aussi *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 74).

[25] Afin de satisfaire au fardeau qui lui incombe, c'est-à-dire démontrer que sa créance est une réclamation qui se rapporte à une dette « résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits », le créancier intéressé devra établir, par

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creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service (*Léger v. Ouellet*, 2011 QCCA 1858, at para. 30 (CanLII); *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376, at para. 37 (CanLII); see also L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 3, at H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, at para. 28; J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at pp. 1001 and 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5th ed. 2016), at pp. 502-3). Once these elements have been proved, the creditor of a claim to which s. 19(2)(d) of the *CCAA* applies is in a better position than other ordinary creditors, insofar as such a claim, while not conferring secured creditor status, cannot be dealt with by a compromise or arrangement (see Houlden, Morawetz and Sarra, at H§63). This exception to the general scheme established by s. 19(1) of the *CCAA* must be interpreted narrowly (see, e.g., by analogy, *Lambert v. Macara*, [2004] R.J.Q. 2637 (C.A.), at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24).

[26] The City's burden was certainly not negligible: it had to prove that SM Group had knowingly made a false representation that led to the VRP claim. However, the City considered it sufficient for that purpose to mention that the claim existed, and did not try to prove or even allege any of these elements, presuming or assuming that the VRP claim resulted from fraudulent representations.

[27] As a result, the content of the VRP agreement, Bill 26 and the VRP Regulation must be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. In this regard, and for the reasons that follow, we agree with the

prépondérance des probabilités, les quatre éléments suivants : (i) le débiteur lui a fait une représentation; (ii) cette représentation était fausse; (iii) le débiteur savait que la représentation était fausse; (iv) cette fausse représentation a été faite dans le but d'obtenir un bien ou un service (*Léger c. Ouellet*, 2011 QCCA 1858, par. 30 (CanLII); *Dupuis c. Cernato Holdings Inc.*, 2019 QCCA 376, par. 37 (CanLII); voir aussi L. W. Houlden, G. B. Morawetz et J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. rév. (feuilles mobiles)), vol. 3, H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, par. 28; J. P. Sarra, G. B. Morawetz et L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), p. 1001 et 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5e éd. 2016), p. 502-503). Une fois ces éléments prouvés, le créancier d'une réclamation visée par l'al. 19(2)d) de la *LACC* bénéficie d'une position plus avantageuse que les autres créanciers ordinaires, dans la mesure où cette réclamation ne peut être compromise dans le cadre d'une transaction ou d'un arrangement, quoiqu'elle ne confère pas le statut de créancier garanti (voir Houlden, Morawetz et Sarra, H§63). Cette exception au régime général institué par le par. 19(1) de la *LACC* doit être interprétée restrictivement (voir notamment, par analogie, *Lambert c. Macara*, [2004] R.J.Q. 2637 (C.A.), par. 96; *Canada Mortgage and Housing Corp. c. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, par. 24).

[26] Le fardeau qui incombait à la Ville n'était certes pas négligeable. En effet, elle devait prouver que Groupe SM avait sciemment fait une fausse représentation ayant mené à la créance PRV. Toutefois, la Ville a estimé, aux fins de cette démonstration, qu'il suffisait de mentionner l'existence de cette créance, et n'a pas cherché à prouver ni même à alléguer l'un ou l'autre de ces éléments, présumant ou tenant pour acquis que la créance PRV découlait de représentations frauduleuses.

[27] En conséquence, pour déterminer si la créance PRV peut être considérée dans le cadre d'une transaction ou d'un arrangement, il est nécessaire d'interpréter le contenu de l'entente PRV, la Loi 26 ainsi que le règlement PRV. À cet égard, et pour les raisons

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majority of the Court of Appeal that s. 19(2)(d) of the *CCAA* does not apply to the VRP claim.

[28] First, the content of the VRP agreement itself is a complete bar to the City's argument that participation in the program in itself justifies a finding that the City's claim results from SM Group's fraudulent activities. Because this confidential agreement entered into by the parties clearly stipulates that the amount fixed in the agreement can in no way be considered to constitute an admission of liability, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the *CCAA*. The onus was therefore on the City to prove, in accordance with the provisions of that statute, that SM Group had knowingly made a false representation to it in order to obtain property or a service.

[29] In this regard, there is, moreover, a well-established principle in the case law that a court must generally make its own findings of fact in applying s. 19(2)(d) (see Houlden, Morawetz and Sarra, at H§63). This is true, for example, even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings. It can be inferred by analogy from the case law on s. 178(1)(e) of the *BIA* that the courts have been particularly consistent and rigorous in assessing the evidence presented to them in this regard (see, e.g., *Terrain DEV Immobilier inc. v. Charron*, 2021 QCCA 417, at para. 2 (CanLII); *Dupuis*, at paras. 36-40; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164, at paras. 13-19 (CanLII); *Tavan v. Rostami*, 2014 QCCA 304, at paras. 3-6 (CanLII); *Léger*, at paras. 30-40; *Guilbert v. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, at paras. 20-25; *Sharma v. Sandhu*, 2019 MBQB 160, at paras. 38-45 (CanLII); *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719, at paras. 90-92 (CanLII); *Berger*, at paras. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (Ont. H.C.J.), at pp. 106-7, aff'd (1985), 53 C.B.R. (N.S.) 275 (C.A.); *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB

que nous expliquons ci-dessous, nous partageons les conclusions des juges majoritaires de la Cour d'appel : la créance PRV n'est pas visée par l'al. 19(2)d) de la *LACC*.

[28] En premier lieu, le contenu même de l'entente PRV constitue un obstacle dirimant à la prétention de la Ville selon laquelle le seul fait de la participation à ce programme suffit pour conclure que sa créance résulte des activités frauduleuses de Groupe SM. En effet, comme il est clairement stipulé dans cette entente confidentielle intervenue entre les parties que la somme convenue dans celle-ci ne peut en aucun cas être assimilée à une admission de responsabilité, on ne saurait présumer que la créance PRV constitue une réclamation visée à l'al. 19(2)d) de la *LACC*. En conséquence, il incombait à la Ville de prouver, conformément aux dispositions de cette loi, que Groupe SM lui avait faussement et sciemment fait une représentation afin d'obtenir un bien ou un service.

[29] D'ailleurs, en cette matière, une règle jurisprudentielle bien établie veut qu'un tribunal tire généralement ses propres conclusions factuelles aux fins d'application de l'al. 19(2)d) (voir Houlden, Morawetz et Sarra, H§63). Il en est ainsi, notamment, malgré la présence de conclusions liées possiblement à la fraude prononcées dans le cadre d'un procès antérieur, ou encore lorsqu'un jugement par défaut ou un acquiescement à jugement contiendrait de telles conclusions. La jurisprudence portant sur l'al. 178(1)e) de la *LFI* permet d'inférer, par analogie, que les tribunaux se montrent particulièrement constants et rigoureux dans l'appréciation de la preuve qui leur est présentée à cet égard (voir notamment *Terrain DEV Immobilier inc. c. Charron*, 2021 QCCA 417, par. 2 (CanLII); *Dupuis*, par. 36-40; *Pelletier c. CAE Rive-Nord*, 2019 QCCA 2164, par. 13-19 (CanLII); *Tavan c. Rostami*, 2014 QCCA 304, par. 3-6 (CanLII); *Léger*, par. 30-40; *Guilbert c. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, par. 20-25; *Sharma c. Sandhu*, 2019 MBQB 160, par. 38-45 (CanLII); *Royal Bank of Canada c. Hejna*, 2013 ONSC 1719, par. 90-92 (CanLII); *Berger*, par. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (H.C.J. Ont.), p. 106-107, conf. par (1985), 53 C.B.R. (N.S.) 275 (C.A.);

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183, 58 C.B.R. (5th) 301, at paras. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, at paras. 37-63; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261, at paras. 30-48 (CanLII); *Johnson v. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, at paras. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, at paras. 53-58).

[30] Second, Bill 26 and the VRP Regulation published in the *Gazette officielle du Québec* pursuant to ss. 3 and 4 of that statute do not provide any greater support for the City's position. We agree with the majority of the Court of Appeal, who rejected the idea of a statutory presumption or a presumption of fact that a debtor made fraudulent representations based solely on the fact that it participated in the VRP. That scheme, which was in effect from November 2015 to December 2017, created no such presumption.

[31] The purpose of the VRP as defined in s. 3 of Bill 26 — in Chapter II, entitled "Reimbursement Program" — supports this conclusion:

3. The Minister publishes in the *Gazette officielle du Québec* a voluntary, fixed-term reimbursement program to make it possible for an enterprise or a natural person mentioned in section 10 to reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics.

[32] The use of the words "may have been" in the phrase "there may have been fraud or fraudulent tactics" clearly contradicts the City's argument. Moreover, the same words are also used in s. 1 of the VRP Regulation in describing the purpose of that program:

1. The Voluntary Reimbursement Program makes it possible for every natural person and every enterprise to reimburse certain amounts improperly paid by a public body in the course of the tendering, awarding or management of a public contract entered into after 1 October 1996 in relation to which there may have been fraud or fraudulent tactics.

Agriculture Financial Services Corp. c. Zaborski, 2009 ABQB 183, 58 C.B.R. (5th) 301, par. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, par. 37-63; *The Toronto-Dominion Bank c. Merenick*, 2007 BCSC 1261, par. 30-48 (CanLII); *Johnson c. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, par. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, par. 53-58).

[30] En deuxième lieu, la Loi 26, tout comme le règlement PRV publié dans la *Gazette officielle du Québec* en vertu des art. 3 et 4 de cette loi, n'appuient pas davantage la thèse de la Ville. Nous partageons l'avis des juges majoritaires de la Cour d'appel, qui rejettent l'idée d'une présomption légale ou factuelle de l'existence de représentations frauduleuses de la part d'un débiteur du seul fait de sa participation au PRV. Ce régime, qui a été en vigueur de novembre 2015 à décembre 2017, n'a pas créé une telle présomption.

[31] En effet, l'objet du PRV tel qu'il est défini à l'art. 3 de la Loi 26, au chapitre II intitulé « Programme de remboursement », étaye cette conclusion :

3. Le ministre publie à la *Gazette officielle du Québec* un programme de remboursement volontaire à durée déterminée afin qu'une entreprise ou une personne physique mentionnée à l'article 10 puisse rembourser certaines sommes payées injustement dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public et pour lequel il aurait pu y avoir fraude ou manœuvre dolosive.

[32] L'emploi du conditionnel dans l'expression « il aurait pu y avoir fraude ou manœuvre dolosive » contredit clairement la thèse avancée par la Ville. De plus, le conditionnel est également utilisé à l'art. 1 du règlement PRV pour décrire l'objet de ce programme :

1. Le Programme de remboursement volontaire permet à toute personne physique et à toute entreprise de rembourser certaines sommes payées injustement par un organisme public dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public, conclu après le 1er octobre 1996, et pour lequel il aurait pu y avoir fraude ou ma[n]œuvre dolosive.

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[33] The fact that fraud is characterized as a possibility rather than a certainty is by no means surprising. Given the VRP's purpose of recovering amounts paid improperly by public bodies, it stands to reason that Bill 26 does not provide for any mechanism to determine whether amounts agreed to under the VRP are in fact related, in whole or in part, to fraud. Section 7 of the VRP Regulation supports this point, since it states the following:

7. The fact that a natural person or an enterprise participates in the Program does not constitute an admission of liability or of a fault committed by the natural person or enterprise.

[34] The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8:

8. Every natural person or enterprise participating in the Program acknowledges that revealing information or sending documents within the Program framework does not restrict in any manner whatever a public body's capacity to bring civil proceedings against the natural person or enterprise in relation to public contracts for which a settlement has not been reached under the Program or to which the Act does not apply.

Every natural person or enterprise acknowledges that participation in the Program and the conclusion of an agreement under it in no manner protects the natural person or enterprise, or its officers, against any penal or criminal proceedings that have been or may be brought in connection with public contracts entered into by the natural person or enterprise.

[35] Evidence that a natural person or enterprise participated in the VRP therefore cannot on its own justify characterizing a claim as being related to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*.

[33] Que la fraude soit caractérisée comme une éventualité, par opposition à quelque chose de certain, n'a rien de surprenant. En effet, comme l'objectif du PRV consiste à récupérer des sommes payées injustement par des organismes publics, il va de soi que la Loi 26 ne prévoit aucun mécanisme pour déterminer si, dans les faits, les sommes convenues dans le cadre du PRV sont reliées, en partie ou en totalité, à une fraude. L'article 7 du règlement PRV appuie ce constat, puisqu'il précise ce qui suit :

7. Le fait pour une personne physique ou une entreprise de se prévaloir du Programme ne constitue pas une reconnaissance de responsabilité ni une admission qu'elle a commis une faute.

[34] La faute dont il est question à l'art. 7 relève de la responsabilité civile et se limite au contrat public visé par l'entente PRV. Lorsque le législateur entend faire référence à des procédures de nature pénale ou criminelle, ou encore à des recours civils se situant hors du champ de l'entente PRV, il le fait expressément. L'article 7 du règlement PRV, lu conjointement avec l'art. 8, confirme cette interprétation :

8. Toute personne physique ou entreprise qui se prévaut du Programme reconnaît que le fait qu'elle révèle des informations ou transmette des documents dans ce cadre n'a pas pour effet de limiter, de quelque façon que ce soit, la capacité d'un organisme public d'entreprendre contre elle tout recours civil concernant des contrats publics qui n'auront pas fait l'objet d'un règlement dans le cadre du Programme ou qui ne sont pas visés par la Loi.

De plus, toute personne physique ou entreprise reconnaît que sa participation au Programme, et la conclusion d'une entente en vertu de celui-ci, ne la protège, ni ses dirigeants, d'aucune façon de poursuites pénales et/ou criminelles qui ont été ou pourraient être intentées contre elle à l'égard de contrats publics qu'elle a conclus.

[35] En conséquence, la seule preuve qu'une personne physique ou une entreprise a participé au PRV ne saurait à elle seule permettre de qualifier une créance de réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*.

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[36] However, the City submits that reading ss. 1, 3 and 10 of Bill 26 together leads to an entirely different conclusion, namely that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. In our view, the City is wrong.

[37] It is true that s. 1 of Bill 26 does not refer to fraud as being hypothetical:

1. This Act provides for exceptional measures for the reimbursement and recovery of amounts improperly paid as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of public contracts.

As we saw above, however, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: there is no question that, unlike s. 1 of Bill 26, which sets out the purpose of that statute generally, the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. In addition, the City's interpretation cannot be reconciled with ss. 7 and 8 of the VRP Regulation, which are reproduced above.

[38] That being said, the City points out that s. 3 of Bill 26 refers to s. 10, which specifically states that fraud was committed:

10. Any enterprise or natural person who has, in any capacity, participated in fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract is presumed to have caused injury to the public body concerned.

In such a case, the officers of the enterprise in office at the time the fraud or fraudulent tactics occurred are held liable unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.

The directors of the enterprise in office at the time the fraud or fraudulent tactics occurred are also held liable if it is established that they knew or ought to have known that fraud or fraudulent tactics were committed in relation to the contract concerned, unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.

[36] Cependant, la Ville soutient qu'une lecture conjointe des art. 1, 3 et 10 de la Loi 26 mène à une toute autre conclusion, à savoir que la personne physique ou l'entreprise qui participe au PRV a nécessairement fraudé un organisme public. Nous sommes d'avis qu'elle a tort.

[37] Il est vrai que l'art. 1 de la Loi 26 ne traite pas de la fraude à titre hypothétique :

1. La présente loi prévoit des mesures exceptionnelles adaptées au remboursement et au recouvrement de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de l'adjudication, de l'attribution ou de la gestion de contrats publics.

Toutefois, comme nous l'avons vu précédemment, l'art. 3 de la Loi 26 et l'art. 1 du règlement PRV sont clairs : il est acquis que, contrairement à l'art. 1 de la Loi 26, qui énonce l'objet de cette loi de manière générale, les dispositions substantielles de la Loi 26 et du règlement PRV ne considèrent la fraude que de façon hypothétique. L'interprétation de la Ville est également inconciliable avec les art. 7 et 8 du règlement PRV, qui sont reproduits plus haut.

[38] Cela dit, la Ville fait remarquer que l'art. 3 de la Loi 26 renvoie à l'art. 10 lequel énonce explicitement qu'une fraude a été commise :

10. Toute entreprise ou toute personne physique qui, à quelque titre que ce soit, a participé à une fraude ou à une manœuvre dolosive dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public est présumée avoir causé un préjudice à l'organisme public concerné.

Le cas échéant, la responsabilité de ses dirigeants en fonction au moment de la fraude ou de la manœuvre dolosive est engagée, à moins qu'ils ne démontrent avoir agi avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

La responsabilité des administrateurs de l'entreprise en fonction au moment de la fraude ou de la manœuvre dolosive est également engagée s'il est établi qu'ils savaient ou qu'ils auraient dû savoir qu'une fraude ou une manœuvre dolosive a été commise relativement au contrat visé, à moins qu'ils ne démontrent avoir agi avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

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The enterprises and natural persons referred to in this section are solidarily liable for the injury caused, unless such liability is waived by the public body.

[39] We do not agree with the City's interpretation on this point. It is up to the courts to conclude that fraud of this kind has been committed. More precisely, we are of the view that the City is confusing two schemes created by Bill 26: one — the VRP (ss. 3 to 9) — introduced by Chapter II and the other by Chapter III, which is entitled "Special Rules Applicable to Judicial Proceedings" (ss. 10 to 17). The first scheme was designed to encourage — for a two-year period — natural persons or enterprises fearing that a public body would bring civil proceedings against them to participate in the VRP with a view to entering into an agreement through a completely confidential process (s. 7 of Bill 26; s. 4 of the VRP Regulation). It was only once the first scheme ended that the second, one of an entirely different nature, took effect.

[40] The scheme provided for in ss. 10 to 17 of Bill 26 is one that deviates from the general law. It applies to judicial proceedings brought by a public body, or by the Minister of Justice on behalf of a public body, against a natural person or enterprise that allegedly participated in fraud in relation to a public contract. When a court allows such an action, not only can it assume that the defendant caused injury to the public body through its fraudulent act (s. 10 para. 1), but in addition, "[t]he injury is presumed to correspond to the amount claimed by the public body concerned for the contract concerned if the amount does not exceed 20% of the total amount paid for that contract" (s. 11 para. 1). The enterprises and natural persons contemplated by the statute are solidarily liable for such injury (s. 10 para. 4). An amount granted "bears interest from the date the work is accepted by the public body concerned for the contract concerned" (s. 11 para. 3). As well, the court "must add a lump sum equal to 20% of any amount granted for injury, to cover expenses incurred for the purposes of th[e] Act" (s. 14).

Les entreprises et les personnes physiques visées au présent article sont solidairement responsables du préjudice causé, à moins que l'organisme public n'y renonce.

[39] Nous ne partageons pas cette interprétation de la Ville. Il appartient aux tribunaux de conclure qu'une fraude de cette nature a été commise. Plus précisément, nous estimons que la Ville confond deux régimes créés par la Loi 26 : l'un introduit par le chapitre II — le PRV — (art. 3 à 9), l'autre par le chapitre III intitulé « Règles particulières applicables aux recours judiciaires » (art. 10 à 17). Le premier régime a été conçu afin d'inciter, pendant une période de deux ans, les personnes physiques ou les entreprises craignant qu'un organisme public introduise contre elles une poursuite civile à participer au PRV dans le but de conclure une entente en toute confidentialité (art. 7 de la Loi 26; art. 4 du règlement PRV). Or, ce n'est qu'une fois que le premier régime prend fin que le second entre en vigueur, lequel est d'une toute autre nature.

[40] Le régime prévu aux art. 10 à 17 de la Loi 26 est un régime exorbitant du droit commun, applicable aux recours judiciaires intentés par un organisme public ou le ministre de la Justice, pour le compte d'un organisme public, contre une personne physique ou une entreprise qui aurait participé à une fraude visant un contrat public. Lorsqu'un tel recours est accueilli, non seulement le tribunal peut-il tenir pour acquis que le défendeur a causé par son acte frauduleux un préjudice à l'organisme public (art. 10 al. 1), mais aussi que « [c]e préjudice est présumé correspondre à la somme réclamée par l'organisme public concerné pour le contrat visé lorsque cette somme ne représente pas plus de 20 % du montant total payé pour le contrat visé » (art. 11 al. 1), préjudice pour lequel les entreprises et les personnes physiques visées par la loi sont solidairement responsables (art. 10 al. 4). La somme accordée « porte intérêt à compter de la réception de l'ouvrage par l'organisme public concerné pour le contrat visé » (art. 11 al. 3). De même, le tribunal « doit ajouter à la somme qu'il accorde en réparation du préjudice un montant forfaitaire égal à 20 % de cette somme à titre de frais engagés pour l'application de la [. . .] loi » (art. 14).

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[41] In other words, these provisions are designed to make it easier to prove causation and injury when such a proceeding is brought, but it should be noted that they are of no effect if a court finds that the evidence of fraud is insufficient; as well, and most importantly, they in no way make it easier to prove such a fault. Section 10 of Bill 26 is therefore of no assistance to the City, which in any event has not sought to show, on any basis other than the mere existence of the VRP agreement, that SM Group took part in fraud in connection with a contract the City awarded to it. The schemes created by Bill 26 suggest that a court will recognize the existence of fraud only under the Chapter III scheme. Moreover, it appears that the reference to s. 10 in s. 3 merely serves to specify the natural persons to whom the VRP applies, namely directors and officers of enterprises.

[41] Autrement dit, ces dispositions visent à faciliter la preuve du lien de causalité et du préjudice lorsqu'un tel recours est intenté, mais, faut-il le souligner, elles demeurent sans effet dans l'éventualité où un tribunal judiciaire conclut que la preuve relative à la fraude s'avère insuffisante; aussi, et surtout, elles ne facilitent en aucun cas la preuve d'une telle faute. Partant, l'art. 10 de la Loi 26 n'est d'aucun secours pour la Ville, qui, de toute manière, n'a pas cherché à démontrer, autrement qu'en invoquant la seule existence de l'entente PRV, que Groupe SM a participé à une fraude dans le cadre d'un contrat qu'elle lui a octroyé. À en juger par les régimes mis en œuvre par cette loi, la reconnaissance judiciaire de l'existence d'une fraude n'intervient que dans le régime propre au chapitre III de celle-ci. De plus, il appert que le renvoi à l'art. 10 dans l'art. 3 ne sert qu'à préciser quelles sont les personnes physiques visées par le PRV, en l'occurrence les administrateurs et dirigeants des entreprises.

[42] Lastly, it should be mentioned that it can easily be imagined that an enterprise that entered into a potentially contentious public contract with a public body would make the strategic choice to participate in the VRP out of fear of bad publicity or to avoid exposing itself to the exceptional scheme of Chapter III of Bill 26, the result of which, if the proceeding were decided in the public body's favour, would likely be significant additional financial liability for the enterprise on top of the legal fees it would have to pay.

[42] En dernier lieu, il convient de souligner qu'il est facile d'imaginer qu'une entreprise ayant conclu un contrat public possiblement litigieux avec un organisme public fasse le choix stratégique de participer au PRV par crainte de mauvaise publicité ou encore pour éviter de s'exposer au régime exorbitant prévu au chapitre III de la Loi 26, lequel serait susceptible d'emporter pour elle, si le recours était accueilli en faveur de l'organisme, une responsabilité financière additionnelle non négligeable, en sus des frais juridiques qu'elle aurait à débourser.

[43] In sum, neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act; nor does the VRP agreement constitute a serious, precise and concordant presumption of fact (art. 2849 of the *Civil Code of Québec*). It follows that the City has not shown that the VRP claim falls within s. 19(2)(d) of the *CCAA*.

[43] En somme, ni le contenu de l'entente PRV ni le cadre juridique qui lui est propre ne permettent de présumer que Groupe SM a admis avoir commis un acte frauduleux, pas plus que l'entente PRV ne constitue une présomption de fait grave, précise et concordante (art. 2849 du *Code civil du Québec*). Il s'ensuit que la Ville n'a pas démontré que la créance PRV relevait de l'al. 19(2)d) de la *LACC*.

(2) Compensation Between Debts Arising Before and After an Initial Order (Pre-post Compensation)

(2) Compensation entre des dettes nées avant et après le prononcé de l'ordonnance initiale (compensation pré-post)

[44] The bankruptcy of large companies often resulted in "the entire disruption of the corporation,

[44] La mise en faillite des grandes compagnies a fréquemment mené à [TRADUCTION] « la

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loss of goodwill, and sale of assets on a discounted basis" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 22-23; see also *Century Services*, at para. 16). Parliament, wishing to protect the survivability of such companies, which are essential to economic prosperity and to a high rate of employment, therefore set up a restructuring process in the *CCAA* that was designed to prevent them from being dismantled and having their assets liquidated at a discount (*Century Services*, at paras. 17-18 and 70; *Callidus*, at paras. 41-42).

[45] Initially, restructuring under the *CCAA* was done through a plan of arrangement or compromise negotiated between the debtor company and its creditors that averted the company's bankruptcy by allowing it to adjust its debts and reorganize its business (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at pp. 588-90 and 592). Later, liquidation under the *CCAA* emerged as a practice. Liquidation can also serve as a tool for restructuring a struggling business "by allowing the business to survive, albeit under a different corporate form or ownership" (*Callidus*, at para. 45; see also Sarra, at p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311).

[46] The primary tool that allows the *CCAA* to achieve its restructuring objective is a stay of proceedings and of creditors' rights (Sarra, at pp. 17 and 52; McElcheran, at p. 5). The direct effect of a stay is that it creates a status quo period that stabilizes the debtor company's situation by shielding it from its creditors while the restructuring process is under way (*Century Services*, at para. 60; see also *Kitco*, at para. 43 (CanLII)). Without such a period, there would be a free-for-all in which individual creditors would fight it out to enforce their rights without regard for the company's survival or the maximization of its liquidation value (*Century Services*, at para. 22).

[47] During the status quo period, the debtor company can therefore continue operating without fear of being driven into bankruptcy by its creditors. This

perturbation complète des activités de l'entreprise, à la perte de sa clientèle et à la vente à rabais de son actif » (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 22-23; voir aussi *Century Services*, par. 16). Le législateur, soucieux de protéger la capacité de survie de ces compagnies essentielles à la prospérité économique et à un taux d'emploi élevé, a donc mis en place dans la *LACC* un processus de restructuration destiné à éviter leur démantèlement et la liquidation à rabais de leurs actifs (*Century Services*, par. 17-18 et 70; *Callidus*, par. 41-42).

[45] Initialement, la restructuration sous le régime de la *LACC* se faisait au moyen d'un plan d'arrangement ou de transaction négocié entre la compagnie débitrice et ses créanciers qui évitait sa mise en faillite en lui permettant de rajuster ses dettes et de réorganiser ses affaires (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 588-590 et 592). Puis a émergé, en application de la *LACC*, une pratique de liquidation qui peut elle aussi constituer un outil de restructuration de l'entreprise en difficulté « en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents » (*Callidus*, par. 45; voir aussi Sarra, p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), p. 311).

[46] L'instrument principal qui permet à la *LACC* de réaliser son objectif de restructuration est la suspension des procédures et des droits des créanciers (Sarra, p. 17 et 52; McElcheran, p. 5). L'effet direct de la suspension est qu'elle instaure une période de statu quo qui stabilise la situation de la compagnie débitrice en la mettant à l'abri de ses créanciers pendant que la restructuration suit son cours (*Century Services*, par. 60; voir aussi *Kitco*, par. 43). L'absence d'une telle période entraînerait une situation anarchique où chaque créancier se battrait pour faire valoir ses droits, sans égard à la survie de l'entreprise ou à la maximisation de sa valeur de liquidation (*Century Services*, par. 22).

[47] Durant cette période, la compagnie débitrice peut donc poursuivre ses activités sans craindre d'être poussée à la faillite par ses créanciers. Ce

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temporary respite creates an environment conducive to fair negotiations between the various stakeholders and gives the debtor the necessary time to prepare a plan of compromise or arrangement ensuring its survival, or to take steps to maximize the value of the business it operates with a view to its liquidation under the *CCAA* (*Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (Q.B.), at para. 15; *Kitco*, at para. 43; *Callidus*, at paras. 40 and 46).

[48] The fundamental feature of the *CCAA* is a grant to the courts that apply it of a broad discretion to make any orders needed to ensure that restructuring is successful and that the *CCAA*'s objectives are achieved (*Century Services*, at para. 19). The true "engine" driving the statutory scheme (*Callidus*, at para. 48, citing *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36), this judicial discretion also plays a prominent part in stays of proceedings.

[49] In principle, a court may deny a stay application. Such applications are rarely denied, however, to the point where the terms "initial order" and "stay order" have, in practice, become interchangeable (Sarra, at p. 51). Stays are in fact requested and granted systematically, other than in certain exceptional cases (p. 51).

[50] A stay is a temporary measure, however; once it has been lifted, creditors regain their ability to fully exercise their rights and remedies (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, at paras. 9 and 14). On an initial application in respect of a debtor company, a court may include in its initial order a first stay period of no more than 10 days (s. 11.02(1) of the *CCAA*). After that, the court may renew the stay for any period it considers necessary (s. 11.02(2) of the *CCAA*). When a stay is renewed, or at any other time in the course of the proceedings, an interested creditor may, in accordance with the procedure set out in the initial order, apply to the court to lift a stay affecting any of its rights or remedies (Sarra, at pp. 58-60 and 88; see also *Muscletech Research & Development Inc., Re*

moment de répit crée un environnement propice à une négociation équitable entre les différentes parties prenantes, en plus d'offrir à la débitrice le temps nécessaire pour préparer un plan de transaction ou d'arrangement assurant sa survie ou pour prendre des mesures maximisant la valeur de l'entreprise qu'elle exploite en vue de sa liquidation en vertu de la *LACC* (*Meridian Developments Inc. c. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (B.R.), par. 15; *Kitco*, par. 43; *Callidus*, par. 40 et 46).

[48] La caractéristique fondamentale de la *LACC* est l'attribution au tribunal chargé de son application d'un vaste pouvoir discrétionnaire lui permettant de rendre les ordonnances nécessaires pour mener à bon port la restructuration et atteindre les objectifs de la *LACC* (*Century Services*, par. 19). Véritable « moteur » du régime législatif (*Callidus*, par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36), ce pouvoir discrétionnaire du tribunal joue également un rôle de premier plan dans le cadre de la suspension des procédures.

[49] En principe, le tribunal peut refuser une demande de suspension. Ces demandes sont toutefois rarement refusées, à tel point que les termes « ordonnance initiale » et « ordonnance de suspension » sont devenus, en pratique, interchangeables (Sarra, p. 51). La suspension est en effet demandée et accordée systématiquement, si ce n'est dans certains cas exceptionnels (p. 51).

[50] La suspension est cependant une mesure temporaire; une fois levée, les créanciers retrouvent la capacité d'exercer pleinement leurs droits et recours (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, par. 9 et 14). Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut assortir son ordonnance initiale d'une première période de suspension d'une durée maximale de 10 jours (par. 11.02(1) de la *LACC*). Par la suite, la suspension peut être renouvelée par le tribunal pour la période qu'il estime nécessaire (par. 11.02(2) de la *LACC*). Au moment du renouvellement de la suspension, ou à tout autre moment au cours des procédures, un créancier intéressé peut, conformément à la procédure prévue à cet effet dans l'ordonnance initiale, demander au tribunal de lever

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(2006), 19 C.B.R. (5th) 54 (Ont. S.C.J.), at para. 5; *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, at paras. 7-8 and 14-15).

[51] While it is true that the *BIA* and the *CCAA* form part of an integrated body of insolvency law, there are nonetheless some fundamental differences between the two schemes (*Century Services*, at para. 78). Unlike the *BIA*, the *CCAA* gives courts a broad discretion to decide whether a stay is appropriate, to determine how long it should last and to adjust its scope depending on what is needed to restructure the debtor company and to achieve the objectives of the *CCAA*. In this regard, the *CCAA* has been described as a "skeletal" statute that does not contain "a comprehensive code that lays out all that is permitted or barred" (*Century Services*, at para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44).

[52] To fully understand the rights and restrictions applicable in a given case, it is therefore not enough to read the legislation; it is also important to consider the court's exercise of its discretion, which is reflected in all of the many orders made throughout the proceedings.

[53] The question raised by this appeal is therefore whether a court's discretion allows it to stay a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law and, by extension, to authorize pre-post compensation in appropriate cases.

(a) *Power to Grant and Lift a Stay of the Right to Pre-post Compensation*

[54] In our view, the broad discretion conferred on a court by ss. 11 and 11.02 of the *CCAA* allows it to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process.

la suspension affectant l'un de ses droits ou recours (Sarra, p. 58-60 et 88; voir aussi *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (C.S.J. Ont.), par. 5; *Parc industriel Laprade inc. c. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, par. 7-8 et 14-15).

[51] Bien que la *LFI* et la *LACC* fassent partie d'un ensemble intégré de règles du droit de l'insolvabilité, il existe tout de même des différences fondamentales entre les deux régimes (*Century Services*, par. 78). En effet, contrairement à ce qui prévaut sous la *LFI*, la *LACC* confère au tribunal un large pouvoir discrétionnaire lui permettant de décider de l'opportunité d'une suspension, de déterminer la durée de celle-ci et d'en ajuster la portée selon les besoins de la restructuration et selon ce qui est nécessaire pour réaliser les objectifs de la *LACC*. En ce sens, la *LACC* a été décrite comme une loi [TRADUCTION] « schématique » ne contenant « pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Century Services*, par. 57, citant *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44).

[52] Pour bien saisir les droits et restrictions applicables dans un cas donné, il ne suffit donc pas de lire la loi; il faut également se pencher sur l'exercice par le tribunal de son pouvoir discrétionnaire, lequel se manifeste dans toute la multitude d'ordonnances rendues tout au long des procédures.

[53] La question que soulève le présent pourvoi consiste donc à déterminer si le pouvoir discrétionnaire dont dispose le tribunal lui permet de suspendre le droit d'opérer compensation pré-post qu'invoque un créancier en vertu du droit civil ou de la common law et, corollairement, d'autoriser la compensation pré-post dans les cas qui s'y prêtent.

a) *Pouvoir d'accorder et de lever une suspension du droit à la compensation pré-post*

[54] Nous sommes d'avis que le vaste pouvoir discrétionnaire conféré au tribunal par les art. 11 et 11.02 de la *LACC* permet à celui-ci de suspendre des droits reconnus aux créanciers mais dont l'exercice

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This includes a creditor's right to effect pre-post compensation.

[55] Under s. 11.02 of the *CCAA*, a court may stay any action, suit or other proceeding that might be brought against the debtor company. Despite the language of s. 11.02, which at first glance limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order (see *Meridian*, at para. 26; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), at pp. 113-14; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, at paras. 31-33; McElcheran, at pp. 135 and 245-46; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 363). For example, in *Quintette Coal*, the British Columbia Court of Appeal concluded that a creditor's right to pre-post set-off can be stayed just like any other enforcement measure with a high disruptive potential (see also *Associated Investors of Canada Ltd. (Manager of) v. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), at paras. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 13-16, aff'd 2015 BCCA 426, 378 B.C.A.C. 116, at paras. 28-30). In our view, this interpretation is the correct one, as it advances the *CCAA*'s remedial objectives and is consistent with its scheme.

[56] It can also be seen from the various model initial orders adopted by the country's superior courts that prohibitions against setting off debts are standard practice, and in the vast majority of cases take effect as soon as an initial order is made (see Court of Queen's Bench of Alberta, *Alberta Template CCAA Initial Order*, January 2019 (online), at paras. 14 and 16; Supreme Court of British Columbia, *Model CCAA Initial Order*, August 1, 2015 (online), at paras. 16 and 18; Ontario Superior Court of Justice, Commercial List, *Initial Order*, January 21, 2014 (online), at paras. 15-16; Superior Court of Quebec, Commercial Division, *Initial Order*, May 2014 (online), at paras. 10 and 12; Court of Queen's Bench for

serait susceptible de mettre en péril la restructuration, y compris le droit d'opérer compensation pré-post.

[55] L'article 11.02 de la *LACC* permet de suspendre toute action, poursuite ou autre procédure pouvant être intentée contre la compagnie débitrice. Malgré le texte de l'art. 11.02, qui limite à première vue aux procédures judiciaires l'application du pouvoir de suspension, la jurisprudence interprète de manière large et libérale l'étendue des droits et recours susceptibles d'être inclus dans une ordonnance de suspension (voir *Meridian*, par. 26; *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), p. 113-114; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, par. 31-33; McElcheran, p. 135 et 245-246; R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 363). À titre d'exemple, dans l'arrêt *Quintette Coal*, la Cour d'appel de la Colombie-Britannique a conclu que le droit d'un créancier d'opérer compensation pré-post pouvait être suspendu au même titre que toute autre mesure d'exécution possédant un fort potentiel perturbateur (voir aussi *Associated Investors of Canada Ltd. (Manager of) c. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), par. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, par. 13-16, conf. par 2015 BCCA 426, 378 B.C.A.C. 116, par. 28-30). Selon nous, cette interprétation est la bonne, puisqu'elle favorise les objectifs réparateurs de la *LACC*, en plus d'être cohérente avec l'économie de cette loi.

[56] À la lumière des divers modèles d'ordonnances initiales adoptés par les cours supérieures du pays, on constate d'ailleurs que l'interdiction d'opérer compensation entre des dettes est pratique courante et que, dans la très vaste majorité des cas, une telle interdiction entre en vigueur dès le prononcé de l'ordonnance initiale (voir Cour du Banc de la Reine de l'Alberta, *Alberta Template CCAA Initial Order*, janvier 2019 (en ligne), par. 14 et 16; Cour suprême de la Colombie-Britannique, *Model CCAA Initial Order*, 1er août 2015 (en ligne), par. 16 et 18; Cour supérieure de justice de l'Ontario, rôle des affaires commerciales, *Ordonnance initiale*, 21 janvier 2014 (en ligne), par. 15-16; Cour supérieure du Québec,

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Saskatchewan, *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (online), at paras. 15-16).

[57] A court's discretion is therefore broad enough to allow it to stay the right of creditors to effect pre-post compensation. In such a case, the prohibition against pre-post compensation flows directly from the stay order. Conversely, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. On this point, we reject the absolute prohibition proposed by the Quebec Court of Appeal in *Kitco*, because we conclude that a court has the discretion to allow pre-post compensation in appropriate cases.

[58] The instances in which a court should not stay the right to effect pre-post compensation in an initial order will be rare, however. It must be borne in mind that a supervising judge's discretion, although broad, is not boundless. It must be exercised in furtherance of the *CCAA*'s remedial objectives (*Callidus*, at para. 49).

[59] The status quo period could be rendered pointless if creditors were allowed to effect pre-post compensation without restraint (see *Kitco*, at paras. 20 and 43). *Tungsten*, in which the court stayed pre-post set-off, provides a good example of the disruptive potential of this form of set-off (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 ("*Tungsten* (S.C.)"), at para. 32, aff'd 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 16, 20 and 25, and 2015 BCCA 426, 378 B.C.A.C. 116, at para. 29). If a creditor could rely on compensation to refuse to pay for goods or services supplied by the debtor during the status quo period, the restructuring could be torpedoed. The debtor would have a disincentive to provide its creditors with goods and services because it would fear not being paid for them; it would then be deprived of the funds needed to continue

Chambre commerciale, *Ordonnance initiale*, mai 2014 (en ligne), par. 10 et 12; Cour du Banc de la Reine de la Saskatchewan, *Saskatchewan Template CCAA Initial Order*, 6 décembre 2017 (en ligne), par. 15-16).

[57] Le pouvoir discrétionnaire dont dispose le tribunal est donc suffisamment large pour lui permettre de suspendre le droit des créanciers d'opérer compensation pré-post. Dans un tel cas, l'interdiction d'opérer compensation pré-post découle directement de l'ordonnance de suspension. En revanche, le tribunal peut à sa discrétion refuser d'imposer une telle interdiction ou, si la compensation pré-post a été suspendue par l'ordonnance, lever cette suspension par la suite pour permettre à un créancier intéressé de faire valoir ses droits. Sur ce point, nous écartons l'interdiction absolue proposée par la Cour d'appel du Québec dans l'arrêt *Kitco*, puisque nous concluons que le tribunal possède le pouvoir discrétionnaire de permettre la compensation pré-post dans les cas qui s'y prêtent.

[58] Rares seront toutefois les occasions où un tribunal ne devrait pas suspendre le droit d'opérer compensation pré-post dans l'ordonnance initiale. Faut-il le rappeler, le pouvoir discrétionnaire du juge surveillant, quoique vaste, n'est pas sans limites. Il doit tendre à la réalisation des objectifs réparateurs de la *LACC* (*Callidus*, par. 49).

[59] En effet, la période de statu quo pourrait devenir lettre morte si l'on permettait aux créanciers d'opérer sans retenue la compensation pré-post (voir *Kitco*, par. 20 et 43). L'affaire *Tungsten*, dans laquelle le tribunal avait suspendu l'exercice de la compensation pré-post constitue un bon exemple du potentiel perturbateur de cette forme de compensation (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (« *Tungsten* (C.S.) »), par. 32, conf. par 2015 BCCA 390, 377 B.C.A.C. 6, par. 16, 20 et 25, et par 2015 BCCA 426, 378 B.C.A.C. 116, par. 29). Si le créancier pouvait, en invoquant la compensation, refuser de payer le prix pour les biens ou services fournis par la débitrice pendant la période de statu quo, la restructuration risquerait d'être torpillée. La débitrice serait incitée à ne fournir ni biens ni services à ses créanciers par

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operating (see *Kitco*, at paras. 46-48). Section 32 of the *CCAA* in fact gives the debtor a right — subject to the limits and formal requirements provided for in that provision — to disclaim or resiliate any agreement to which it is a party on the day on which the restructuring proceedings commence. In addition, an interim lender would most likely refuse to continue to finance the debtor's operations during this period if the loaned funds were destined to enrich another creditor at its expense. Lastly, the rampart set up by a stay to protect against attacks from all sides by creditors would also crumble, thereby increasing the risk of the debtor's collapse and bankruptcy (see also A. R. Anderson, T. Gelbman and B. Pullen, "Recent Developments in the Law of Set-off", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 22 and 29).

[60] The inevitable interruption of the business relationship between the debtor and those who are at once creditors and customers could not come at a worse time. Without these contracts and without the payment of accounts receivable and interim financing to replenish the debtor's working capital, the resale value of its business would melt away, thus setting up roadblocks for restructuring it by way of liquidation. And such a situation could also be unfavourable to creditors that wish to effect compensation. If the debtor terminates a contract and refuses to perform it, the creditor concerned will be deprived of the benefit of the contract and will have to find a new contracting party in place of the debtor, with no guarantee that the price will remain the same.

[61] Furthermore, where pre-post compensation has been stayed, the court retains the discretion to lift the stay based on the specific facts of each case. However, it must be cautious in doing so, given the high disruptive potential of such compensation.

[62] In conclusion, we are of the view that ss. 11 and 11.02 of the *CCAA* authorize a court to stay pre-post compensation. Although we would temper the rule from *Kitco*, which involves an absolute prohibition against pre-post compensation, it is our view

crainte de ne pas être payée en retour; elle serait alors privée des fonds nécessaires pour poursuivre ses opérations (voir *Kitco*, par. 46-48). L'article 32 de la *LACC* lui donne justement le droit de résilier tout contrat auquel elle est partie à la date à laquelle les procédures de restructuration ont été intentées, sous réserve des limites et formalités qui sont prévues par cette disposition. De plus, le prêteur intérimaire refuserait fort probablement de continuer à financer les opérations de la débitrice durant cette période, si les sommes prêtées sont destinées à enrichir un autre créancier à son détriment. Enfin, le rempart érigé par la suspension contre les attaques tous azimuts des créanciers s'effriterait lui aussi, augmentant ainsi les risques de déconfiture et de faillite de la débitrice (voir aussi A. R. Anderson, T. Gelbman et B. Pullen, « Recent Developments in the Law of Set-off », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2009* (2010), 1, p. 22 et 29).

[60] L'inévitable interruption de la relation d'affaires entre la débitrice et ceux qui sont à la fois créanciers et clients ne pourrait intervenir à un pire moment. Sans ces contrats et sans un fonds de roulement regarni par le paiement des comptes à recevoir et le financement intérimaire, la valeur de revente de l'entreprise exploitée par la débitrice s'atrophierait, dressant alors des écueils à sa restructuration par voie de liquidation. Par ailleurs, une telle situation peut également être défavorable pour le créancier qui désire opérer compensation. Si la débitrice met fin au contrat et refuse de s'exécuter, le créancier concerné sera privé du bénéfice du contrat et devra trouver un nouveau cocontractant à la place de la débitrice, sans garantie que le prix restera le même.

[61] En outre, lorsque la compensation pré-post a été suspendue, le tribunal conserve le pouvoir discrétionnaire de lever la suspension selon les faits particuliers de chaque affaire. Cependant, il doit faire preuve de prudence, considérant le fort potentiel perturbateur d'une telle compensation.

[62] Pour conclure, nous sommes d'avis que les art. 11 et 11.02 de la *LACC* autorisent le tribunal à suspendre l'exercice de la compensation pré-post. Tout en tempérant la règle énoncée dans l'arrêt *Kitco*, qui interdisait de manière absolue la compensation

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that in the vast majority of cases an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. Finally, where an initial order has stayed the right of creditors to pre-post compensation, the court retains the discretion to lift the stay having regard to the circumstances.

(b) *Scope of Section 21 of the CCAA*

[63] In addition, we note that s. 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the *CCAA*. Although s. 21 of the *CCAA* indicates that there is a right to effect compensation in proceedings under that statute, we are of the opinion that it applies only to compensation between debts that arise *before an initial order is made* (in other words, "pre-pre compensation"). The modern approach to statutory interpretation dictates this conclusion (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Our interpretation of s. 21 of the *CCAA* is not based on an inappropriate analogy with the provisions of the *BIA*.

[64] Section 21 does state that it is possible to effect compensation in insolvency proceedings under the *CCAA*, but it does not specifically deal with pre-post compensation. It reads as follows:

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

Read in light of its context, its purpose and the scheme of the *CCAA*, s. 21 is, in our view, limited to authorizing pre-pre compensation for the purpose

pré-post, nous estimons que, dans la très vaste majorité des cas, l'ordonnance initiale suspendra, et devrait suspendre, le droit d'un créancier d'opposer à la débitrice une telle forme de compensation. Finalement, lorsque l'ordonnance initiale a suspendu le droit des créanciers à la compensation pré-post, le tribunal conserve le pouvoir discrétionnaire de lever la suspension en fonction des circonstances.

b) *La portée de l'art. 21 de la LACC*

[63] Nous soulignons par ailleurs que l'art. 21 de la *LACC* ne confère pas aux créanciers un droit à la compensation pré-post qui serait à l'abri du pouvoir de suspension dont dispose le juge surveillant en vertu des art. 11 et 11.02 de la *LACC*. Bien que l'art. 21 de la *LACC* atteste d'un droit d'opérer compensation dans le cadre des procédures prises sous cette loi, nous sommes d'avis qu'il ne vise que la compensation entre des dettes nées *avant le prononcé de l'ordonnance initiale* (autrement dit, la « compensation pré-pré »). Cette conclusion s'impose suivant la méthode moderne d'interprétation des lois (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21, citant E. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87). Notre interprétation de l'art. 21 de la *LACC* ne repose pas sur une analogie inappropriée avec les dispositions de la *LFI*.

[64] En effet, cet article précise qu'il est possible d'opérer compensation dans le cadre de procédures en insolvabilité introduites sous le régime de la *LACC*, mais il ne traite pas expressément de la compensation pré-post. Cette disposition est rédigée ainsi :

Compensation

21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.

Lu à la lumière de son contexte, de son objet et de l'esprit de la *LACC*, nous sommes d'avis que l'art. 21 se limite à autoriser la compensation pré-pré aux fins

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of quantifying creditors' claims on the date of commencement of proceedings.

[65] With regard to the context, s. 21 is in a different part of the statute than the one that provides for a court's discretion to order a stay. The power to order a stay (ss. 11 and 11.02) and most of the exceptions to it (see, e.g., ss. 11.01, 11.08 and 11.1) appear in Part II, which is entitled "Jurisdiction of Courts". Section 21, meanwhile, is in the division of Part III entitled "Claims", which also includes ss. 19 and 20. This indicates that Parliament probably did not consider s. 21 to be an exception to the stay period. If Parliament had in fact intended s. 21 to be an exception, it would have included it in Part II or expressly stated that it was an exception.

[66] What is more, when s. 21 is considered in the broader context of the "Claims" division, it becomes clear that this provision is part of a set of rules governing the claims that may be dealt with by a compromise or arrangement and the quantification of the resulting amounts.

[67] Section 19 specifies which claims may be dealt with by a compromise or arrangement (s. 19(1)) and those which will remain intact despite the creditors' agreement to a compromise or arrangement and its sanction by a court (s. 19(2)). Only claims arising before the date of commencement of bankruptcy or insolvency proceedings are "claims" that fall under s. 19 and therefore give creditors a right to vote on a compromise or arrangement. As for s. 20, it contains rules for determining the amount of claims. Once that amount has been determined, it can then be used to define the relative weight of the voting rights of each creditor with a claim.[1]

de quantification des réclamations des créanciers au jour de l'ouverture.

[65] En ce qui concerne le contexte, l'art. 21 fait partie d'une section différente de celle visant le pouvoir discrétionnaire de suspension conféré au tribunal. Le pouvoir de suspension (art. 11 et 11.02) ainsi que la plupart de ses exceptions (voir, p. ex., art. 11.01, 11.08 et 11.1) figurent dans la partie II, intitulée « Juridiction des tribunaux ». Pour sa part, l'art. 21 fait plutôt partie de la section « Réclamations » de la partie III, qui comprend également les art. 19 et 20. Ceci indique que le législateur ne considérait vraisemblablement pas l'art. 21 comme une exception à la période de suspension. Si son intention avait été plutôt d'en faire une exception, il aurait inclus l'art. 21 dans la partie II ou affirmé expressément qu'il s'agit d'une exception.

[66] Au surplus, il ressort d'un examen de l'art. 21 dans le contexte plus large de la section « Réclamations » que cette disposition fait partie d'un ensemble de règles encadrant les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement et la quantification des montants qui en découlent.

[67] L'article 19 précise quelles sont les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement (par. (1)) et celles qui demeureront intactes malgré l'acceptation par les créanciers d'une transaction ou d'un arrangement et son homologation par le tribunal (par. (2)). Seules les créances ayant pris naissance avant la date d'ouverture des procédures en faillite ou insolvabilité constituent des « réclamations » visées par l'art. 19 et donnent ainsi aux créanciers le droit de voter sur une transaction ou un arrangement. Quant à l'art. 20, il contient des règles permettant de déterminer le montant des réclamations. Une fois déterminé, ce montant permet ensuite de définir le poids relatif du droit de vote de chaque créancier détenant une réclamation[1].

[1] A plan of compromise or arrangement must be approved by a special majority representing two thirds in value of the creditors or a class of creditors (s. 6(1) of the *CCAA*).

[1] Le plan de transaction ou d'arrangement doit être approuvé par une majorité qualifiée des deux tiers en valeur des créanciers ou d'une catégorie de créanciers (par. 6(1) de la *LACC*).

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[68] Section 21 complements ss. 19 and 20; the compensation authorized by s. 21 is intended, among other things, to determine the value of the claim that a creditor may have against the debtor on the *date of commencement of proceedings*. In other words, the purpose of s. 21 is to provide an accurate picture of the pecuniary interest each creditor has in the restructuring on the date of commencement of proceedings, and of the number of votes each creditor should have (see *Kitco*, at para. 83). This provision is not concerned with what might happen to the debtor's business after that date, because the date of commencement of proceedings is when [TRANSLATION] "the claims must be established" and therefore when the mutuality of debts must be assessed (B. Boucher, "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", in *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (loose-leaf), by S. Rousseau, ed., fasc. 14, at No. 70; see also *Kitco*, at para. 34).

[68] L'article 21 complète les art. 19 et 20; la compensation autorisée par l'art. 21 vise, entre autres, à déterminer la valeur de la réclamation qu'un créancier peut avoir contre la débitrice au *jour de l'ouverture*. Autrement dit, l'art. 21 vise à donner l'heure juste sur l'intérêt pécuniaire que détient chaque créancier dans la restructuration au jour de l'ouverture et le nombre de votes dont il devrait disposer (voir *Kitco*, par. 83). Cette disposition s'intéresse peu à ce qui pourrait se passer postérieurement à cette date dans les affaires de la débitrice; en effet, c'est au jour de l'ouverture que « doivent être établies les réclamations » et donc que la réciprocité des dettes doit s'apprécier (B. Boucher, « Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, nº 70; voir aussi *Kitco*, par. 34).

[69] With all due respect for our colleague, in light of the context of s. 21, it is evident that this provision is not meant to legitimize pre-post compensation.

[69] Avec égards pour l'opinion de notre collègue, à la lumière du contexte de l'art. 21, il est apparent que cette disposition n'a pas pour vocation de légitimer la compensation pré-post.

[70] This contextual interpretation of s. 21, which limits its scope to pre-pre compensation, is also confirmed by the section's purpose. It was added to the *CCAA* to prevent the unfair situation that would result from a creditor being required to pay its debt to the debtor company in full but receiving almost nothing from the debtor in payment of its claim under an arrangement or compromise. The effect of s. 21 is that the creditor receives payment of its claim up to the value of the debt it owes to the debtor (Anderson, Gelbman and Pullen, at p. 27; Boucher, at No. 70; McElcheran, at p. 116).

[70] Cette interprétation contextuelle de l'art. 21, qui limite son champ d'application à la compensation pré-pré, est également confirmée par son objet. Cette disposition a été ajoutée à la *LACC* afin de prévenir l'injustice qui résulterait du fait qu'un créancier serait tenu de payer intégralement sa dette à la compagnie débitrice, mais ne recevrait presque rien de la débitrice en paiement de sa créance aux termes d'un arrangement ou d'une transaction. En raison de l'art. 21, le créancier reçoit paiement de sa créance jusqu'à concurrence de la valeur de la dette qu'il devait à la débitrice (Anderson, Gelbman et Pullen, p. 27; Boucher, nº 70; McElcheran, p. 116).

[71] It is true that compensation "creat[es] a type of security interest in the [insolvent company's] estate" because it "[authorizes] the party claiming set-off [to] 'reorde[r]' . . . his priority" by reducing the value of that party's claim (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at paras. 59-60; see *Kitco*, at paras. 63-68). The

[71] Il est vrai que la compensation « crée une sorte de garantie sur l'actif de la [compagnie insolvable] », parce qu'elle « autorise la partie qui invoque la compensation à "modifier" l'ordre de priorité » en réduisant la valeur de sa créance (*Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 59-60; voir *Kitco*, par. 63-68). Le créancier

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creditor uses its indebtedness to the debtor as a form of security for its claim, security that is equal in value to its debt to the insolvent company (*Stein v. Blake*, [1996] 1 A.C. 243 (H.L.), at p. 251). This portion of its claim is therefore sure to be paid in full (*Husky Oil*, at para. 58). The effect of compensation is thus to deviate from the principle of equality among ordinary creditors, a fundamental principle of insolvency law that applies with equal force in proceedings under the *CCAA*, one of the remedial objectives of which is to ensure the fair and equitable treatment of the claims made against a debtor (*Callidus*, at para. 40). The exception created by compensation must therefore be interpreted narrowly. As a general rule, "[o]nce a formal insolvency process commences, all unsecured creditor remedies are stayed and the creditor must stand in line behind secured and preferred creditors and share any remaining recoveries in the estate *pro rata* with all other unsecured creditors" (McElcheran, at p. 78).

se sert de sa dette envers la débitrice comme d'une forme de garantie à l'égard de sa créance, une garantie d'une valeur égale à sa dette envers la compagnie insolvable (*Stein c. Blake*, [1996] 1 A.C. 243 (H.L.), p. 251). Cette portion de sa créance est donc assurée d'être payée en totalité (*Husky Oil*, par. 58). Par ses effets, la compensation déroge ainsi au principe de l'égalité entre les créanciers ordinaires, un principe fondamental du droit de l'insolvabilité qui s'applique avec autant de force dans le cadre de procédures intentées sous le régime de la *LACC*, dont l'un des objectifs réparateurs vise à assurer un traitement juste et équitable des réclamations déposées contre un débiteur (*Callidus*, par. 40). L'exception créée par la compensation doit donc être interprétée de manière restrictive. En règle générale, [TRADUCTION] « [u]ne fois que s'amorce formellement une procédure en matière d'insolvabilité, tous les recours des créanciers non garantis sont suspendus et chaque créancier doit faire la queue derrière les créanciers garantis et les créanciers privilégiés, et partager avec tous les autres créanciers non garantis, au prorata, toute somme qui reste dans le patrimoine » (McElcheran, p. 78).

[72] The prejudice suffered by a creditor wishing to effect pre-post compensation does not justify expanding the scope of s. 21. When the debt owed by the creditor arises after a stay order has been made, prejudice is merely illusory. The fact that the creditor contracted obligations toward the debtor company during the stay period does not place it in a worse situation than it would have been in had it contracted with a third party instead. If it had contracted with a third party, it would likewise have had to pay the full price of the goods or services it obtained (*Tungsten* (S.C.), at para. 27). A creditor that contracts with the debtor company during the status quo period knows or ought to know that it will probably receive only pennies on the dollar in payment of its pre-order claim and that payment of its post-order debt will benefit it and the other creditors.

[72] Le préjudice subi par un créancier désirant opérer compensation pré-post ne justifie pas d'élargir la portée de l'art. 21. Lorsque la dette due par le créancier prend naissance après le prononcé de l'ordonnance de suspension, le préjudice n'est qu'illusoire. Le fait que le créancier ait contracté des obligations envers la compagnie débitrice durant la période de suspension ne le place pas dans une pire situation que celle dans laquelle il aurait été s'il avait plutôt contracté avec un tiers. S'il avait contracté avec un tiers, il aurait de la même façon été contraint de payer intégralement le prix des produits ou services qu'il a obtenus (*Tungsten* (C.S.), par. 27). Le créancier qui contracte avec la compagnie débitrice durant la période de statu quo sait ou devrait savoir qu'il ne recevra probablement que des sous pour chaque dollar de sa créance pré-ordonnance et que le paiement de sa dette post-ordonnance lui bénéficiera, ainsi qu'aux autres créanciers.

[73] Because there is really prejudice only in the case of pre-pre compensation, this exception to the

[73] Puisque le préjudice ne se manifeste réellement qu'en ce qui concerne la compensation pré-pré,

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principle of equality should apply to only one of the debtor's assets on the date of commencement of insolvency proceedings, that is, the debt owed to it by the creditor (*Kitco*, at para. 68; *Husky Oil*, at para. 59). Otherwise, giving the green light to pre-post compensation would amount to granting certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings (for example, amounts received as interim financing). Professor Wood aptly describes the injustice that would thus befall the other ordinary creditors whose rights and remedies have been stayed:

> The ability to exercise a right of set-off in restructuring proceedings can operate to improve greatly the position of one creditor at the expense of the other creditors. This is illustrated in the following example. Suppose that the debtor company owes $1,000 to a creditor. The debtor company then initiates restructuring proceedings. While the proceedings are under way, the debtor company sells and delivers goods to the creditor for $1,000. By exercising its right of set-off, the creditor obtains full recovery of its claim at the expense of the other unsecured creditors whose claims will be compromised or otherwise affected by the plan. [p. 400]

[74] Yet the very purpose of the stay period is to ensure that no creditor gains an advantage over the others while the restructuring of the debtor company is under way (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (S.C.), at para. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at para. 6); *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, at para. 17). Pre-post compensation should not allow a creditor to do indirectly what it cannot do directly. Parliament could not have intended to create such an additional security interest that can be realized during the stay period simply because the creditor and the debtor company have a continuing business relationship.

[75] To repeat, viewing s. 21 as allowing pre-post compensation would undermine the effectiveness of the status quo period, would jeopardize the survival

cette exception au principe de l'égalité ne devrait donc porter que sur un seul des éléments d'actifs de la débitrice au jour de l'ouverture des procédures en insolvabilité, c'est-à-dire la dette du créancier à son endroit (*Kitco*, par. 68; *Husky Oil*, par. 59). Autrement, donner le feu vert à la compensation pré-post équivaudrait à attribuer à certains créanciers une « sorte de garantie » additionnelle sur de nouveaux éléments d'actif acquis par la débitrice après l'ouverture des procédures (par exemple, les sommes reçues à titre de financement intérimaire). Le professeur Wood décrit bien l'injustice qui serait ainsi causée aux autres créanciers ordinaires dont les droits et recours sont suspendus :

> [TRADUCTION] La capacité d'exercer un droit d'opérer compensation lors de procédures de restructuration peut avoir pour effet d'améliorer grandement la position d'un créancier au détriment des autres. Voici un exemple qui illustre cette affirmation. Supposons qu'une compagnie débitrice doit 1 000 $ à un créancier. Cette compagnie entame des procédures de restructuration. Alors que les procédures sont en cours, la compagnie débitrice vend et livre au créancier des biens d'une valeur de 1 000 $. Exerçant son droit d'opérer compensation, ce dernier recouvre entièrement le montant de sa réclamation, au détriment des autres créanciers non garantis, dont les réclamations seront compromises ou autrement affectées par le plan. [p. 400]

[74] Or, l'objectif de la période de suspension est justement d'empêcher un créancier d'être avantagé par rapport aux autres pendant la restructuration de la compagnie débitrice (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (C.S.), par. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), par. 6; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, par. 17). La compensation pré-post ne devrait pas permettre à un créancier de faire indirectement ce qu'il ne peut faire directement. Le législateur ne peut avoir souhaité créer une telle garantie additionnelle pouvant être réalisée pendant la période de suspension du seul fait que le créancier et la compagnie débitrice ont une relation d'affaires qui se poursuit.

[75] Faut-il le rappeler, considérer que l'art. 21 autorise la compensation pré-post minerait l'efficacité de la période de statu quo, mettrait en péril la survie

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of the debtor company or the business it operates and could derail the restructuring process. It is clear that Parliament could not have intended that a struggling company, deprived of its only lifeline, be condemned to drown in its debts solely because a single creditor wanted to gain an advantage over the others. Such an outcome is contrary to the fundamental objectives of the *CCAA*.

[76] Before concluding, we will pause to briefly discuss *Kitco*. In that case, the Court of Appeal rejected a literal interpretation of s. 21 as allowing all forms of compensation, including pre-post compensation, without any restrictions. Our colleague is of the view that *Kitco*, which was applied by the majority of the Court of Appeal and by the supervising judge in the instant case, has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. He cites *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (Ont. S.C.J.), and *Tungsten* in this regard.

[77] In our view, *Kitco* is not at odds with the jurisprudence of the rest of the country on the interpretation of s. 21. *Air Canada* and *Tungsten* did not determine whether pre-post compensation is consistent with the interpretation and objectives of the *CCAA*, let alone establish a framework for the exercise of this right by creditors.

[78] First of all, in *Air Canada*, the issues did not relate to the impact of pre-post compensation on the achievement of the *CCAA*'s objectives. Rather, the case concerned the requirements for legal set-off at common law and the interpretation of a provision of the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, that was worded differently from s. 18.1 (now s. 21) of the *CCAA*. On the subject of legal set-off, Air Canada argued that the making of an initial order under the *CCAA* results in a loss of mutuality between debts, by analogy with the vesting of a bankrupt's property in a trustee under the *BIA*. This was the context in which the court found that an

de la compagnie débitrice ou de l'entreprise qu'elle exploite et pourrait faire dérailler la restructuration. Il ne fait aucun doute que le législateur ne peut avoir souhaité qu'une compagnie en difficulté, privée de sa seule bouée de sauvetage, soit condamnée à crouler sous le poids de ses dettes, uniquement parce qu'un seul créancier a souhaité s'avantager au détriment des autres. Un tel résultat va à l'encontre des objectifs fondamentaux de la *LACC*.

[76] Avant de conclure, nous ouvrons une parenthèse au sujet de l'arrêt *Kitco*. Dans cette affaire, la Cour d'appel a rejeté l'interprétation littérale de l'art. 21 selon laquelle cette disposition autoriserait sans réserve toute forme de compensation, y compris la compensation pré-post. Notre collègue est d'avis que cet arrêt, appliqué par la majorité de la Cour d'appel et la juge surveillante dans la présente affaire, crée une asymétrie entre l'interprétation par les tribunaux québécois de l'art. 21 de la *LACC* et celle des tribunaux des autres provinces canadiennes. Notre collègue cite à cet égard les affaires *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (C.S.J. Ont.), et *Tungsten*.

[77] À notre avis, l'arrêt *Kitco* ne s'inscrit pas en faux contre la jurisprudence du reste du pays en ce qui concerne l'interprétation de l'art. 21. En effet, les affaires *Air Canada* et *Tungsten* n'ont pas tranché la question de savoir si la compensation pré-post est conforme à l'interprétation et aux objectifs de la *LACC*, et encore moins établi les balises entourant l'exercice de ce droit par des créanciers.

[78] D'abord, dans l'affaire *Air Canada*, les questions en litige ne portaient pas sur les répercussions de la compensation pré-post sur la réalisation des objectifs de la *LACC*. Cette affaire portait plutôt sur les critères de la compensation légale en common law, ainsi que sur l'interprétation d'une disposition de la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11, dont le texte différait de celui de l'art. 18.1 de la *LACC* (maintenant l'art. 21 de la *LACC*). Au chapitre de la compensation légale, Air Canada prétendait que le prononcé d'une ordonnance initiale en vertu de la *LACC* entraînait une perte de réciprocité entre

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initial order under the *CCAA* does not alter the status of creditor and debtor of the insolvent company, unlike what happens in a bankruptcy proceeding.

[79] Moreover, in *Tungsten*, the dispute related primarily to the possibility of staying the right to pre-post set-off. The judge who ruled on the applications did not analyze the arguments concerning the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, finding that it was not necessary to do so in the circumstances. Our colleague maintains that the question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted by s. 21 of the *CCAA*. In our view, the fact that the possibility of effecting pre-post set-off was not argued tends more to weaken the authority of that decision than to strengthen it.

[80] Therefore, and with due respect for the contrary view, the state of the law on the interpretation of s. 21 had not been settled elsewhere in Canada. When ruling in *Kitco*, the Court of Appeal was not bound by *Air Canada* and *Tungsten*.

[81] In summary, we conclude, as the Court of Appeal did in *Kitco*, that s. 21 of the *CCAA* allows pre-pre compensation for the purpose of quantifying creditors' claims on the date of commencement of proceedings (*Kitco*, at para. 82). This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the *CCAA* does not prohibit this form of compensation either. A supervising judge therefore retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

[82] We turn now to the situation in this case.

les dettes, par analogie avec la saisine des biens du failli par un syndic sous le régime de la *LFI*. C'est dans ce contexte que le tribunal a conclu que l'ordonnance initiale rendue en application de la *LACC* ne modifie pas les qualités de créancière et de débitrice de la société insolvable, contrairement à une procédure de faillite.

[79] De plus, dans l'affaire *Tungsten*, le litige portait principalement sur la possibilité de suspendre le droit à la compensation pré-post. En première instance, le juge n'a procédé à aucune analyse des arguments relatifs aux impacts de la compensation pré-post sur la période de statu quo et sur les objectifs sous-jacents de cette dernière, estimant qu'il n'était pas nécessaire de le faire dans les circonstances. Notre collègue soutient que la question de savoir si la compensation pré-post pouvait s'opérer n'a jamais été soulevée par les parties, ce qui démontrait implicitement que cette compensation était permise par l'art. 21 de la *LACC*. Selon nous, l'absence de débat sur la possibilité d'opérer compensation pré-post a davantage pour effet d'affaiblir l'autorité de cette décision que de la renforcer.

[80] En conséquence, et avec égards pour l'opinion contraire, l'état du droit n'était pas définitif ailleurs au Canada sur l'interprétation de l'art. 21. Lorsqu'elle s'est prononcée dans l'arrêt *Kitco*, la Cour d'appel n'était pas liée par les affaires *Air Canada* et *Tungsten*.

[81] En somme, à l'instar de la Cour d'appel dans l'arrêt *Kitco*, nous concluons que l'art. 21 de la *LACC* permet la compensation pré-pré aux fins de quantification des réclamations des créanciers au jour de l'ouverture (*Kitco*, par. 82). Cette disposition n'a pas pour effet d'autoriser la compensation pré-post. Cela dit, l'art. 21 de la *LACC* n'a pas non plus pour effet d'interdire cette forme de compensation. Ainsi, le juge surveillant conserve le pouvoir discrétionnaire de suspendre ou d'autoriser l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law.

[82] Voyons ce qu'il en est en l'espèce.

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(c) *Application*

[83] In the case at bar, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation:

No Exercise of Rights or Remedies

ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Debtors is a party as a result of the insolvency of the foreign Debtors and/or these CCAA proceedings, any events of default or non-performance by the Debtors or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Debtors, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court.

. . .

No Interference with Rights

ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, except with the written consent of the Debtors, as applicable, and the Monitor, or with leave of this Court. [Emphasis added.]

(A.R., vol. I, at p. 75)

[84] Given that the order stayed compensation in respect of pre-post claims, what remains to be determined is whether the Superior Court should have

c) *Application*

[83] Dans la présente affaire, les termes de l'ordonnance de suspension rendue par le Tribunal sont suffisamment larges pour interdire la compensation pré-post :

[TRADUCTION]

Suspension des droits et recours

ORDONNE CE QUI SUIT : Durant la Période de suspension, et sous réserve, entre autres, de l'article 11.1 de la LACC, tous les droits et recours, notamment les modifications aux droits existants et les événements réputés survenir suivant toute entente à laquelle l'un des Débiteurs est partie en raison de l'insolvabilité des Débiteurs étrangers et/ou des présentes procédures fondées sur la LACC, de quelque manquement ou inexécution par les Débiteurs ou de quelque admission ou témoignage dans le cadre de ces procédures fondées sur la LACC, de quelque personne physique, firme, personne morale, société de personnes, société à responsabilité limitée, fiducie, coentreprise, association, organisation, organisme ou agence du gouvernement, ou de toute autre entité (toutes les entités énumérées précédemment étant appelées collectivement « **Personnes** » et individuellement « **Personne** ») visant les Débiteurs ou s'y rapportant, ou touchant l'Entreprise, les Biens ou toute partie de ceux-ci, sont suspendus par les présentes, sauf sur autorisation de la Cour.

. . .

Interdiction de porter atteinte aux droits

ORDONNE CE QUI SUIT : Durant la Période de suspension, il est interdit à toute Personne de supprimer, de refuser d'honorer, de modifier, de violer, de répudier, de résilier ou de cesser d'exécuter, selon le cas, quelque droit, droit de renouvellement, contrat, entente, licence ou permis en faveur des Débiteurs ou détenu par ceux-ci, sauf avec le consentement écrit des Débiteurs, le cas échéant, et du Contrôleur, ou sur autorisation de la Cour. [Nous soulignons.]

(d.a., vol. I, p. 75)

[84] L'ordonnance ayant suspendu la compensation à l'égard des créances pré-post, il reste à déterminer si le Tribunal aurait dû exercer son

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exercised its discretion under s. 11 of the *CCAA* and allowed such compensation in respect of the VRP claim. Although we are of the view that the supervising judge erred in finding, in reliance on *Kitco*, that she had no discretion to authorize pre-post compensation, we feel that remanding the case to the court of original jurisdiction would be unhelpful and would not be in the interests of justice. What is more, the delays resulting from this case have prejudiced the rights of third persons in good faith involved in the restructuring of SM Group. In this regard, Thornhill was unable to reimburse, as stipulated, the transition financing granted by the interveners Alaris Royalty Corp. and Integrated Private Debt Fund V LP, which are also creditors of SM Group, largely because of the City's refusal to pay the cost of the work done by SM Group.

pouvoir discrétionnaire en vertu de l'art. 11 de la *LACC* et permettre l'application de cette compensation à l'égard de la créance PRV. Bien que nous soyons d'avis que la juge surveillante a fait erreur en concluant qu'elle ne possédait aucun pouvoir discrétionnaire l'habilitant à autoriser la compensation pré-post en se basant sur l'arrêt *Kitco*, il nous apparaît que le renvoi du dossier en première instance serait inutile et contraire aux intérêts de la justice. Au surplus, les délais occasionnés par le présent dossier causent préjudice aux droits des tiers de bonne foi ayant participé à la restructuration de Groupe SM. À cet égard, Thornhill n'a pas été en mesure de rembourser, selon les termes stipulés, le financement de transition consenti par les intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP, également créancières de Groupe SM, notamment en raison du refus de la Ville d'acquitter le coût des travaux effectués par Groupe SM.

[85] In exercising its discretion under the *CCAA*, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part (*Callidus*, at para. 49; *Century Services*, at para. 70).

[85] Dans l'exercice du pouvoir discrétionnaire que lui confère la *LACC*, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur (*Callidus*, par. 49; *Century Services*, par. 70).

[86] The first consideration, the appropriateness of the order being sought, relates both to the order itself and to the means that are employed (*Century Services*, at para. 70). It is assessed in light of the remedial objectives of the *CCAA* (*Callidus*, at para. 49; *Century Services*, at para. 70). These remedial objectives include the following: avoiding the social and economic losses resulting from the liquidation of an insolvent company; maximizing creditor recovery; ensuring fair and equitable treatment of the claims against the debtor company; preserving going-concern value where possible; protecting jobs and communities affected by the company's financial distress; and enhancing the credit system generally (*Callidus*, at paras. 40-42). In this regard, the context of restructuring by way of liquidation, and the impact of pre-post compensation on its progress, can be weighed by a court in exercising its discretion. In addition, protecting the public interest, although it overlaps a number of the remedial objectives to be considered by the courts, must also be included

[86] La première considération, soit le caractère opportun de l'ordonnance sollicitée, vise tout autant l'ordonnance elle-même que les moyens utilisés (*Century Services*, par. 70). Elle s'évalue au regard des objectifs réparateurs de la *LACC* (*Callidus*, par. 49; *Century Services*, par. 70). Parmi ces objectifs réparateurs, mentionnons les suivants : éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable; maximiser le recouvrement au profit des créanciers; assurer un traitement juste et équitable des réclamations déposées contre la compagnie débitrice; préserver la valeur d'exploitation dans la mesure du possible; protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise; améliorer le système de crédit de manière générale (*Callidus*, par. 40-42). À ce chapitre, le contexte d'une restructuration par voie de liquidation, ainsi que les répercussions de la compensation pré-post sur son bon déroulement, peuvent être soupesés par le tribunal dans l'exercice de son pouvoir discrétionnaire. De

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in this list (*Callidus*, at para. 40; *Century Services*, at para. 60).

[87] Here, the City argues that protecting the public interest is a consideration that favours pre-post compensation. It submits that the majority of the Court of Appeal erred in not considering [TRANSLATION] "the public interest in ensuring the recovery of fraudulently misappropriated public funds" (A.F., at para. 2; see also para. 80). We cannot accept this argument, for the following reasons.

[88] In our view, the City is wrongly conflating the public interest with its own interest as a public body with a claim. The objective of protecting the public interest does not mean that public bodies should be placed in a better position than other creditors because their claims relate to public funds. That would be contrary to the principle of equality among creditors. In the context of the *CCAA*, protecting the public interest therefore cannot be reduced to protecting the interests of a particular creditor. It involves taking account of interests beyond those of the debtor company and its creditors, such as the interests of employees whose jobs are threatened or of the community in which the debtor company operates (*Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 102; *Metcalfe*, at paras. 50-52; Sarra, at pp. 162 and 501; Wood, at p. 341; see also, for a clear illustration, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), at para. 50).

[89] Protecting the public interest can also encompass considerations of commercial morality that reflect societal norms, such as considerations related to the fact that no one should profit from fraudulent activities in which they have taken part (A. Keay, "Insolvency Law: A Matter of Public Interest?" (2000), 51 *N. Ir. Legal Q.* 509, at pp. 513 and 525). In very specific circumstances, a court could therefore conclude that protection of the public interest and the *CCAA*'s other remedial objectives justify authorizing

surcroît, bien qu'elle recoupe un certain nombre des objectifs réparateurs dont les tribunaux doivent tenir compte, la protection de l'intérêt public doit elle aussi figurer sur cette liste (*Callidus*, par. 40; *Century Services*, par. 60).

[87] En l'espèce, la Ville prétend que la protection de l'intérêt public milite en faveur de la compensation pré-post. Elle estime que les juges majoritaires de la Cour d'appel ont commis une erreur en ne considérant pas « l'intérêt public de voir à la récupération des deniers publics détournés frauduleusement » (m.a., par. 2; voir aussi par. 80). Nous ne pouvons retenir cette prétention. Voici pourquoi.

[88] Selon nous, la Ville amalgame à tort l'intérêt public avec son propre intérêt en tant qu'organisme public titulaire d'une créance. L'objectif de protection de l'intérêt public ne signifie pas que les entités publiques devraient être placées dans une position plus avantageuse que les autres créanciers parce que leurs créances concernent des deniers publics. Cela contredit le principe de l'égalité entre les créanciers. Dans le contexte de la *LACC*, la protection de l'intérêt public ne saurait donc être réduite à la protection de l'intérêt d'un créancier en particulier. Elle suppose la prise en compte d'intérêts qui dépassent ceux de la compagnie débitrice et de ses créanciers, comme celui des employés dont les emplois sont menacés ou celui de la communauté dans laquelle évolue la compagnie débitrice (*Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, par. 102; *Metcalfe*, par. 50-52; Sarra, p. 162 et 501; Wood, p. 341; voir aussi, pour une illustration éloquente, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (C.J. Ont. (Div. gén.)), par. 50).

[89] La protection de l'intérêt public peut aussi s'étendre à des considérations de moralité commerciale qui reflètent les normes sociales, comme des considérations liées au fait que nul ne devrait bénéficier d'activités frauduleuses auxquelles il a pris part (A. Keay, « Insolvency Law : A Matter of Public Interest? » (2000), 51 *N. Ir. Legal Q.* 509, p. 513 et 525). Dans des circonstances bien particulières, le tribunal pourrait donc conclure que la protection de l'intérêt public, de même que les

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pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the *CCAA*, which explains the relevance of determining whether the VRP claim is a claim resulting from fraud in this case. But while such a conclusion is possible in law, it should not be drawn automatically. In every case, a court should exercise its discretion as indicated in *Callidus* and *Century Services*, and if it so happens that predominant weight must be given to the objective of protecting the public interest, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors.

[90] In the instant case, the City's VRP claim is an ordinary claim because, as we have indicated, the City has not proved the alleged fraud and such proof cannot be inferred solely from the fact that its claim is related to an agreement entered into under the VRP. Its argument that the objective of protecting the public interest favours pre-post compensation must therefore be rejected. The City has not relied on any of the *CCAA*'s other remedial objectives in support of its position. It follows that it has not discharged its burden of proving that the order being sought is appropriate. Moreover, the work performed for the City by SM Group was in the public interest, as it involved continuing to carry out major projects, such as the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

[91] The second consideration, due diligence, clearly weighs against pre-post compensation by the City. Under the *CCAA*, this consideration is important because it "discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage" (*Callidus*, at para. 51). The procedure set out in the *CCAA* involves negotiations as well as compromises between the debtor and stakeholders and is overseen by a court and a monitor; it follows that all those who participate must be on an equal footing and must have a clear understanding of their respective obligations and rights (para. 51). This

autres objectifs réparateurs de la *LACC*, justifient d'autoriser la compensation pré-post en faveur d'un créancier qui a démontré avoir été victime de fraude au sens de l'al. 19(2)d) de la *LACC*, d'où la pertinence de déterminer si la créance PRV est une réclamation qui découle de fraude dans le cas qui nous occupe. Mais si une telle conclusion est possible en droit, elle ne devrait pas relever de l'automatisme. Dans chaque cas, le tribunal doit exercer son pouvoir discrétionnaire de la façon indiquée dans les arrêts *Callidus* et *Century Services*, et si d'aventure il est appelé à accorder un poids prépondérant à l'objectif de protection de l'intérêt public, il doit se garder de réduire l'intérêt public à l'intérêt d'un créancier ou d'un groupe de créanciers en particulier.

[90] En l'espèce, la créance PRV de la Ville est une créance ordinaire, puisque, comme nous l'avons indiqué, la Ville n'a pas apporté la preuve de la fraude alléguée et cette preuve ne saurait s'inférer du seul fait que sa créance se rattache à une entente conclue en vertu du PRV. En conséquence, sa prétention selon laquelle l'objectif de protection de l'intérêt public milite en faveur de la compensation pré-post doit être rejetée. La Ville n'a pas invoqué d'autre objectif réparateur de la *LACC* au soutien de sa position. Il s'ensuit qu'elle ne s'est pas déchargée du fardeau qui lui incombait d'établir le caractère indiqué de l'ordonnance sollicitée. De plus, les travaux effectués par Groupe SM pour la Ville étaient dans l'intérêt public, puisqu'ils consistaient à poursuivre la réalisation de chantiers majeurs, tels que la construction du pont Samuel-De Champlain et la réfection de l'échangeur Turcot.

[91] La deuxième considération, soit celle de la diligence, milite clairement à l'encontre de l'exercice de la compensation pré-post par la Ville. Sous le régime de la *LACC*, cette considération est importante étant donné qu'elle « décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage » (*Callidus*, par. 51). La procédure prévue par la *LACC* implique des négociations ainsi que des transactions entre le débiteur et les intéressés et elle est supervisée par le tribunal et le contrôleur; il s'ensuit que tous les acteurs qui y participent doivent

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Court accordingly reached the following conclusion in *Callidus*:

> A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently). [para. 51]

[92] In this case, it is clear that the City did not act in accordance with the standard of diligence expected in *CCAA* proceedings. On this point, Deloitte submits that the City should have given notice of its intention to effect compensation in the days after the initial order was made on August 24, 2018. The record does not show that the City learned of the initial order on August 24, 2018, but, as indicated in an email to counsel for Deloitte, the City was aware of the existence of that order by at least September 10, 2018. Whatever the case may be, we are of the view that a diligent creditor, after learning of the debtor's insolvency when it is subject to proceedings under the *CCAA*, cannot wait 47 to 58 days to notify the debtor of its intention to effect compensation.

[93] The City justifies the lateness of its application by stating that it was waiting for one of the payments on the VRP claim, which was due on October 31, 2018, before taking any action. Yet the VRP agreement indicates that the payment in question was actually due on October 1, 2018. Furthermore, the City knew or ought to have known that the term had already expired several weeks earlier, as SM Group's insolvency had resulted in the loss of the benefit of the term of the VRP claim.

se trouver sur un pied d'égalité et avoir une compréhension sans équivoque de leurs obligations et droits respectifs (par. 51). En conséquence, dans l'arrêt *Callidus*, notre Cour a conclu :

> La partie qui, dans le cadre d'une procédure fondée sur la *LACC*, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie). [par. 51]

[92] Dans la présente affaire, il appert clairement que la Ville ne s'est pas comportée conformément à la norme de diligence attendue dans le cadre d'une procédure fondée sur la *LACC*. À ce propos, Deloitte soutient que la Ville aurait dû signifier son intention d'opérer compensation dans les jours qui ont suivi le prononcé de l'ordonnance initiale, le 24 août 2018. Le dossier ne révèle pas que la Ville a pris connaissance de l'ordonnance initiale dès le 24 août 2018, mais, tel qu'indiqué dans un courriel adressé au procureur de Deloitte, elle connaissait l'existence de cette ordonnance depuis le 10 septembre 2018 au moins. Quoi qu'il en soit, nous sommes d'avis qu'un créancier diligent, une fois qu'il a pris connaissance de l'insolvabilité du débiteur alors qu'il est l'objet d'une procédure intentée en vertu de la *LACC*, ne peut attendre de 47 à 58 jours pour lui signifier son intention d'opérer compensation.

[93] La Ville justifie la tardiveté de sa demande en affirmant qu'elle attendait un des paiements de la créance PRV dû le 31 octobre 2018, avant de prendre quelque action que ce soit. Or, l'entente PRV indique plutôt que ce paiement était dû le 1er octobre 2018. De plus, la Ville savait ou aurait dû savoir que le terme était échu depuis plusieurs semaines déjà, puisque l'insolvabilité de Groupe SM a entraîné la perte du bénéfice du terme de la créance PRV.

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[94] Whether intentional or not, this inaction on the City's part tended to place it in a better position than other ordinary creditors at what, we should point out, was a critical time in the restructuring process. By invoking compensation, the City could obtain services without paying for them. The City had to suspect that if it had indicated its intention to proceed in this manner right from the start, as due diligence requires, SM Group would likely have refused to undertake the work provided for in the contract, knowing that it would not be paid and that this would be a major stumbling block in the interim financing process. What is more, under s. 32 of the *CCAA*, SM Group could even have asked that the contract be resiliated.

[95] In summary, the considerations that guide the exercise of a court's discretion do not justify lifting the stay of the City's right to pre-post compensation. Given our conclusions on the first two considerations, it is not necessary for us to discuss the City's good faith. In our view, remanding the case to the court of original jurisdiction would lead inevitably to the same outcome.

B. *Water Meter Contract Claim*

[96] Here again, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation. However, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in the case relating to the water meter contract. The relevant excerpts from its judgment are as follows:

[TRANSLATION]

THE COURT, seized of the Application of Ville de Montréal dated September 27, 2018 for authorization to lift the stay of proceedings in order to deal with and liquidate a claim in the Civil Division ("**Application**");

. . .

LIFTS, in favour of the Applicant, Ville de Montréal, the stay of proceedings ordered in this case with regard to S.M.

[94] Intentionnelle ou non, cette inaction de la Ville était de nature à la placer dans une position plus avantageuse que celle des autres créanciers ordinaires, et ce, faut-il le souligner, à un moment crucial des procédures de restructuration. En effet, en invoquant compensation, elle pouvait, ce faisant, obtenir des services sans les payer. La Ville devait se douter que si elle avait manifesté son intention de procéder ainsi dès le départ, en toute diligence, Groupe SM aurait vraisemblablement refusé d'entreprendre les travaux prévus au contrat, sachant qu'il ne serait pas payé et qu'il s'agirait là d'un obstacle majeur au processus de financement intérimaire. Qui plus est, suivant l'art. 32 de la *LACC*, Groupe SM aurait même pu demander la résiliation de ce contrat.

[95] En somme, les considérations guidant l'exercice du pouvoir discrétionnaire du tribunal ne justifient pas de lever la suspension du droit à la compensation pré-post de la Ville. Considérant nos conclusions relatives aux deux premières considérations, il n'est pas nécessaire de nous pencher sur la bonne foi de la Ville. Nous sommes d'avis que le renvoi du dossier en première instance mènerait inéluctablement au même résultat.

B. *Créance relative au contrat des compteurs d'eau*

[96] Ici encore, les termes de l'ordonnance de suspension prononcée par le Tribunal sont suffisamment larges pour interdire la compensation pré-post. Le Tribunal a cependant accepté de lever la suspension des procédures pour permettre à la Ville d'établir l'existence et le montant de sa créance dans le dossier relatif au contrat des compteurs d'eau. Voici les extraits pertinents de son jugement :

LE TRIBUNAL, saisi de la Demande de la Ville de Montréal datée du 27 septembre 2018 pour être autorisée à lever la suspension des procédures afin de traiter et liquider une réclamation en Chambre civile (la « **Demande** »);

. . .

LÈVE, en faveur de la Requérante Ville de Montréal, la suspension des procédures ordonnée dans ce dossier

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Consultants Inc., The S.M. Group Inc., The SMI Group Inc. and The S.M. Group International L.P. ("**Debtors Concerned**") . . . for the sole purpose of allowing the Applicant, Ville de Montréal, to establish its claim against the Debtors Concerned . . . in the proceedings instituted in the Superior Court of Quebec bearing number 500-17-104932-184; [Emphasis added.]

(A.R., vol. IV, at p. 129)

[97] This order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. The City submits that it is entitled to withhold the payments owed to SM Group until judgment is rendered in that case.

[98] In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of the case relating to the water meter contract would not be appropriate. Remanding the case to the court of original jurisdiction for a decision on this question would, once again, be unhelpful and contrary to the interests of justice.

[99] Not only would the order being sought by the City place Thornhill at the mercy of the outcome of lengthy and complex judicial proceedings — which, it must not be forgotten, concern a claim for several million dollars — but it would not be appropriate for the same reasons as those relating to the VRP claim. The City is conflating the public interest with its own interest as a public body with a claim that was never established. In addition, the City did not act diligently. Although its originating application in the case relating to the water meter contract was filed on September 26, 2018, it breached its obligation of diligence by waiting until November 7, 2018 before indicating its intention to effect compensation, even though it had been aware of the initial order since at least September 10, 2018.

à l'égard de Les Consultants S.M. inc., Le Groupe S.M. inc., le Groupe SMI inc. et Le Groupe S.M. International S.E.C. (les « **Débitrices visées** ») [. . .] afin uniquement de permettre à la Requérante, Ville de Montréal, d'établir sa réclamation contre les Débitrices visées [. . .] dans le cadre des procédures initiées devant la Cour supérieure du Québec portant le numéro 500-17-104932-184; [Nous soulignons.]

(d.a., vol. IV, p. 129)

[97] Cette ordonnance n'a pas autorisé la Ville à retenir les sommes dues à Groupe SM pour les travaux postérieurs à l'ordonnance initiale en vue d'opérer compensation dans l'éventualité où elle aurait gain de cause dans le dossier relatif au contrat des compteurs d'eau. La Ville affirme qu'elle est en droit de retenir les paiements dus à Groupe SM jusqu'à ce qu'un jugement soit rendu dans l'affaire relative au contrat des compteurs d'eau.

[98] Dans les circonstances, une ordonnance permettant à la Ville de retenir les sommes dues à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau n'est pas indiquée. Le renvoi du dossier en première instance pour trancher cette question serait, encore une fois, inutile et contraire aux intérêts de la justice.

[99] En effet, non seulement l'ordonnance recherchée par la Ville placerait Thornhill à la merci du résultat de procédures judiciaires longues et complexes — qui, faut-il le rappeler, concernent une créance de plusieurs millions —, mais elle ne serait pas indiquée pour les mêmes motifs que ceux relatifs à la créance PRV. La Ville confond ici l'intérêt public et son propre intérêt en tant qu'organisme public titulaire d'une créance qui n'a jamais été établie. Ensuite, la Ville n'a pas fait montre de diligence. Même si sa demande introductive d'instance dans le dossier relatif au contrat des compteurs d'eau a été introduite le 26 septembre 2018, la Ville a manqué à son obligation de diligence en attendant au 7 novembre 2018 pour signaler son intention d'opérer compensation, alors qu'elle avait connaissance de l'ordonnance initiale au moins depuis le 10 septembre 2018.

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VI. Conclusion

[100] For these reasons, we would dismiss this appeal with costs.

English version of the reasons delivered by

[101] BROWN J. (dissenting) — I agree with the majority that a supervising judge has a discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), as to whether to allow a creditor to effect compensation, or set-off, between pre-initial order and post-initial order debts ("pre-post compensation"). I find, however, that this discretion is not limited solely to the exceptional circumstances the majority describes. While my colleagues in the majority recognize the broad discretion conferred on a supervising judge by the *CCAA*, in my view they fail to give full effect to it by concluding that pre-post compensation will never be authorized unless there are exceptional circumstances.

[102] Moreover, unlike my colleagues who limit the scope of s. 21 of the *CCAA* to compensation between debts arising before an initial order is made, I conclude that pre-post compensation is permitted under s. 21 of the *CCAA* but that it must be subject to the exercise of a supervising judge's discretion. The majority at the Quebec Court of Appeal (2020 QCCA 438), like the supervising judge (2019 QCCS 2316), erred in relying on the Quebec Court of Appeal's decision in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, to conclude that pre-post compensation will never be authorized. But, for the reasons set out below, this Court must in my view reject the approach taken in *Kitco*.

[103] Given that the supervising judge in this case did not exercise her discretion, believing herself to be bound by *Kitco*, it would be unwise for this Court to exercise that discretion for the first time in order to determine whether Ville de Montréal

VI. Conclusion

[100] Pour ces motifs, nous sommes d'avis de rejeter le présent pourvoi avec dépens.

Les motifs suivants ont été rendus par

[101] LE JUGE BROWN (dissident) — Je partage l'avis de la majorité selon lequel le juge surveillant possède, en vertu de l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »), le pouvoir discrétionnaire d'autoriser ou non un créancier à opérer compensation entre des dettes pré-ordonnance initiale et post-ordonnance initiale (« compensation pré-post »). Cependant, j'estime que ce pouvoir n'est pas limité aux seules circonstances exceptionnelles décrites par la majorité. En effet, à mon avis, bien qu'ils reconnaissent le large pouvoir discrétionnaire conféré au juge surveillant par la *LACC*, mes collègues majoritaires échouent à lui donner plein effet en ce qu'ils concluent que la compensation pré-post ne sera jamais autorisée sauf circonstances exceptionnelles.

[102] En outre, contrairement à mes collègues, qui restreignent le champ d'application de l'art. 21 de la *LACC* à la compensation entre des dettes nées avant la délivrance de l'ordonnance initiale, je conclus que la compensation pré-post est permise en vertu de l'art. 21 de la *LACC*, mais doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. Les juges majoritaires de la Cour d'appel du Québec (2020 QCCA 438), ainsi que la juge surveillante (2019 QCCS 2316), s'appuient erronément sur l'arrêt de la Cour d'appel du Québec dans *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, pour conclure que la compensation pré-post ne sera jamais autorisée. Mais, pour les raisons exprimées ci-dessous, l'approche établie dans l'arrêt *Kitco* doit à mon avis être rejetée par la Cour.

[103] Étant donné que la juge surveillante n'a pas exercé son pouvoir discrétionnaire dans la présente affaire, se croyant liée par l'arrêt *Kitco*, il serait mal avisé pour la Cour d'exercer pour la première fois ce pouvoir afin de déterminer si la Ville de Montréal peut

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(the "City") may effect compensation here. I would therefore allow the appeal solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect compensation between the debts incurred by SM Group before the initial order and the amounts owed by the City to SM Group for work performed by the latter after the initial order. I would also allow the appeal so that it can be determined whether compensation is available in respect of the City's water meter claim against SM Group, as nothing in s. 21 of the *CCAA* prohibits judicial compensation.

[104] Furthermore, and again unlike my colleagues, I find that there is no need in this appeal to decide whether the City's claim against SM Group, which derives from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3, must be characterized as a claim based on "false pretences or fraudulent misrepresentation" within the meaning of s. 19(2)(d) of the *CCAA*. In my view, s. 21 of the *CCAA* must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). I nonetheless agree with my colleagues that proof by a creditor that it was a victim of fraud within the meaning of s. 19(2)(d) is a factor favouring pre-post compensation that must be weighed by a supervising judge along with the other relevant considerations.

[105] My colleagues consider it necessary to characterize the City's claim arising from the Voluntary Reimbursement Program ("VRP") because proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge's discretion to permit or to deny pre-post compensation (para. 20). As they acknowledge, this is a relevant factor in the exercise of *a supervising judge's* discretion. As I will explain in greater detail below, whether the City's VRP claim results from fraud is a question to be decided *by the supervising judge* in

opérer compensation en l'espèce. Par conséquent, j'accueillerais l'appel à seule fin de retourner le dossier devant la Cour supérieure pour qu'il soit décidé si la Ville peut opérer compensation entre les dettes de Groupe SM antérieures à l'ordonnance initiale et les sommes dues par la Ville à Groupe SM pour des travaux réalisés par ce dernier après l'ordonnance initiale. J'accueillerais également l'appel afin qu'il soit décidé si la réclamation de la Ville à l'encontre de Groupe SM à l'égard des compteurs d'eau donne ouverture à compensation, puisque rien dans l'art. 21 de la *LACC* n'interdit la compensation judiciaire.

[104] Au surplus, et contrairement à mes collègues, j'estime qu'il n'est pas nécessaire dans le présent pourvoi de trancher la question de savoir si la réclamation de la Ville de Montréal à l'encontre de Groupe SM, laquelle s'appuie sur la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3, doit être qualifiée de réclamation fondée sur des « faux-semblants ou la présentation erronée et frauduleuse des faits » au sens de l'al. 19(2)d) de la *LACC*. À mon avis, l'art. 21 de la *LACC* doit être interprété comme permettant d'opérer compensation pré-post, peu importe qu'il s'agisse ou non d'une réclamation qui découle d'une fraude au sens de l'al. 19(2)d). Je conviens néanmoins avec mes collègues que le fait pour un créancier de démontrer qu'il a été victime d'une fraude au sens de l'al. 19(2)d) est un facteur favorable à la compensation pré-post qui doit être soupesé par le juge surveillant avec les autres considérations pertinentes.

[105] Mes collègues estiment qu'il est nécessaire de qualifier la créance de la Ville de Montréal issue du Programme de remboursement volontaire (« PRV »), parce que la démonstration du caractère frauduleux de la dette à l'origine d'une créance constitue un facteur pertinent dans l'exercice par le juge surveillant de son pouvoir discrétionnaire de permettre ou non la compensation pré-post (par. 20). Tel qu'ils le reconnaissent, il s'agit d'un facteur pertinent dans l'exercice du pouvoir discrétionnaire *du juge surveillant*. Comme je l'explique

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the exercise of her discretion, not by *my colleagues* or this Court.

I. Decision of the Quebec Court of Appeal in *Kitco*

[106] Kitco Metals Inc. specialized in buying scrap gold and extracting fine gold from it for resale. It was subject to special tax rules: it paid the goods and services tax and the Quebec sales tax on the purchase of scrap gold ("inputs"), but the sale of fine gold was not subject to these taxes. Under these special rules, Kitco paid the taxes to its gold suppliers, which were required to remit them to the Agence du revenu du Québec ("Agency"). When the fine gold was sold, Kitco was then entitled to a refund of the taxes paid. The Agency, however, became aware of a fraudulent scheme by which the gold suppliers were not remitting to it the taxes they collected, even though it was refunding Kitco for them.

[107] The Agency, suspecting that Kitco was involved in this fraudulent scheme, sent it a notice of assessment for more than $300 million (the pre-order debt). On June 7, 2011, the Agency proceeded with compulsory execution on that notice to recover the amounts it considered it was owed. The next day, Kitco filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), thereby staying its creditors' remedies (s. 69). One month later, it instead obtained an initial order under the *CCAA* that continued the stay of remedies (stay still in effect at the time of judgment). Meanwhile, Kitco had been continuing its business activities since June 8, 2011: it was paying taxes on inputs and claiming tax refunds from the Agency in accordance with the applicable tax rules. The Agency owed it more than $1.7 million in refunds (the post-order debt) but applied this amount as compensation against the tax assessments it was claiming from Kitco. Kitco successfully brought a

plus amplement ci-après, la question de savoir si la créance PRV de la Ville de Montréal résulte d'une fraude est une question à laquelle il appartient *à la juge surveillante* de répondre dans le cadre de l'exercice de son pouvoir discrétionnaire, et non à *mes collègues* ou à la Cour.

I. L'arrêt *Kitco* de la Cour d'appel du Québec

[106] Métaux Kitco inc. est une entreprise qui se spécialise dans l'achat de ferraille d'or, dont elle extrait l'or fin afin de pouvoir le revendre. En vertu des règles fiscales, elle est soumise à un régime spécial, c'est-à-dire qu'elle paie la taxe sur les produits et services et la taxe de vente du Québec à l'achat de ferraille d'or (« intrants »), mais la vente d'or fin n'est pas assujettie à ces taxes. Conformément à ce régime spécial, Kitco paie les taxes à ses fournisseurs d'or, lesquels doivent remettre ces taxes à l'Agence du revenu du Québec. Par la suite, lors de la vente d'or fin, Kitco a droit à un remboursement des taxes payées. Cependant, l'Agence constate l'existence d'un stratagème frauduleux suivant lequel les fournisseurs d'or ne lui versent pas les taxes perçues, alors qu'elle rembourse Kitco pour celles-ci.

[107] L'Agence suspecte Kitco d'être impliquée dans ce stratagème frauduleux et lui envoie un avis de cotisation de plus de 300 millions de dollars (soit la dette pré-ordonnance). Le 7 juin 2011, elle entreprend l'exécution forcée de cet avis pour récupérer les sommes qu'elle estime dues. Dès le lendemain, Kitco dépose un avis d'intention de faire une proposition sous le régime de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »), suspendant les recours de ses créanciers (art. 69). Un mois plus tard, elle obtient plutôt, en vertu de la *LACC*, une ordonnance initiale qui continue la suspension des recours (suspension toujours en vigueur au moment de l'arrêt). Parallèlement, Kitco continue ses activités commerciales depuis le 8 juin 2011 : elle paie des taxes sur les intrants et en réclame le remboursement à l'Agence, conformément au régime fiscal en place. L'Agence lui doit plus de 1,7 million de dollars en remboursement (soit la dette post-ordonnance), mais impute par compensation cette somme sur les

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motion in the Superior Court to force the Agency to refund it $1.7 million on the basis that this compensation was unlawful.

[108] Vézina J.A., writing for the Court of Appeal in *Kitco*, began by explaining that June 8, 2011 was the date of commencement of insolvency proceedings and therefore the date on which the creditors' remedies were stayed and their claims had to be established (para. 34 (CanLII)). He also took the view that the compensation effected by the Agency was unlawful. In his opinion, although s. 21 of the *CCAA* does not expressly state that compensation can be effected only in respect of debts that arose prior to insolvency proceedings, a literal interpretation of the section must be rejected because it would be incompatible with, among other things, the principle that ordinary creditors must be treated equally (para. 20). Such an interpretation would also undermine the status quo period that companies in financial difficulty need in order to develop a plan of arrangement (para. 43). Vézina J.A. therefore concluded that a literal interpretation would ultimately be contrary to the *CCAA*'s restructuring objective (para. 45).

[109] This conclusion was based in large part on Vézina J.A.'s observation that the schemes of the *BIA* and the *CCAA* have [TRANSLATION] "close links" and are two "integrated" schemes, which means that "case law and scholarly opinion can be applied to both equally" (paras. 51-52). Relying on para. 56 of *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, he considered that "[t]he general principles of the *BIA* preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy" (*Kitco*, at para. 61). On this point, he found that the principles laid down in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, in which the Court stated that set-off is like a form of security, cannot readily be transposed into the civil law, in which compensation is automatic and is effected by operation of law once two debts coexist and are certain, liquid and exigible (para. 65). Lastly, he was of the view that s. 21 of the

cotisations fiscales qu'elle réclame à Kitco. Cette dernière présente avec succès une requête devant la Cour supérieure pour forcer l'Agence à lui rembourser 1,7 million de dollars au motif qu'il s'agit d'une compensation illégale.

[108] Dans l'arrêt *Kitco*, le juge Vézina, qui rédige les motifs de la Cour d'appel, explique d'abord que le 8 juin 2011 constitue la date d'ouverture de la procédure en insolvabilité, et donc la date à laquelle les recours des créanciers sont suspendus et leurs réclamations doivent être établies (par. 34). Il se dit aussi d'avis que la compensation opérée par l'Agence est illégale. Selon lui, bien que l'art. 21 de la *LACC* ne dise pas expressément que seules les dettes nées avant les procédures en insolvabilité sont susceptibles de compensation, il faut rejeter l'interprétation littérale de cet article, puisqu'elle serait contraire notamment au principe voulant qu'il faille traiter les créanciers ordinaires sur un pied d'égalité (par. 20). Elle fait également échec à la période de statu quo, laquelle est nécessaire aux entreprises en difficultés financières pour leur permettre d'élaborer un plan d'arrangement (par. 43). Il conclut donc qu'une interprétation littérale serait au final contraire à l'objectif de restructuration de la *LACC* (par. 45).

[109] Cette conclusion s'appuie en grande partie sur le constat du juge Vézina que les régimes de la *LFI* et de la *LACC* entretiennent des « liens étroits » et constituent « deux régimes intégrés », de telle sorte que « les enseignements de la jurisprudence et les avis des auteurs sont transposables de l'[un] à l'autre » (par. 51-52). Il s'appuie sur le par. 56 de l'arrêt *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, 2005 CSC 52, [2005] 2 R.C.S. 564, et en retient que « [l]es principes généraux de la LFI s'opposent à toute opération qui aurait pour effet d'accorder une garantie qui n'existait pas avant la faillite » (*Kitco*, par. 61). À cet égard, il estime que les enseignements de l'arrêt *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, qui a précisé que la compensation s'apparentait à une forme de garantie, sont difficilement transposables en droit civil où la compensation est automatique et s'opère de plein droit dès que deux dettes coexistent et sont

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CCAA and s. 97(3) of the *BIA* identify the point in time when compensation may be effected, that is, on the date on which the creditors' "provable claims" must be established, which is the date of commencement of insolvency proceedings:

[TRANSLATION] In my opinion, sections 21 *CCAA* and 97(3) *BIA*, which provide that the "law of set-off or compensation applies to all claims. . .", thereby identify the point in time when compensation is effected, or in other words, the moment at which the claims must be established: it is on the date of [commencement of proceedings] that temporal reciprocity is established. [para. 82]

[110] Vézina J.A. found, at para. 78, that the question of what constitutes a "provable claim" is answered by s. 121(1) of the *BIA*, which refers to "[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt".

[111] With respect, I am of the view that several errors were made in *Kitco*. First, Vézina J.A. erred in relying on this Court's judgment in *D.I.M.S. Construction* to reach the conclusion that pre-post compensation can never be allowed under the *CCAA*, even though that judgment was rendered in the context of a bankruptcy under the *BIA*. Despite the similarities between the insolvency schemes established by the *CCAA* and the *BIA*, these are two different statutes, and their differences are significant in the case at bar. Secondly, *Kitco* was based on an inappropriate narrow interpretation of s. 21 of the *CCAA* that disregarded the "flexible" nature the *CCAA* is recognized as having (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 337) as well as the broad discretion conferred on supervising judges, whereas courts of other Canadian provinces have held that pre-post set-off can be permitted. Thirdly, *Kitco* was decided in a context where a company in financial difficulty was actually restructured, and it

certaines, liquides et exigibles (par. 65). Finalement, il considère que l'art. 21 de la *LACC* et le par. 97(3) de la *LFI* précisent à quel moment peut s'opérer la compensation, soit à la date où doivent être établies les « réclamations prouvables » des créanciers, c'est-à-dire le jour de l'ouverture des procédures d'insolvabilité :

À mon avis, les articles 21 *L.a.c.c.* et 97 (3) *L.f.i.* qui édictent que « les règles de la compensation s'appliquent à toutes les réclamations. . . », précisent par là le moment où la compensation s'opère, soit au moment où doivent être établies les réclamations; c'est au jour d'Ouverture que s'établit la réciprocité temporelle. [par. 82]

[110] Le juge Vézina estime, au par. 78, que la réponse à la question de savoir en quoi consiste une « réclamation prouvable » se trouve au par. 121(1) de la *LFI*, c'est-à-dire « [t]outes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date ».

[111] Avec égards, je suis d'avis que plusieurs erreurs ont été commises dans l'arrêt *Kitco*. Premièrement, le juge Vézina s'est erronément appuyé sur l'arrêt de la Cour dans *D.I.M.S. Construction* pour arriver à la conclusion que la compensation pré-post ne pouvait jamais être autorisée en vertu de la *LACC*, alors que cet arrêt a été rendu dans un contexte de faillite sous le régime de la *LFI*. Malgré les similitudes entre les régimes d'insolvabilité établis par la *LACC* et la *LFI*, ces deux lois sont distinctes — et de manière significative en l'espèce. Deuxièmement, l'arrêt *Kitco* repose sur une interprétation restrictive et inappropriée de l'art. 21 de la *LACC*, qui fait fi du caractère « souple » (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 14) et [TRADUCTION] « flexible » (R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 337) reconnu à la *LACC* ainsi que du vaste pouvoir discrétionnaire dont le juge surveillant est investi, alors que les tribunaux d'autres provinces canadiennes ont jugé que la compensation pré-post pouvait être permise. Troisièmement, l'arrêt *Kitco* a

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cannot readily be transposed into a context such as the one in the instant case, which instead involves the liquidation of a company's assets and contracts.

A. *Fundamental Differences Between the Two Insolvency Schemes*

[112] It is important to underscore the fundamental differences between the scheme established by the *CCAA* and the one established by the *BIA*, differences that highlight that, under the *CCAA* scheme, the mutuality of debts is maintained and supervising judges have a broad discretion that allows them to authorize pre-post compensation. I do not question the notion that these two schemes must be viewed as "an integrated body of insolvency law" and that legislative efforts to harmonize them have been going on for several decades (*Century Services*, at paras. 19-24 and 78). As I recount below, however, there remain many differences between the two schemes (Wood, at p. 337).

[113] The three principal Canadian statutes dealing with insolvency, the *CCAA*, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), have the following main objectives: ". . . to treat the claims of creditors fairly and equitably, to protect the public interest, to create a fair, timely and cost-effective process, and to achieve a balance of benefit and cost in deciding whether to restructure or liquidate a business, maximizing enterprise value" (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10, objectives referred to with approval by the Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522, at para. 40). More specifically, the *CCAA*'s main objective is the financial and commercial rehabilitation of an insolvent company through the filing of a plan of arrangement with its creditors (Wood, at p. 338; B. Boucher, "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", in *JurisClasseur Québec — Collection*

été rendu dans un contexte de restructuration réelle d'une entreprise en difficultés financières, et il est difficilement transposable dans un contexte comme celui qui nous occupe, où il s'agit plutôt d'une liquidation des actifs et des contrats d'une entreprise.

A. *Les distinctions fondamentales entre les deux régimes d'insolvabilité*

[112] Il importe de souligner les différences fondamentales entre le régime établi par la *LACC* et celui établi par la *LFI*, lesquelles font ressortir, sous le régime de la *LACC*, le maintien de la réciprocité des dettes ainsi que le vaste pouvoir discrétionnaire permettant au juge surveillant d'autoriser la compensation pré-post. Je ne remets pas en doute l'idée que ces deux régimes doivent être perçus comme « un ensemble intégré de règles du droit de l'insolvabilité » et que des efforts législatifs visant à harmoniser les deux régimes ont été déployés depuis plusieurs décennies (*Century Services*, par. 19-24 et 78). Toutefois, comme nous le verrons ci-dessous, de nombreuses différences persistent entre ces deux régimes (Wood, p. 337).

[113] Les trois principales lois canadiennes en matière d'insolvabilité, c'est-à-dire la *LACC*, la *LFI* et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11 (« *LLR* »), ont comme objectifs fondamentaux : [TRADUCTION] « . . . le traitement juste et équitable des réclamations des créanciers, la protection de l'intérêt public, la création d'un processus juste, opportun et efficient, et, lors de la prise de la décision de restructurer ou de liquider une entreprise, l'établissement d'un équilibre coûts-avantages maximisant la valeur de celle-ci » (J. P. Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10, objectifs mentionnés avec approbation par la Cour dans *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 40). La *LACC* a plus particulièrement comme objectif principal de permettre à une entreprise insolvable de se rétablir financièrement et commercialement par le dépôt d'un plan d'arrangement auprès de ses créanciers (Wood, p. 338; B. Boucher, « Procédures en vertu

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Droit des affaires — Faillite, insolvabilité et restructuration (loose-leaf), by S. Rousseau, ed., fasc. 14, at Nos. 2 and 8). In seeking an initial order, an insolvent company shields itself from its creditors, staying their remedies for a certain period so that all its energy can be channeled into preparing a plan of arrangement for a viable recovery (Boucher, at No. 2).

[114] For these reasons, the scheme established by the *CCAA* is flexible and allows creative solutions to be put forward to achieve the objective mentioned above, the restructuring of a financially distressed company, in contrast to the *BIA*, which provides a set of pre-established rules (Boucher, at No. 8; Wood, at p. 337). The *CCAA* is therefore characterized as "remedial" legislation (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 500; Boucher, at No. 3).

[115] The Court has found that the *CCAA*'s provisions must be interpreted expansively to enable its remedial objectives to be achieved, and in particular to allow a company to continue its activities and to avoid the social and economic losses that can result from its liquidation (*Century Services*, at para. 70). Because of the remedial scope of the *CCAA*, a "broad" discretion is also conferred on supervising judges by s. 11 of the *CCAA* (*Callidus*, at para. 48; *Century Services*, at para. 14). This section provides that a supervising judge may make "any order that [the judge] considers appropriate", although it specifies that such an order must be consistent with the restrictions set out in the *CCAA* and must be "appropriate" in light of the circumstances of each case. As this Court noted in *Callidus*, s. 11 is in a sense the "engine" of the *CCAA* (para. 48, quoting *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36). This discretion granted to supervising judges under the *CCAA* allows for the implementation of "creative and effective" solutions (*Century Services*, at para. 21, quoting Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors*

de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, nº 2 et 8). En demandant une ordonnance initiale, l'entreprise insolvable se met à l'abri de ses créanciers, suspendant ainsi leurs recours pendant une certaine période, afin de pouvoir concentrer toutes ses énergies sur la confection d'un plan d'arrangement permettant une relance viable (Boucher, nº 2).

[114] Pour ces raisons, le régime établi par la *LACC* est flexible et permet de mettre de l'avant des solutions créatives afin d'atteindre l'objectif énoncé précédemment, soit la restructuration d'une entreprise en difficultés financières, par opposition à la *LFI*, qui prévoit un ensemble de règles préétablies (Boucher, nº 8; Wood, p. 337). En tant que telle, la *LACC* est une loi qualifiée de « réparatrice » (Boucher, nº 3; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 500).

[115] La Cour a reconnu que les dispositions de la *LACC* doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, notamment permettre la survie des activités de l'entreprise et éviter les pertes sociales et économiques pouvant résulter de la liquidation de cette dernière (*Century Services*, par. 70). En raison de la portée réparatrice de la *LACC*, un « vaste » pouvoir discrétionnaire est également conféré au juge surveillant par l'art. 11 de la *LACC* (*Callidus*, par. 48; *Century Services*, par. 14). Cet article prévoit qu'un juge surveillant peut rendre « toute ordonnance qu'il estime indiquée », mais précise toutefois qu'une telle ordonnance ne peut être contraire aux restrictions prévues par la *LACC* et qu'elle doit être « indiquée » au regard des circonstances de chaque affaire. La Cour a indiqué dans l'arrêt *Callidus* que l'art. 11 est en quelque sorte le « moteur » de la *LACC* (par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36). Ce pouvoir discrétionnaire conféré au juge surveillant en vertu de la *LACC* permet la mise en place de solutions « créatives et efficaces » (*Century Services*, par. 21, citant Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la*

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Arrangement Act (2002), at p. 41), in recognition of the "positional advantage" gained by supervising judges, who "acquir[e] extensive knowledge and insight into the stakeholder dynamics and the business realities of [*CCAA*] proceedings" (*Callidus*, at paras. 47-48). Examples of "creative" solutions adopted by courts under the *CCAA* include "security for debtor in possession financing or super-priority charges on the debtor's assets" and the release of "claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors" (*Century Services*, at para. 62).

Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies (2002), p. 50), en reconnaissance de la « position avantageuse » du juge surveillant, lequel « acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure [fondée sur la *LACC*] » (*Callidus*, par. 47-48). À titre de solutions « créatives » retenues par les tribunaux sous le régime de la *LACC*, mentionnons la « constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur », ainsi que la libération de « tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents » (*Century Services*, par. 62).

[116] As the Court again recently recognized, the broad discretion conferred on supervising judges by s. 11 of the *CCAA* enables them to propose solutions "that respond to the circumstances of each case and 'meet contemporary business and social needs'" (*Callidus*, at para. 48, quoting *Century Services*, at para. 58). This broad discretion is unique to the *CCAA* and has no equivalent in the *BIA*, which is based instead on pre-established rules designed to apply to a range of situations. This is, therefore, one major difference between the two insolvency schemes.

[116] Comme l'a reconnu la Cour encore récemment, le vaste pouvoir discrétionnaire conféré au juge surveillant par l'art. 11 de la *LACC* permet à ce dernier de mettre de l'avant des solutions « susceptibles de répondre aux circonstances de chaque cas et de "[s'adapter] aux besoins commerciaux et sociaux contemporains" » (*Callidus*, par. 48, citant *Century Services*, par. 58). Ce vaste pouvoir discrétionnaire du juge surveillant est unique à la *LACC* et n'a pas d'équivalent dans la *LFI*, laquelle est plutôt fondée sur des règles préétablies visant à régir une gamme de situations. Il s'agit donc là d'une distinction majeure entre les deux régimes d'insolvabilité.

[117] Another major difference between these two schemes is that the *CCAA* allows a company that has obtained an initial order to continue its business activities during the restructuring or reorganization period (*Callidus*, at para. 41). The continuation of a struggling company's business activities averts "the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70) and "preserves going-concern value" (*Callidus*, at para. 46). Accordingly, when an insolvent company has recourse to the *CCAA*, it is not divested of its property in favour of a third party, unlike with the measures put in place under the *BIA* that vest the bankrupt's property in a trustee (s. 71 of the *BIA*). There is thus no loss of mutuality under

[117] Une autre différence majeure entre ces deux régimes est le fait que la *LACC* permet à une entreprise, après qu'elle a obtenu une ordonnance initiale, de poursuivre ses activités commerciales pendant la période de restructuration ou de réorganisation (*Callidus*, par. 41). La poursuite des activités commerciales de l'entreprise en difficulté évite « les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*, par. 70) et permet de « protéger sa valeur d'exploitation » (*Callidus*, par. 46). Ainsi, lorsque l'entreprise insolvable a recours à la *LACC*, elle n'est pas dessaisie de ses biens au profit d'un tiers, contrairement aux mesures mises en place en vertu de la *LFI*, suivant lesquelles le syndic obtient la

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the *CCAA*. The status of debtor or creditor of the insolvent company remains unchanged and is not bestowed on a third party.

[118] This mutuality, which survives the initial order, is what makes compensation possible under the *CCAA*, unlike under the *BIA*. This same fundamental difference between the *CCAA* scheme and the *BIA* scheme also played a crucial role in *D.I.M.S. Construction*, on which Vézina J.A. largely relied in *Kitco*. In *D.I.M.S. Construction*, this Court had to determine whether the schemes established in two Quebec labour law statutes subverted the scheme of distribution provided for by the *BIA*. Those two statutes created a similar mechanism that required an employer subject to one of them to pay an assessment due from a contractor whose services it had retained. Once the employer had paid the assessment, it was entitled to retain the amount it had paid out of any sums it owed to the contractor, thereby effecting compensation (para. 2). In that case, three employers had been directed to pay the assessments of a contractor, D.I.M.S. Construction inc., *before* it went bankrupt on April 1, 1999, but only one of them had done so before that date (paras. 3-4). D.I.M.S. Construction's trustee in bankruptcy, relying on the Court's judgment in *Husky Oil*, asked the Court to declare that two sections of the statutes in question were inoperable in the context of a bankruptcy under the *BIA* (para. 5).

[119] In her analysis, Deschamps J. began by discussing s. 97(3) of the *BIA*, which concerns compensation, and made two relevant observations. First, because s. 97(3) applies to claims against a bankrupt's estate, a creditor must meet the conditions set out in s. 121(1) of the *BIA*, which means that, in order to effect compensation, the creditor must "prove the bankrupt was subject to a debt by reason of an obligation incurred before the bankruptcy" (para. 40 (emphasis added)). Second, s. 97(3) states that compensation is effected in the same manner as if the

saisine des biens du failli (art. 71 de la *LFI*). Il n'y a donc pas de perte de réciprocité sous le régime de la *LACC*. La qualité de débitrice ou de créancière de l'entreprise insolvable demeure inchangée et n'est pas octroyée à un tiers.

[118] Cette réciprocité, qui subsiste au-delà de l'ordonnance initiale, est ce qui rend possible la compensation en vertu de la *LACC*, par opposition à la *LFI*. En outre, cette même distinction fondamentale entre le régime de la *LACC* et celui de la *LFI* a joué un rôle crucial dans l'arrêt *D.I.M.S. Construction*, sur lequel s'est en grande partie appuyé le juge Vézina dans l'arrêt *Kitco*. En effet, dans l'arrêt *D.I.M.S. Construction*, la Cour devait décider si les régimes législatifs établis dans deux lois québécoises en matière de droit du travail portaient atteinte au plan de répartition prévu par la *LFI*. Ces deux lois établissaient un mécanisme similaire par lequel un employeur assujetti à l'une de ces lois devait payer la cotisation due par un entrepreneur dont il retenait les services. Une fois la cotisation payée par l'employeur, ce dernier avait le droit de retenir sur les sommes qu'il devait à l'entrepreneur le montant de la cotisation qu'il avait déboursé, et donc d'opérer compensation (par. 2). Dans cette affaire, trois employeurs avaient été sommés de payer les cotisations de l'entrepreneur D.I.M.S. Construction inc. *avant* sa faillite le 1er avril 1999, mais un seul d'entre eux avait payé la cotisation avant cette date (par. 3-4). Le syndic à la faillite de D.I.M.S. Construction demandait à la Cour de déclarer inopérants deux articles de ces lois dans le cadre d'une faillite sous le régime de la *LFI* en invoquant l'arrêt de la Cour dans *Husky Oil* (par. 5).

[119] Dans son analyse, la juge Deschamps s'attarde d'abord au par. 97(3) de la *LFI* portant sur la compensation et fait deux constats utiles. Premièrement, comme le par. 97(3) s'applique aux réclamations visant l'actif du failli, le créancier doit remplir les conditions prévues au par. 121(1) de la *LFI*, c'est-à-dire que, pour qu'il puisse opérer compensation, il doit « prouver une créance à laquelle le failli était assujetti en raison d'une obligation contractée antérieurement à la faillite » (par. 40 (je souligne)). Deuxièmement, le par. 97(3) précise que

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bankrupt were a plaintiff or a defendant in a lawsuit and, exceptionally, makes it possible to proceed "as if the bankrupt's patrimony had not vested in the trustee as a result of the bankruptcy" (para. 41).

[120] Deschamps J. concluded that there are three possible scenarios in Quebec civil law, depending on when an employer pays an assessment due from a contractor: (1) the payment is made by the employer *before* the bankruptcy, and the debts become certain, liquid and exigible *before* the bankruptcy; (2) the payment is made *before* the bankruptcy and the employer is in debt to the bankrupt contractor, but one of the conditions for legal compensation is not met; and (3) the payment is made *after* the bankruptcy (para. 42). Regarding the third scenario — one that also brings into play art. 1651 of the *Civil Code of Québec*, which provides that a person subrogated to the rights of another (the employer in that case) does not have more rights than the subrogating creditor — Deschamps J. concluded that when the employer pays after the contractor's bankruptcy, "[t]he dual status of creditor and debtor", and therefore the mutuality of the debts, does not arise until *after* the bankruptcy (para. 51). It must therefore be inferred that s. 97(3) of the *BIA*, read in conjunction with ss. 121, 136(3) and 141 of the *BIA*, requires that "the mutual debts come into existence before the bankruptcy" in order for compensation to be effected (para. 55 (emphasis added)). Deschamps J. added at para. 56 that, according to the rules specific to the bankruptcy scheme under the *BIA*, the trustee may object to the substitution of a creditor (the employer in that case) if this has the effect of giving the creditor a security that did not exist at the time of the bankruptcy:

> What distinguishes a pre-bankruptcy payment from a post-bankruptcy payment is that, in the former case, the substitution of creditors takes place before the moment when the trustee acquires the bankrupt's property. In the case of a post-bankruptcy payment, the substitution occurs after the bankruptcy, and the trustee can object to it. The general principles of the BIA preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy. [Emphasis added.]

la compensation s'opère de la même manière que si le failli était demandeur ou défendeur d'une action en justice, et elle permet exceptionnellement de faire « comme si le patrimoine du failli n'avait pas, par la faillite, été dévolu au syndic » (par. 41).

[120] La juge Deschamps conclut que trois scénarios sont possibles en droit civil québécois en fonction du moment où l'employeur paie la cotisation due par l'entrepreneur : (1) le paiement est fait par l'employeur *avant* la faillite et les dettes sont devenues certaines, liquides et exigibles *avant* la faillite, (2) le paiement est fait *avant* la faillite, l'employeur est endetté envers l'entrepreneur failli, mais l'une des conditions de la compensation légale n'est pas satisfaite et (3) le paiement est fait *après* la faillite (par. 42). Relativement au troisième scénario, lequel fait également interagir l'art. 1651 du *Code civil du Québec*, qui prévoit qu'une personne subrogée dans les droits d'une autre (ici, l'employeur) n'a pas plus de droits que le subrogeant, la juge Deschamps conclut que lorsque l'employeur paie après la faillite de l'entrepreneur, « [l]a double qualité de créancier et de débiteur » et donc la réciprocité des dettes ne survient qu'*après* la faillite (par. 51). Par conséquent, il faut en déduire que, lorsque lu en conjonction avec les art. 121, 136(3) et 141 de la *LFI*, le par. 97(3) de la *LFI* prévoit que « les créances mutuelles doivent avoir pris naissance avant la faillite » pour qu'il y ait compensation (par. 55 (je souligne)). La juge Deschamps ajoute, au par. 56, qu'en vertu des règles propres au régime de la faillite sous la *LFI*, le syndic peut s'opposer à la substitution du créancier (ici, l'employeur), si cela a pour effet de conférer à ce dernier une garantie qui n'existait pas au moment de la faillite :

> Ce qui distingue le paiement avant la faillite du paiement après la faillite est le fait que, dans le premier cas, la substitution de créancier a lieu avant le moment où le syndic acquiert les biens du failli. Lorsque le paiement est fait après la faillite, la substitution est postérieure à la faillite et le syndic est en mesure de s'y opposer. Les principes généraux de la LFI s'opposent à toute opération qui aurait pour effet d'accorder une garantie qui n'existait pas avant la faillite. [Je souligne.]

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[121] The argument is a simple one. For legal compensation to be effected, in addition to the fact that a claim must be shown to be certain, liquid and exigible, [TRANSLATION] "two persons must be reciprocally debtor and creditor of each other" (*Code civil du Québec: Annotations — Commentaires 2020-2021* (5th ed. 2020), by B. Moore, ed., et al., at p. 1558). This is one of the four essential conditions for compensation to be possible. This mutuality of claims is severed when an insolvent company becomes bankrupt, because a trustee in bankruptcy is appointed and the company's property is vested in the trustee (s. 71 of the *BIA*). On the date of the initial bankruptcy event, the bankrupt company loses its status as creditor or debtor in favour of the trustee. As well, the bankrupt company ceases its business activities and normally does not incur any obligations after the bankruptcy. This is why claims provable under the *BIA* must be established on the date of the initial bankruptcy event and why, logically, compensation cannot be effected between pre- and post-bankruptcy debts (ss. 97(3) and 121(1)). However, as the intervener Union des municipalités du Québec rightly noted at the hearing, the situation is very different when an insolvent company applies for an initial order under the *CCAA*, since the company continues its business activities while at the same time seeking a stay of its creditors' remedies (transcript, at pp. 48-49). Under the *CCAA*, the property of the company applying for an initial order is not vested in a monitor. The mutuality of debts remains intact, as the company continues to be the debtor or creditor of a claim (see, on this point, L. Morin and G.-P. Michaud, "Set-Off and Compensation in Insolvency Restructuring under the *BIA*/*CCAA*: After the *Kitco* and *Beyond the Rack* Decisions", in Sarra and Romaine, *Annual Review of Insolvency Law 2016*, 311, at pp. 343-44; see also A. R. Anderson, T. Gelbman and B. Pullen, "Recent Developments in the Law of Set-off", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 23-25 (these authors acknowledge that an insolvent company's property is not vested in a monitor under the *CCAA* and that the mutuality of debts is not severed, but they advocate having the courts interpret the *CCAA* in such a way as to put an end to this mutuality)).

[121] L'argument est simple. Pour qu'il y ait compensation légale, en sus du fait que le caractère certain, liquide et exigible de la créance doit être démontré, « deux personnes doivent être réciproquement débitrices et créancières l'une de l'autre » (*Code civil du Québec : Annotations — Commentaires 2020-2021* (5e éd. 2020), par B. Moore, dir., et autres, p. 1558). Il s'agit là d'une des quatre conditions essentielles pour qu'il soit possible d'opérer compensation. Cette réciprocité des créances cesse d'exister lorsqu'une entreprise insolvable devient faillie, puisqu'un syndic à la faillite est nommé et obtient la saisine de ses biens (art. 71 de la *LFI*). La qualité de créancière ou de débitrice de l'entreprise qui devient faillie s'éteint au profit du syndic le jour de l'ouverture de la faillite. De plus, l'entreprise faillie cesse ses opérations commerciales et n'encourt normalement pas d'obligations post-faillite. C'est pourquoi les réclamations prouvables visées par la *LFI* doivent être établies le jour de l'ouverture de la faillite, et il ne peut logiquement y avoir compensation entre des dettes pré et post-faillite (par. 97(3) et 121(1)). Or, comme l'a fait remarquer avec justesse l'intervenante l'Union des municipalités du Québec à l'audience, la situation est tout autre lorsqu'une entreprise insolvable demande la délivrance d'une ordonnance initiale en vertu de la *LACC*, puisqu'elle continue ses activités commerciales, tout en demandant la suspension des recours de ses créanciers (transcription, p. 48-49). Sous le régime de la *LACC*, le contrôleur n'obtient pas la saisine des biens de l'entreprise ayant demandé une ordonnance initiale. La réciprocité des dettes subsiste, l'entreprise demeurant débitrice ou créancière d'une réclamation (voir à ce sujet L. Morin et G.-P. Michaud, « Set-Off and Compensation in Insolvency Restructuring under the *BIA*/*CCAA* : After the *Kitco* and *Beyond the Rack* Decisions », dans Sarra et Romaine, *Annual Review of Insolvency Law 2016*, 311, p. 343-344; voir aussi A. R. Anderson, T. Gelbman et B. Pullen, « Recent Developments in the Law of Set-off », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2009* (2010), 1, p. 23-25 (ces auteurs reconnaissent que la saisine des biens de l'entreprise insolvable n'est pas dévolue au contrôleur dans le cadre de la *LACC*, et que la réciprocité des dettes n'est pas éteinte, mais prêchent pour que la *LACC* soit interprétée par les tribunaux de manière à mettre fin à cette réciprocité)).

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[122] These two fundamental differences between the *CCAA* scheme and the *BIA* scheme suffice to explain why this Court should reject the approach proposed in *Kitco*. As we will see below, courts of other Canadian provinces have relied in part on these differences between the two schemes to find that s. 21 of the *CCAA*, unlike the equivalent provisions in the *BIA* (s. 97(3)) and the *WURA* (s. 73(1)), does not prohibit pre-post set-off.

B. *Courts of Other Canadian Provinces Have Recognized the Possibility of Effecting Pre-post Set-off*

[123] For two reasons, the right to effect set-off under the *CCAA* has been a subject of debate among Canadian courts. First, before the legislative reform of 1997 (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12) and the addition of s. 21 (formerly s. 18.1), this right was not formally recognized in the *CCAA*. Secondly, questions relating to the framework for the right to effect set-off have arisen in recent decades, particularly with regard to the possibility of staying this right temporarily after an initial order has been made (*CCAA*, s. 11.02(1); see *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6 ("*Tungsten No. 1*") (decision on application for leave to appeal), aff'd 2015 BCCA 426, 378 B.C.A.C. 116 ("*Tungsten No. 2*"); *Re Just Energy Corp.*, 2021 ONSC 1793); or of directly restricting the right in the language of an initial order under the *CCAA* (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

[124] More specifically, the question now before this Court is whether s. 21 of the *CCAA* allows pre-post compensation. This question is all the more relevant in the context of a restructuring process under

[122] Ces deux distinctions fondamentales entre les régimes de la *LACC* et de la *LFI* suffisent à expliquer pourquoi l'approche mise de l'avant dans l'arrêt *Kitco* doit être rejetée par la Cour. Comme nous le verrons ci-après, les tribunaux d'autres provinces canadiennes se sont notamment appuyés sur ces distinctions entre les deux régimes pour conclure que l'art. 21 de la *LACC*, contrairement aux dispositions équivalentes dans la *LFI* (par. 97(3)) et la *LLR* (par. 73(1)), n'interdit pas la compensation pré-post.

B. *Les tribunaux d'autres provinces canadiennes ont reconnu la possibilité d'opérer compensation pré-post*

[123] Le droit d'opérer compensation en vertu de la *LACC* a fait l'objet de débats dans la jurisprudence canadienne, et ce, pour deux raisons. D'abord, avant la réforme législative de 1997 (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu*, L.C. 1997, c. 12) et l'ajout de l'art. 21 (autrefois l'art. 18.1), le droit d'opérer compensation n'était pas formellement reconnu dans la *LACC*. Ensuite, des questions portant sur l'encadrement du droit d'opérer compensation se sont soulevées dans les dernières décennies, notamment en ce qui a trait à la possibilité de suspendre temporairement le droit d'opérer compensation à la suite de la délivrance d'une ordonnance initiale (*LACC*, par. 11.02(1); voir *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications c. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6 (« *Tungsten n^o 1* ») (décision sur la demande d'autorisation d'appel), conf. par 2015 BCCA 426, 378 B.C.A.C. 116 (« *Tungsten n^o 2* »); *Re Just Energy Corp.*, 2021 ONSC 1793); ou de restreindre ce droit directement dans le texte d'une ordonnance initiale fondée sur la *LACC* (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

[124] Plus particulièrement, la question qui nous occupe ici est celle de savoir si l'art. 21 de la *LACC* permet d'opérer compensation pré-post. Cette question se pose avec une plus grande acuité dans le

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the *CCAA* because the insolvent company continues its business activities.

[125] One of the first cases in which this question was considered after the 1997 legislative reform was *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, a judgment of Farley J. of the Ontario Superior Court of Justice. There, Farley J. had to decide whether a paragraph included in an initial order whose purpose was to limit the right of Air Canada's creditors to effect set-off should be varied.[2] Air Canada essentially argued that under the *CCAA*, as under the *BIA*, legal set-off cannot be permitted between pre- and post-order debts (paras. 10-11). Because the *BIA* provides, in s. 71 (formerly s. 71(2)), that the bankrupt's property vests in the trustee on the date of the initial bankruptcy event, Farley J. concluded that there is no longer any mutuality between a creditor and a bankrupt debtor following a bankruptcy, despite such mutuality being a necessary condition for set-off:

> *In a bankruptcy*, the trustee is inserted into the proceedings. Post-bankruptcy dealings of a creditor with the trustee in bankruptcy do not involve the same party, namely the debtor before the condition of bankruptcy. . . . Thus, creditors who incur post-bankruptcy obligations to trustees in bankruptcy cannot claim legal set-off to avoid paying such obligations by setting-off such obligations against their proven (pre-bankruptcy) claims against the bankrupt. The same parties are not involved so there cannot be mutual cross-obligations. [Emphasis in original; para. 14.]

[126] Farley J. next considered Air Canada's second argument, that s. 21 (then s. 18.1) of the *CCAA* must be interpreted similarly to s. 73(1) of the *WURA* (at paras. 16-17), which provides that the

[2] The paragraph in question read as follows: "THIS COURT ORDERS that persons may exercise only such rights of set off as are permitted under Section 18.1 of the CCAA as of the date of this order. For greater certainty, no person may set off any obligations of an Applicant to such person which arose prior to such date" (para. 2). The last sentence was particularly problematic.

cadre d'un processus de restructuration mené sous le régime de la *LACC*, puisque l'entreprise insolvable continue ses opérations commerciales.

[125] L'une des premières affaires dans lesquelles cette question a été examinée, après la réforme législative de 1997, est la décision *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, rendue par le juge Farley de la Cour supérieure de justice de l'Ontario. Dans cette décision, le juge Farley devait déterminer si un paragraphe inséré dans l'ordonnance initiale et qui visait à limiter le droit pour les créanciers d'Air Canada d'opérer compensation devait être modifié[2]. Essentiellement, Air Canada plaidait que la compensation légale prévue par la *LACC* ne pouvait être autorisée entre des dettes pré et post-ordonnance, comme c'est le cas en vertu de la *LFI* (par. 10-11). Puisque la *LFI* prévoit que, à l'ouverture de la faillite, les biens du failli sont dévolus au syndic en vertu de l'art. 71 (autrefois le par. 71(2)), le juge Farley a conclu qu'il n'y a alors plus de réciprocité entre un créancier et un débiteur failli post-faillite, condition pourtant nécessaire pour qu'il soit possible d'opérer compensation :

> [TRADUCTION] *Lors d'une faillite*, le syndic est ajouté à l'instance. Lorsqu'un créancier effectue des opérations post-faillite avec le syndic de faillite, il ne traite pas avec la même partie, c'est-à-dire avec le débiteur avant la faillite. [. . .] Par conséquent, le créancier qui contracte des obligations post-faillite envers un syndic de faillite ne peut invoquer la compensation légale pour éviter d'acquitter de telles obligations en opérant compensation entre celles-ci et ses réclamations (pré-faillite) contre le failli dont il a fait la preuve. Comme ce ne sont pas les mêmes parties qui sont concernées, il ne saurait y avoir d'obligations réciproques. [En italique dans l'original; par. 14.]

[126] Ensuite, le juge Farley a analysé le second argument d'Air Canada qui prétendait que l'art. 21 de la *LACC* (alors l'art. 18.1), devait être interprété de façon similaire au par. 73(1) de la *LLR* (par. 16-17),

[2] Le paragraphe en question était rédigé ainsi : [TRADUCTION] « LA COUR ORDONNE que seuls peuvent être exercés par les personnes concernées les droits d'opérer compensation qui sont autorisés par l'article 18.1 de la LACC à compter de la date de la présente ordonnance. Il est entendu que nul ne peut opérer compensation sur des obligations d'un Demandeur envers une telle personne nées avant la date de la présente ordonnance. » (par. 2). La dernière phrase posait particulièrement problème.

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law of set-off applies to "all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company". He rejected this argument for several reasons, emphasizing in particular the differences between the words of s. 73(1) of the *WURA* and those of s. 21 of the *CCAA*. For example, s. 21 does not provide that set-off must be between claims accruing due as of the date an initial order is made. Farley J. noted that these differences in wording reflect a choice made by Parliament, which did not intend to enact identical set-off provisions in Canada's three insolvency statutes (para. 23). For these reasons, he ordered that the paragraph of the order restricting the right to effect set-off be varied (para. 24).

[127] Although he struck out the part of the initial order that precluded pre-post set-off, Farley J. nonetheless stayed set-off until Air Canada's situation was more stable in order to avoid the disruptive consequences that would result from allowing set-off during the status quo period. He suggested that the best time to effect set-off would be in conjunction with the formation of a plan of arrangement (para. 25).

[128] My colleagues argue (at para. 77) that "*Air Canada* and *Tungsten* [which I will discuss below] did not determine whether pre-post compensation is consistent with the interpretation and objectives of the *CCAA*, let alone establish a framework for the exercise of this right by creditors." This, however, ignores that *Air Canada* is widely recognized as being authoritative and as standing for the proposition that mutuality is not severed by an initial order made under the *CCAA*, which means that pre-post set-off or compensation is possible but is subject to a supervising judge's power to stay it (see R. Thornton, "Air Canada and Stelco: Legal Developments and Practical Lessons", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2006* (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R.

lequel prévoit que la compensation s'applique à « toutes les réclamations sur l'actif d'une compagnie et à toutes les procédures en recouvrement de créances d'une compagnie, échues ou devenues exigibles à l'ouverture de la liquidation de la compagnie ». Le juge Farley a rejeté cet argument pour plusieurs raisons, insistant notamment sur les différences entre le texte du par. 73(1) de la *LLR* et celui de l'art. 21 de la *LACC*. Par exemple, ce dernier article ne prévoit pas que la compensation doit s'effectuer entre des réclamations devenues exigibles à la date de la délivrance de l'ordonnance initiale. Le juge Farley a souligné que ces différences rédactionnelles reflètent le choix du législateur, lequel n'a pas voulu adopter des dispositions législatives identiques en matière de compensation dans les trois lois canadiennes en matière d'insolvabilité (par. 23). Pour ces raisons, il a ordonné la modification du paragraphe de l'ordonnance qui limitait le droit d'opérer compensation (par. 24).

[127] Bien qu'il ait radié la partie de l'ordonnance initiale qui empêchait la compensation pré-post, le juge Farley a néanmoins suspendu la mise en œuvre de la compensation jusqu'à ce que la situation d'Air Canada se soit davantage stabilisée, afin d'éviter les conséquences perturbatrices qu'entraînerait le fait de permettre la compensation pendant la période de statu quo. Il a suggéré que le meilleur moment pour opérer compensation serait lors de la formulation d'un plan d'arrangement (par. 25).

[128] Mes collègues prétendent (au par. 77) que « les affaires *Air Canada* et *Tungsten* [que je décris ci-dessous] n'ont pas tranché la question de savoir si la compensation pré-post est conforme à l'interprétation et aux objectifs de la *LACC*, et encore moins établi les balises entourant l'exercice de ce droit par des créanciers ». Cette prétention ne tient toutefois pas compte du fait que la décision *Air Canada* est largement reconnue comme faisant autorité et appuyant la proposition selon laquelle la réciprocité n'est pas rompue par une ordonnance initiale rendue en vertu de la *LACC*, de sorte que la compensation pré-post est possible mais assujettie au pouvoir du juge surveillant d'en suspendre l'exécution (voir R. Thornton, « Air Canada and Stelco : Legal Developments and Practical Lessons », dans J.

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(6th) 147 ("*Tungsten No. 3*"), at para. 15). For example, Robert Thornton writes:

> Air Canada was indebted to certain parties as at the date of the Initial Order. Subsequent to the date of the Initial Order, those parties became indebted to Air Canada. They wished to set-off their post-CCAA debts against Air Canada's pre-CCAA debts owing to them. . . .
>
> . . .
>
> . . . Farley J. held that there was no loss of mutuality upon the commencement of a CCAA proceeding. Accordingly, legal set-off is available both in respect of debts existing as at the date of an initial order and in respect of debts that arose after the date of an initial order. Farley J. was correct in so doing.
>
> . . .
>
> It now appears to be clear in Canada that legal and equitable set-off are unaffected by proceedings commenced under the CCAA other than (i) the right to exercise them may be "temporally" stayed and (ii) if the CCAA applicant refuses to acknowledge the set-off, it would be necessary for the creditor to seek judicial intervention.
>
> It is the authors' view that it is appropriate for set-off rights to continue after the commencement of a CCAA proceeding. The CCAA applicant continues to carry on business in the ordinary course. [Emphasis added; pp. 94-96.]

[129] In *Tungsten*, the British Columbia Court of Appeal also considered set-off under s. 21 of the *CCAA* — first in an application for leave to appeal two orders of the British Columbia Supreme Court (*Tungsten No. 1*, per Savage J.A.) and then in an appeal from that decision denying leave to appeal (*Tungsten No. 2*). The insolvent company had obtained an initial order under the *CCAA* effective June 9, 2015, at which time it owed approximately $4.4 million to Global Tungsten and Powders Corp. ("GTP") under a loan agreement. It subsequently continued selling tungsten to GTP, which gave notice

P. Sarra, dir., *Annual Review of Insolvency Law 2006* (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (« *Tungsten n^o 3* »), par. 15). Par exemple, Robert Thornton écrit :

> [TRADUCTION] Air Canada était endettée envers certaines parties à la date de l'Ordonnance initiale. Après cette date, ces parties sont devenues débitrices d'Air Canada. Elles souhaitaient opérer compensation entre leurs dettes post-LACC envers Air Canada et les dettes pré-LACC de cette dernière envers elles. . . .
>
> . . .
>
> . . . Le juge Farley a conclu qu'il n'y a pas perte de mutualité dès l'introduction de procédures en vertu de la LACC. Par conséquent, la compensation légale est possible tant à l'égard de créances existant à la date d'une ordonnance initiale qu'à l'égard de créances nées après cette date. Le juge Farley était fondé à conclure ainsi.
>
> . . .
>
> Il semble maintenant clair au Canada que l'introduction de procédures en vertu de la LACC n'a pas d'incidence sur la compensation légale et sur la compensation en equity, sous réserve (i) du fait que le droit de les appliquer peut être « temporairement » suspendu et (ii) du fait que si la partie qui invoque la LACC refuse d'acquiescer à la compensation, il sera nécessaire de solliciter l'intervention des tribunaux.
>
> Les auteurs sont d'avis qu'il est approprié que les droits d'opérer compensation continuent de s'appliquer après l'introduction de procédures en vertu de la LACC. La partie qui invoque cette loi continue d'exploiter son entreprise comme à l'habitude. [Je souligne; p. 94-96.]

[129] Dans l'affaire *Tungsten*, la Cour d'appel de la Colombie-Britannique s'est également penchée sur la compensation prévue par l'art. 21 de la *LACC*, d'abord dans le cadre d'une demande de permission d'appeler de deux ordonnances de la Cour suprême de la Colombie-Britannique (*Tungsten n^o 1*, le juge Savage), puis en appel de cette décision refusant la permission d'appeler (*Tungsten n^o 2*). L'entreprise insolvable avait obtenu, en vertu de la *LACC*, une ordonnance initiale prenant effet à compter du 9 juin 2015, date à laquelle elle devait approximativement 4,4 millions de dollars à Global Tungsten and

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that it wished to set off its claim (the pre-order debt) against the amounts due or accruing due for the tungsten sold to it (the post-order debt) (*Tungsten No. 1*, at paras. 2 and 6). The chambers judge had held that GTP had a valid right of set-off (*Tungsten No. 2*, at para. 7).

[130] In these two decisions, the main question before the Court of Appeal was whether the chambers judge had erred in concluding that the right to effect set-off could be stayed, like the other creditors' remedies, once the initial order had been made. The question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted under the *CCAA*. Relying on s. 21 of the *CCAA* as well as on s. 11 of that statute, which confers a broad discretion on a supervising judge, the Court of Appeal explained that nothing in the words of s. 21 prohibits a supervising judge from making the right of set-off subject to a stay of remedies (*Tungsten No. 1*, at paras. 12-13 and 16; *Tungsten No. 2*, at paras. 31 and 34-35).

[131] Contrary to what my colleagues say at para. 79, in that case both the chambers judge and the Court of Appeal considered the arguments relating to the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, but they did so from the perspective of a stay of the right to effect set-off rather than by questioning the very possibility of pre-post set-off. This shows that my colleagues' concerns about the disruptive potential of pre-post set-off were given adequate consideration by the supervising judge in exercising his discretion to permit or to stay set-off.

[132] In particular, the chambers judge wrote the following: ". . . a temporal stay of rights can be

Powders Corp. (« GTP ») aux termes d'un contrat de prêt. Par la suite, l'entreprise insolvable continuait de vendre du tungstène à GTP, laquelle a envoyé un avis indiquant qu'elle souhaitait opérer compensation entre sa créance (soit la dette pré-ordonnance) et les sommes échues ou à échoir pour la vente de tungstène (soit la dette post-ordonnance) (*Tungsten n^o 1*, par. 2 et 6). Le juge de première instance avait reconnu que GTP possédait un droit valide d'opérer compensation (*Tungsten n^o 2*, par. 7).

[130] Dans ces deux décisions, la principale question dont la Cour d'appel était saisie consistait à déterminer si le juge de première instance avait fait erreur en concluant que le droit d'opérer compensation pouvait être suspendu, au même titre que les recours des autres créanciers, à partir de la délivrance de l'ordonnance initiale. La question de savoir si compensation pré-post pouvait être opérée n'a jamais été soulevée par les parties, ce qui démontrait implicitement que cette compensation était permise sous le régime de la *LACC*. S'appuyant sur l'art. 21 de la *LACC* ainsi que sur l'art. 11 de celle-ci, qui confère un large pouvoir discrétionnaire au juge surveillant, la Cour d'appel a expliqué que rien dans le texte de l'art. 21 n'interdit au juge surveillant d'assujettir le droit d'opérer compensation à la suspension des recours (*Tungsten n^o 1*, par. 12-13 et 16; *Tungsten n^o 2*, par. 31 et 34-35).

[131] Contrairement à ce qu'avancent mes collègues au par. 79, dans cette affaire, tant le tribunal de première instance que la Cour d'appel ont considéré les arguments relatifs aux incidences de la compensation pré-post sur la période de statu quo et sur les objectifs sous-jacents de cette dernière, mais dans l'optique de la suspension du droit d'opérer compensation plutôt qu'en s'interrogeant sur la possibilité même de la compensation pré-post. Cela démontre que les inquiétudes de mes collègues quant au potentiel perturbateur de la compensation pré-post sont adéquatement prises en compte par le juge surveillant dans l'exercice de son pouvoir discrétionnaire d'autoriser la compensation ou d'en suspendre l'application.

[132] Le juge de première instance a notamment écrit ce qui suit : [TRADUCTION] « . . . une suspension

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granted to further the purpose of the initial order and the purposes of the *Act*" (*Tungsten No. 3*, at para. 25). While conceding that there was some merit to the arguments on the effects of pre-post set-off, he was not prepared to reverse the decision in *Air Canada* (paras. 17-18). Moreover, he stayed the right to effect set-off on the basis that, "[i]n order to preserve the status quo to effect a restructuring, a stay of the set-off is, and was, absolutely essential", and he added, among other things, that if the stay of set-off were not continued, the restructuring efforts "would be thrown into disarray" and "[t]he status quo would be significantly altered and the restructuring would effectively be at an end" (para. 32). The judge who considered the application for leave to appeal noted in turn that, "[c]learly, if an attempt at compromise or arrangement is to have any prospect of success there must be a means of holding creditors at bay" (*Tungsten No. 1*, at para. 16). He added that not staying the right to effect set-off would favour GTP to the detriment of the other creditors (paras. 18 and 25). Groberman J.A., who wrote the judgment of the Court of Appeal, stressed the principle that a creditor should not be able to exercise a right of set-off to circumvent a compromise or arrangement under the *CCAA* (*Tungsten No. 2*, at paras. 37-39).

[133] Despite my colleagues' protestations to the contrary, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the *CCAA*, subject to a supervising judge's discretion to stay such set-off having regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the *CCAA*.

[134] It must be concluded that the approach proposed by the Quebec Court of Appeal in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. This asymmetry is contrary to

temporaire des droits peut être accordée pour appuyer l'application de l'ordonnance initiale et la réalisation des objectifs de la *Loi* » (*Tungsten n^o^ 3*, par. 25). Il a reconnu que les arguments relatifs aux incidences de la compensation pré-post ont du mérite, mais il n'était pas prêt à renverser la décision *Air Canada* (par. 17-18). Il a en outre suspendu le droit d'opérer compensation parce que, [TRADUCTION] « [a]fin de préserver le statu quo en vue d'effectuer la restructuration, la suspension du droit d'opérer compensation est, et était, absolument essentielle », ajoutant entre autres que, si la suspension de la compensation n'était pas reconduite, les efforts de restructuration « seraient désorganisés » et « [l]e statu quo serait considérablement affecté et cela mettrait effectivement un terme à la restructuration » (par. 32). Le juge saisi de la demande d'autorisation d'appel a quant à lui souligné que, [TRADUCTION] « [d]e toute évidence, pour qu'une tentative de transaction ou d'arrangement ait quelque chance de succès, il faut un moyen de tenir les créanciers à distance » (*Tungsten n^o^ 1*, par. 16). Il a ajouté que l'absence de suspension du droit d'opérer compensation aurait pour effet de favoriser GTP au détriment des autres créanciers (par. 18 et 25). Rédigeant l'arrêt de la Cour d'appel, le juge Groberman a insisté sur le principe selon lequel un créancier ne devrait pas pouvoir se prévaloir du droit d'opérer compensation afin de contourner une transaction ou un arrangement fondé sur la *LACC* (*Tungsten n^o^ 2*, par. 37-39).

[133] Malgré les protestations à l'effet contraire de mes collègues, l'état du droit ailleurs au Canada est clair : la compensation pré-post est possible sous le régime de la *LACC*, sous réserve du pouvoir discrétionnaire du juge surveillant d'en suspendre l'application pour tenir compte des incidences de la compensation pré-post sur la période de statu quo et de ses objectifs sous-jacents, du bon déroulement des efforts déployés pour réaliser un arrangement et des objectifs réparateurs de la *LACC*.

[134] Force est de constater que l'approche avancée par la Cour d'appel du Québec dans l'arrêt *Kitco* crée une asymétrie entre l'interprétation de l'art. 21 de la *LACC* par les tribunaux du Québec et par les tribunaux d'autres provinces canadiennes. Cette asymétrie va à l'encontre du principe de l'interprétation

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the principle of homogenous interpretation of federal statutes (Morin and Michaud, at p. 344).

C. *Restructuring an Insolvent Company Versus Liquidating Its Assets*

[135] Finally, in *Kitco*, Vézina J.A. noted that his conclusions were based on the fact that the insolvent company was engaged in a genuine restructuring process and that staying its creditors' remedies was crucial to bringing this process to a successful conclusion. He stressed that Kitco's restructuring plan was in jeopardy because the Agency was effecting compensation with the amounts it was supposed to pay Kitco. Kitco was required to carry on its activities while paying 15 percent in taxes on its gold inputs without receiving the refund to which it was entitled in this regard. It was thus in an [TRANSLATION] "untenable" position relative to competitors in its field (paras. 47-48).

[136] Staying the remedies of an insolvent company's creditors under the *CCAA* to allow the company to develop a plan of arrangement is of critical importance, particularly where the exercise of a creditor's right to effect pre-post compensation might sabotage the company's efforts to regain financial health.

[137] In this case, however, and in the opinion of the monitor and the interveners themselves, there has never been any question of SM Group proposing a plan of arrangement. Once SM Group's principal creditors filed an application for an initial order under the *CCAA*, it was clear that they wished to opt for a liquidation process — that is, the sale of the insolvent company to a new buyer. In this particular situation, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to

uniforme des lois fédérales (Morin et Michaud, p. 344).

C. *La restructuration d'une entreprise insolvable versus la liquidation des actifs de cette entreprise*

[135] Enfin, dans l'arrêt *Kitco*, le juge Vézina a souligné que ses conclusions étaient fondées sur le fait que l'entreprise insolvable était engagée dans un véritable processus de restructuration et que la suspension des recours de ses créanciers était essentielle pour lui permettre de mener à bien ce processus. Il a insisté sur le fait que le plan de restructuration de Kitco était mis en péril parce que l'Agence opérait compensation sur les sommes qu'elle devait verser à Kitco. En effet, Kitco était obligée de poursuivre ses activités tout en payant des taxes de l'ordre de 15 p. 100 sur ses intrants d'or sans recevoir le remboursement auquel elle avait droit à cet égard. Elle se trouvait ainsi dans une position « insoutenable » comparativement aux entreprises concurrentes dans son domaine (par. 47-48).

[136] La suspension, en vertu de la *LACC*, des recours des créanciers d'une entreprise insolvable afin de permettre à celle-ci d'élaborer un plan d'arrangement revêt une importance cruciale, en particulier lorsque l'exercice du droit d'un créancier d'opérer compensation pré-post risque de saboter les efforts déployés par l'entreprise pour retrouver sa santé financière.

[137] En l'espèce, toutefois, et de l'avis même du contrôleur et des intervenants, il n'a jamais été question pour Groupe SM de proposer un plan d'arrangement. Dès le dépôt d'une demande d'ordonnance initiale en vertu de la *LACC* par les principaux créanciers de Groupe SM, il était clair que ces derniers souhaitaient opter pour un processus de liquidation, soit la vente de l'entreprise insolvable à un nouvel acquéreur. Dans ce cas particulier, alors qu'un plan d'arrangement n'est pas envisageable et que l'entreprise insolvable sera de toute manière liquidée ou vendue, conclure que la compensation pré-post n'est jamais permise pourrait être injuste pour les créanciers de cette entreprise ayant une créance certaine, liquide et exigible. En effet, dans ces cas, les recours

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effect pre-post compensation, since the insolvent company will become an "empty shell" after the sale. Moreover, because a plan of arrangement cannot be contemplated, allowing pre-post compensation will not have the effect of derailing the company's restructuring process, as there is no such process.

II. Discretion Not Exercised by the Supervising Judge in This Case

[138] In my view, pre-post compensation is permitted under s. 21 of the *CCAA*, but it must be subject to the exercise of a supervising judge's discretion. In *Callidus*, this Court clarified the framework for the exercise of this discretion under s. 11 of the *CCAA*. The first two criteria are found in s. 11, which provides that a supervising judge may make any order that is "appropriate" in the circumstances of the case and consistent with the restrictions set out in the *CCAA*. The Court added that the exercise of the discretion must also further the remedial objectives of the *CCAA* and be focused in particular on the criteria of appropriateness, good faith and due diligence (para. 70).

[139] My colleagues make a series of arguments against compensation in general and pre-post compensation in particular: the high disruptive potential of compensation; respect for the status quo period; the loss of incentive for the debtor to provide goods and services during the stay period because it would fear not being paid for them, which would deprive it of the funds needed to continue operating; the fact that an interim lender would most likely refuse to continue to finance the debtor's operations if the loaned funds were destined to enrich another creditor; the fact that the rampart set up by a stay to protect against attacks by creditors would crumble; the fact that compensation deviates from the principle of equality among ordinary creditors and that pre-post compensation amounts to giving certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after

des créanciers seront suspendus indéfiniment et ils ne pourront jamais exercer compensation pré-post, l'entreprise insolvable étant devenue après la vente une « coquille vide ». Par ailleurs, puisqu'un plan d'arrangement n'est pas envisageable, permettre la compensation pré-post n'aura pas comme effet de faire dérailler le processus de restructuration de l'entreprise, ce processus étant inexistant.

II. L'absence d'exercice du pouvoir discrétionnaire par la juge surveillante en l'espèce

[138] À mon avis, la compensation pré-post est permise en vertu de l'art. 21 de la *LACC*, mais elle doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. La Cour a précisé, dans l'arrêt *Callidus*, les balises encadrant l'exercice de ce pouvoir discrétionnaire en vertu de l'art. 11 de la *LACC*. Les deux premiers critères sont énoncés à l'art. 11, qui précise que le juge surveillant peut rendre toute ordonnance qui est « indiquée » dans les circonstances de l'affaire et qui n'est pas contraire aux restrictions prévues par la *LACC*. De plus, la Cour a ajouté que l'exercice du pouvoir discrétionnaire doit permettre la réalisation des objets réparateurs de la *LACC* en s'attachant plus particulièrement aux critères de l'opportunité, de la bonne foi et de la diligence (par. 70).

[139] Mes collègues avancent une série d'arguments à l'encontre de la compensation en général et de la compensation pré-post en particulier : le fort potentiel perturbateur d'une compensation; le respect de la période de statu quo; la perte d'incitatifs pour la débitrice de fournir des biens et services durant la période de suspension, de crainte de ne pas être payée en retour, ce qui aurait pour effet de la priver des fonds nécessaires pour poursuivre ses opérations; le fait que le prêteur intérimaire refuserait fort probablement de continuer à financer les opérations de la débitrice si les sommes prêtées sont destinées à enrichir un autre créancier; le fait que le rempart érigé par la suspension contre les attaques des créanciers s'effriterait; le fait que la compensation déroge au principe de l'égalité entre les créanciers ordinaires et le fait que la compensation pré-post équivaut à attribuer à certains créanciers une « sorte

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the commencement of proceedings; etc. (paras. 59, 61 and 73).

[140] Most of these arguments presuppose that pre-post compensation will be systematically allowed without regard for the circumstances of each case and without considering whether it is "appropriate" — hence my colleagues' position that pre-post compensation should never be authorized unless there are exceptional circumstances. Although these arguments are legitimate, they must be left to the supervising judge, who will weigh them — along with the other relevant considerations and circumstances — in exercising the discretion to permit or to deny pre-post compensation in a particular case, having regard to the remedial objectives of the *CCAA*.

[141] Believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, the supervising judge in this case did not exercise her discretion under s. 11 of the *CCAA*. Given that this discretion was not exercised by the supervising judge, it is not for this Court to exercise it to determine whether to permit compensation between the amounts owed by the City to SM Group and the claim held by the City against SM Group. The Court has made it clear that supervising judges are in the best position to decide whether to exercise their discretion in a particular case based on "a circumstance-specific inquiry that must balance the various objectives of the *CCAA*" (*Callidus*, at para. 76).

[142] My colleagues are of the view that remanding the case to the court of original jurisdiction would be unhelpful and not in the interests of justice (paras. 84 and 98). I respectfully disagree. In fact, this Court recently noted in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, [2021] 2 S.C.R. 704, that in cases involving an exercise of discretion by a court of first instance, "it is not in the interests of justice for this Court to step into [that court's] shoes and decide these matters at first instance", and that this

de garantie » additionnelle sur de nouveaux éléments d'actif acquis par la débitrice après l'ouverture des procédures; etc. (par. 59, 61 et 73).

[140] La plupart de ces arguments présument que la compensation pré-post sera systématiquement accordée sans égards aux circonstances propres à chaque affaire, et nonobstant la question de savoir si celle-ci est « indiquée » — d'où la position de mes collègues selon laquelle la compensation pré-post ne devrait jamais être autorisée, sauf circonstances exceptionnelles. Bien que légitimes, ces arguments doivent être laissés à l'appréciation du juge surveillant qui, dans l'exercice de son pouvoir discrétionnaire d'accorder ou non la compensation pré-post dans une affaire donnée, les soupèsera avec les autres considérations et circonstances pertinentes, le tout à la lumière des objectifs réparateurs de la *LACC*.

[141] Estimant être liée par les conclusions de la Cour d'appel du Québec dans l'arrêt *Kitco*, la juge surveillante n'a pas exercé le pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*. Vu l'absence d'exercice de ce pouvoir par la juge surveillante, il ne revient pas à la Cour de l'exercer afin de décider s'il y a lieu d'autoriser ou non la compensation entre les sommes dues par la Ville de Montréal à Groupe SM et la créance de cette dernière à l'encontre de Groupe SM. La Cour a précisé que les juges surveillants sont les mieux placés pour décider s'ils doivent exercer leur pouvoir discrétionnaire dans une situation donnée en s'appuyant sur « une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la *LACC* » (*Callidus*, par. 76).

[142] Mes collègues sont d'avis que le renvoi du dossier en première instance serait inutile et contraire aux intérêts de la justice (par. 84 et 98). Avec égards, je ne suis pas d'accord. En effet, la Cour a récemment rappelé dans l'arrêt *Société Radio-Canada c. Manitoba*, 2021 CSC 33, [2021] 2 R.C.S. 704, que dans les affaires qui reposent sur l'exercice d'un pouvoir discrétionnaire par un tribunal de première instance, « il n'est pas dans l'intérêt de la justice que notre Cour se mette à la place de [ce tribunal] et

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Court's role is limited to reviewing the exercise of the discretion "through [a] deferential lens" (para. 88).

III. Conclusion

[143] For these reasons, I would allow the appeal solely for the purpose of remanding the case to the Superior Court to have it determine whether the City may effect compensation between SM Group's pre-initial order debts and the post-initial order amounts owed by the City to SM Group. I would also allow the appeal so that it can be determined whether the City may effect compensation in respect of its water meter claim.

Appeal dismissed with costs, BROWN J. *dissenting.*

Solicitors for the appellant: IMK, Montréal.

Solicitors for the respondent: Stikeman Elliott, Montréal.

Solicitors for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP: McCarthy Tétrault, Montréal.

Solicitors for the intervener Thornhill Investments Inc.: Fasken Martineau DuMoulin, Montréal.

Solicitor for the intervener Ville de Laval: Service des affaires juridiques de la Ville de Laval, Laval.

Solicitors for the intervener Union des municipalités du Québec: Borden Ladner Gervais, Montréal.

tranche ces questions en première instance » et que le rôle de la Cour se limite à réviser l'exercice de ce pouvoir « avec un regard empreint de déférence » (par. 88).

III. Conclusion

[143] Pour ces raisons, j'accueillerais l'appel à seule fin de retourner le dossier devant la Cour supérieure afin qu'il soit décidé si la Ville peut opérer compensation entre les dettes de Groupe SM pré-ordonnance initiale et les sommes dues par la Ville à Groupe SM post-ordonnance initiale. J'accueillerais également l'appel afin qu'il soit décidé si la Ville peut opérer compensation quant à sa réclamation à l'égard des compteurs d'eau.

Pourvoi rejeté avec dépens, le juge BROWN *est dissident.*

Procureurs de l'appelante : IMK, Montréal.

Procureurs de l'intimée : Stikeman Elliott, Montréal.

Procureurs des intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Thornhill Investments Inc. : Fasken Martineau DuMoulin, Montréal.

Procureur de l'intervenante la Ville de Laval : Service des affaires juridiques de la Ville de Laval, Laval.

Procureurs de l'intervenante l'Union des municipalités du Québec : Borden Ladner Gervais, Montréal.

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BOA COMPEER000674

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

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.

2023 ABCA 224 (CanLII)

Appearances:

C.C. Babiuk/B. Frenken
for the Respondents

Appellant J.F. Metcalfe

2023 ABCA 224 (CanLII)

Apotex Inc. *Appellant*

v.

Sanofi-Synthelabo Canada Inc., Sanofi-Synthelabo and Minister of Health *Respondents*

and

Canadian Generic Pharmaceutical Association, BIOTECanada and Canada's Research-Based Pharmaceutical Companies *Interveners*

Apotex Inc. *Appelante*

c.

Sanofi-Synthelabo Canada Inc., Sanofi-Synthelabo et ministre de la Santé *Intimés*

et

Association canadienne du médicament générique, BIOTECanada et Les compagnies de recherche pharmaceutique du Canada *Intervenantes*

2008 SCC 61 (CanLII)

Indexed as: Apotex Inc. *v.* Sanofi-Synthelabo Canada Inc.

Neutral citation: 2008 SCC 61.

File No.: 31881.

2008: April 16; 2008: November 6.

Present: Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

Répertorié : Apotex Inc. *c.* Sanofi-Synthelabo Canada Inc.

Référence neutre : 2008 CSC 61.

N° du greffe : 31881.

2008 : 16 avril; 2008 : 6 novembre.

Présents : Les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Intellectual property — Patents — Medicines — Selection patents — Validity — Whether selection patent invalid on grounds of anticipation, obviousness or double patenting.

Intellectual property — Patents — Anticipation — Two-step approach to anticipation — Requirements of "prior disclosure" and "enablement".

Intellectual property — Patents — Obviousness — Four-step approach to obviousness — When "obvious to try" test appropriate.

Intellectual property — Patents — Double patenting — Whether doctrine of selection patents invalid on ground of double patenting.

S is the holder of the '875 patent which discloses a large genus or class of over 250,000 possible compounds useful in inhibiting platelet aggregation activity in the blood. One of these compounds is the racemate

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Propriété intellectuelle — Brevets — Médicaments — Brevets de sélection — Validité — Allégation d'invalidité du brevet de sélection pour cause d'antériorité, d'évidence ou de double protection.

Propriété intellectuelle — Brevets — Antériorité — Critère à deux volets — Exigence de la « divulgation antérieure » et du « caractère réalisable » pour établir l'antériorité.

Propriété intellectuelle — Brevets — Évidence — Démarche à quatre volets — Dans quels cas y a-t-il lieu d'appliquer le critère de l'« essai allant de soi » pour statuer sur l'évidence?

Propriété intellectuelle — Brevets — Double protection — La notion de brevet de sélection est-elle infondée pour cause de double protection?

S est titulaire du brevet 875, qui divulgue un genre ou une catégorie de large portée comptant plus de 250 000 composés possibles inhibiteurs de l'agrégation des plaquettes dans le sang. L'un de ces composés

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relevant in this case. A racemate is a substance containing equal amounts of two structurally different compounds, called the dextro-rotatory isomer and the levo-rotatory isomer. S also holds the subsequent '777 patent which discloses and claims clopidogrel bisulfate, marketed by S under the trade name of Plavix as an anti-coagulant that exhibits platelet aggregation inhibiting activity. Clopidogrel is the dextro-rotatory isomer of the racemate that was selected from and is encompassed by the compounds claimed in the '875 patent, and is less toxic and better tolerated than the levo-rotatory isomer and the racemate. In 2003, A, a generic manufacturer served a notice of allegation on S to obtain a notice of compliance from the Minister of Health in order to market its generic version of Plavix, claiming that it would not infringe S's patent for Plavix because the '777 patent was invalid on the grounds of anticipation, obviousness and double patenting. S successfully sought an order in the Federal Court prohibiting the Minister from issuing the notice of compliance to A on the ground that the generic version of Plavix did infringe the '777 patent. The Federal Court of Appeal upheld the decision. The issue is whether selection patents are invalid in principle or on the facts of this case, on the grounds of anticipation, obviousness and double patenting.

Held: The appeal should be dismissed.

In the field of chemical patents, originating or genus patents are based on the discovery of a new invention, namely, a reaction or compound, while selection patents are for compounds chosen from the compounds described in the originating patent. Selection patents do not differ in nature from any other patent, but in order to be valid, the selected compound must be novel and possess a substantial advantage to be secured or disadvantage to be avoided. [9-10]

A system of genus and selection patents is acceptable in principle and does not necessarily involve anticipation and therefore invalidity. The real question is whether, on the facts of this case, the particular selection patent has been anticipated. This means that, having regard to s. 27(1) of the *Patent Act*, the claimed invention has already been made or publicly disclosed. Here, the applications judge set the bar for proving anticipation too high and overstated the stringency of the test by requiring that the "exact invention" must have already been made and publicly disclosed. Rather, for a successful anticipation claim, a two-step approach should be adopted whereby the requirements of "prior disclosure" and "enablement" should be considered separately and proven. For prior disclosure,

est le racémate visé en l'espèce. Un racémate est une substance constituée à parts égales de deux composés aux structures différentes appelés isomère dextrogyre et isomère lévogyre. S est aussi titulaire du brevet 777, qui divulgue et revendique le bisulfate de clopidogrel, qu'elle commercialise sous l'appellation Plavix comme anticoagulant inhibiteur de l'agrégation plaquettaire. Le clopidogrel est l'isomère dextrogyre du racémate qui a été sélectionné à partir du brevet 875 et qui est visé par les revendications de ce dernier, et il est moins toxique et mieux toléré que l'isomère lévogyre et le racémate. En 2003, A, un fabricant de médicaments génériques, a signifié à S un avis d'allégation pour obtenir du ministre de la Santé un avis de conformité afin de commercialiser sa version générique du Plavix. Il alléguait que le générique ne contreferait pas le brevet de S pour le Plavix, car le brevet 777 était invalide pour cause d'antériorité, d'évidence et de double protection. S a obtenu de la Cour fédérale une ordonnance interdisant au ministre de la Santé de délivrer un avis de conformité à A au motif que la version générique du Plavix contrefaisait son brevet 777. La Cour d'appel fédérale a confirmé la décision. La question qui se pose est celle de savoir si le brevet de sélection est invalide en soi ou en l'espèce pour cause d'antériorité, d'évidence et de double protection.

Arrêt : Le pourvoi est rejeté.

Dans le domaine des produits chimiques, le brevet d'origine ou de genre se fonde sur la découverte d'une invention nouvelle, à savoir une réaction ou un composé, alors que le brevet de sélection a pour objet des composés choisis à partir de ceux décrits dans le brevet d'origine. Le brevet de sélection ne diffère pas en soi de tout autre brevet, mais sa validité exige que le composé sélectionné soit nouveau et permette d'obtenir un avantage important ou d'éviter un inconvénient important. [9-10]

L'existence d'un système de brevets de genre et de sélection est admise en soi et n'implique pas nécessairement l'antériorité et, partant, l'invalidité. La véritable question qui se pose est celle de savoir si, au vu des faits de l'espèce, le brevet de sélection en cause était antériorisé, c'est-à-dire, compte tenu du par. 27(1) de la *Loi sur les brevets*, que l'invention revendiquée avait déjà été réalisée ou rendue publique. Dans la présente affaire, le juge de première instance a rendu trop difficile la preuve de l'antériorité et il a exagéré la rigueur du critère de l'antériorité en considérant que l'« invention exacte » devait déjà avoir été faite et avoir été rendue publique. Pour établir l'antériorité, il faut plutôt appliquer un critère à deux volets exigeant la preuve des éléments distincts que sont la « divulgation antérieure »

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the genus patent must disclose subject matter which, if performed, would necessarily result in infringement of that patent. At this stage, the person skilled in the art is reading the prior patent to understand whether it discloses the special advantages of the second invention. No trial and error is permitted. If in reading the genus patent, there is no discovery of the special advantages of the selection patent, the genus patent does not anticipate the selection patent and the disclosure requirement to prove anticipation, as in this case, fails. For "enablement", the person skilled in the art must have been able to perform the invention without undue burden. The question at this stage of the test is how much trial and error or experimentation is permitted. If an inventive step were required to get to the invention of the second patent, the specification of the first patent would not have provided enabling disclosure. The entire prior genus patent must provide enough information to allow a person skilled in the art to perform or make the selected subsequently claimed invention without "undue burden". The skilled person may use his or her common general knowledge of the relevant art at the relevant time to supplement information contained in the prior genus patent and may conduct routine trials without being considered an undue burden, but prolonged or arduous trial and error experiments would not be considered routine. In this case, the allegation that the '777 patent is invalid on the basis of anticipation must fail. Twenty-one examples from the '875 patent were made and tested, one of which was the relevant racemate. There was no evidence that a person skilled in the art would know, from reading the '875 patent, the specific beneficial properties associated with the more active dextro-rotatory isomer and that it would be less toxic than the racemate or levo-rotatory isomer or any of the other compounds made and tested. Since the '875 patent did not teach these special advantages, the invention of the '777 patent was not disclosed and was therefore not anticipated. Regarding enablement, the evidence with respect to trial and error and the methods of separating the racemate into its isomers, indicates that the identification of clopidogrel, its bisulfate salt and their advantageous properties required extensive investigation over a period of months. However, it was not necessary to determine the question of enablement in view of the finding that there was no disclosure of the '777 invention in the '875 patent. [18-20] [23-25] [31-33] [37-38] [40-42] [46-50] [116]

The allegation that the '777 patent is invalid on the basis of obviousness must also fail. Obviousness

et le « caractère réalisable ». Pour les besoins de la divulgation antérieure, le brevet de genre doit divulguer ce qui, une fois réalisé, emporterait nécessairement sa contrefaçon. À cette étape, la personne versée dans l'art lit le mémoire descriptif du brevet antérieur pour déterminer s'il divulgue les avantages particuliers de l'invention subséquente. Les essais successifs ne sont pas admis. Lorsque la lecture du brevet de genre ne permet pas de connaître les avantages particuliers de l'invention visée par le brevet de sélection, comme c'est le cas en l'espèce, l'antériorité n'est pas établie. En ce qui concerne le « caractère réalisable », la personne versée dans l'art doit avoir été en mesure d'exécuter l'invention sans trop de difficultés. La question qui se pose dès lors est celle de savoir dans quelle mesure le caractère réalisable admet les essais successifs. Lorsqu'une étape inventive était nécessaire pour parvenir à l'invention du deuxième brevet, le mémoire descriptif du premier brevet ne rendait pas l'invention réalisable. Le brevet de genre antérieur, considéré dans son intégralité, doit renfermer suffisamment de renseignements pour permettre à la personne versée dans l'art d'exécuter ou de réaliser sans « trop de difficultés » l'invention revendiquée dans le brevet subséquent. La personne versée dans l'art peut faire appel à ses connaissances générales courantes dans le domaine en cause, au moment considéré, pour compléter les données du brevet antérieur. Elle peut effectuer des essais courants sans que l'on considère la difficulté excessive, mais les essais successifs longs et ardus ne sont pas tenus pour des essais courants. En l'espèce, l'allégation d'invalidité du brevet 777 pour cause d'antériorité doit être rejetée. Vingt et un composés visés par le brevet 875 ont été synthétisés et analysés, et l'un d'eux était le racémate en cause. Aucun élément n'établissait qu'en prenant connaissance du brevet 875, une personne versée dans l'art aurait su que l'isomère dextrogyre plus actif présentait des avantages particuliers et qu'il serait moins toxique que le racémate, l'isomère lévogyre ou n'importe lequel des autres composés synthétisés et analysés. Puisque le brevet 875 ne divulguait pas ces avantages particuliers, l'invention correspondant au brevet 777 n'avait pas été divulguée et, de ce fait, elle n'était pas antériorisée. Pour ce qui est du caractère réalisable, les éléments relatifs aux essais successifs et aux méthodes permettant d'isoler les isomères du racémate prouvent que la découverte du clopidogrel, de son bisulfate et de leurs avantages ont nécessité des mois de recherche approfondie. Étant donné la conclusion que le brevet 875 n'avait pas divulgué l'objet du brevet 777, il n'était cependant pas nécessaire de trancher la question du caractère réalisable. [18-20] [23-25] [31-33] [37-38] [40-42] [46-50] [116]

L'allégation selon laquelle le brevet 777 est invalide pour cause d'évidence doit elle aussi être rejetée.

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is largely concerned with how a skilled worker would have acted in the light of the prior art. An obviousness inquiry should follow a four-step approach. First, the notional "person skilled in the art" and that person's relevant common general knowledge must be identified. Here, that person is a trained pharmachemist. Second, the inventive concept of the claim in question must be determined or construed. The inventive concept of the claims in the '777 patent is that it is a compound useful in inhibiting platelet aggregation which has greater therapeutic effect and less toxicity than the other compounds of the '875 patent. Third, the differences, if any, that exist between the matters cited as forming part of the "state of the art" and the inventive concept of the claim or the claim as construed must be identified. There is no disclosure in the '875 patent of the specific beneficial properties associated with the dextro-rotatory isomer of this racemate or its bisulfate salt, in contrast to the '777 patent, which claims the invention of the dextro-rotatory isomer of the racemate, clopidogrel, and its bisulfate salt, discloses their beneficial properties over the levo-rotatory isomer and the racemate, and expressly describes how to separate the racemate into its isomers. Fourth, a court must consider whether, viewed without any knowledge of the alleged invention as claimed, those differences constitute steps which would have been obvious to the person skilled in the art or whether they require any degree of inventiveness. It is at this final step that the issue of "obvious to try" will arise and the nature of the invention in this case is such as to warrant this test. For a finding that an invention was "obvious to try", there must be evidence to convince a judge on a balance of probabilities that it was more or less self-evident to try to obtain the invention. Mere possibility that something might turn up is not enough. Here, when the relevant factors are considered, the invention was not self-evident from the prior art and common general knowledge in order to satisfy the test. While there were five well-known methods to separate this racemate into its isomers, there was no evidence that a person skilled in the art would have known which of the five known separation techniques would work with this racemate. Further, S spent millions of dollars and several years developing the racemate up to the point of preliminary human clinic trials before it was discovered that the dextro-rotatory isomer was active and non-toxic. As the '875 patent did not differentiate on the basis of efficacy and toxicity, what to select or omit was not then self-evident to a person skilled in the art. It was also not self-evident from the '875 patent or common general knowledge what the beneficial properties of the dextro-rotatory isomer of this racemate or its bisulfate salt would be and therefore what was being tried ought to work. The course of

L'évidence tient en grande partie à la manière dont l'homme du métier aurait agi à la lumière de l'antériorité. L'examen relatif à l'évidence comporte quatre étapes. Premièrement, il faut identifier la « personne versée dans l'art » et déterminer ses connaissances générales courantes pertinentes. En l'espèce, la personne versée dans l'art est le chimiste pharmaceutique de formation. Deuxièmement, il faut définir l'idée originale de la revendication en cause, au besoin par voie d'interprétation. L'idée originale à la base des revendications du brevet 777 est un antiplaquettaire à l'effet thérapeutique supérieur et à la toxicité moindre comparativement aux autres composés couverts par le brevet 875. Troisièmement, il faut recenser les différences, s'il en est, entre ce qui ferait partie de « l'état de la technique » et l'idée originale qui sous-tend la revendication ou son interprétation. Le brevet 875 ne divulgue aucun avantage particulier associé à l'isomère dextrogyre du racémate en cause, ou de son bisulfate, contrairement au brevet 777, qui revendique l'invention de l'isomère dextrogyre du racémate, le clopidogrel et de son bisulfate, divulgue leurs avantages par rapport à l'isomère lévogyre et au racémate, et énonce expressément le procédé de séparation des isomères du racémate. Quatrièmement, le tribunal doit se demander, abstraction faite de toute connaissance de l'invention revendiquée, si ces différences constituent des étapes évidentes pour la personne versée dans l'art ou si elles dénotent quelque inventivité. C'est à cette dernière étape qu'il faut se demander si le critère de l'« essai allant de soi » s'applique et, en l'espèce, la nature de l'invention en cause justifie son application. Pour conclure qu'une invention résulte d'un « essai allant de soi », le tribunal doit être convaincu selon la prépondérance des probabilités qu'il allait plus ou moins de soi de tenter d'arriver à l'invention. La seule possibilité d'obtenir quelque chose ne suffit pas. En l'occurrence, compte tenu de tous les éléments pertinents, l'invention n'était pas évidente au regard de l'antériorité et des connaissances générales courantes de manière à satisfaire au critère. Cinq techniques connues permettaient d'isoler les isomères du racémate, mais rien n'établissait qu'une personne versée dans l'art aurait su laquelle allait fonctionner pour le racémate en cause. De plus, S a consacré des millions de dollars et des années de travaux à la mise au point du racémate puis à la tenue d'essais cliniques préliminaires chez l'humain avant qu'on ne découvre l'activité et la non-toxicité de l'isomère dextrogyre. Le brevet 875 n'établissait pas de distinction en fonction de l'efficacité et de la toxicité, de sorte que ce qu'il y avait lieu de retenir ou d'omettre n'était alors pas évident pour la personne versée dans l'art. Ni le brevet 875 ni les connaissances générales courantes ne rendaient évidents les avantages de l'isomère dextrogyre

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conduct and the time involved throughout demonstrate that the advantage of the dextro-rotatory isomer was not quickly or easily predictable. [66-68] [70] [74] [78-81] [85-86] [90-93]

Finally, the challenge to selection patents based on the ground of double patenting is not well founded. Strategies that attempt to extend the time limit of exclusivity of a patent may be contrary to the objectives of the *Patent Act*, depending on the circumstances, but a generalized concern about evergreening is not a justification for an attack on the doctrine of selection patents. A selection patent may be sought by a party other than the inventor or owner of the original genus patent so that evergreening does not arise. In addition, selection patents encourage improvements over the subject matter of the original genus patent because that selection does something better than or different from what was claimed in the genus patent. There is no "same invention" double patenting because the claims of the '875 and '777 patents were not identical or coterminous and the former is broader than the latter. Further, as the claims in the '777 patent reflect a patentably distinct compound from the compounds in the '875 patent, it is not invalid for "obviousness" double patenting. [97-98] [100-101] [110-111] [113] [115] [117]

Cases Cited

Applied: *In re I. G. Farbenindustrie A. G.'s Patents* (1930), 47 R.P.C. 289; *Synthon B.V. v. SmithKline Beecham plc*, [2006] 1 All E.R. 685, [2005] UKHL 59; *Windsurfing International Inc. v. Tabur Marine (Great Britain) Ltd.*, [1985] R.P.C. 59; *Pozzoli SPA v. BDMO SA*, [2007] F.S.R. 37 (p. 872), [2007] EWCA Civ 588; *Whirlpool Corp. v. Camco Inc.*, [2000] 2 S.C.R. 1067, 2000 SCC 67; *Monsanto Co. v. Commissioner of Patents*, [1979] 2 S.C.R. 1108; **referred to:** *Commissioner of Patents v. Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning*, [1964] S.C.R. 49; *Free World Trust v. Électro Santé Inc.*, [2000] 2 S.C.R. 1024, 2000 SCC 66; *Beloit Canada Ltd. v. Valmet OY* (1986), 8 C.P.R. (3d) 289; *General Tire & Rubber Co. v. Firestone Tyre & Rubber Co.*, [1972] R.P.C. 457; *Hills v. Evans* (1862), 31 L.J. Ch. (N.S.) 457; *E. I. Du Pont de Nemours & Co. (Witsiepe's) Application*, [1982] F.S.R. 303; *Halliburton Energy Services Inc. v. Smith International (North Sea) Ltd.*, [2006] EWCA Civ 1715 (BAILII); *Wobben v. Vestas-Celtic Wind Technology*

du racémate ou de son bisulfate, de sorte qu'il n'était pas évident que l'essai serait fructueux. Les efforts et le temps consacrés tout du long démontrent qu'il n'était pas possible de prédire rapidement ou aisément l'avantage que présentait l'isomère dextrogyre. [66-68] [70] [74] [78-81] [85-86] [90-93]

Enfin, l'allégation selon laquelle les brevets de sélection sont invalides pour cause de double protection n'est pas fondée. Les stratégies visant à accroître la durée du monopole conféré par un brevet peuvent aller à l'encontre des objectifs de la *Loi sur les brevets*, selon les circonstances, mais cette préoccupation générale liée à la perpétuation des brevets ne justifie pas la remise en question des brevets de sélection comme tels. L'obtention d'un brevet de sélection peut intéresser une autre personne que l'inventeur ou le titulaire du brevet de genre d'origine, auquel cas la question de la perpétuation ne se pose pas. En outre, le brevet de sélection favorise le perfectionnement de l'objet du brevet de genre d'origine en ce que la sélection permet d'obtenir quelque chose de mieux ou de différent par rapport à ce qui est revendiqué dans le brevet initial. Il n'y a pas de double brevet relatif à la « même invention », car les revendications des brevets 875 et 777 ne sont pas identiques et les revendications du premier brevet ont une portée plus grande que celles du second. De plus, comme le brevet 777 revendique un composé brevetable distinct de celui visé par les revendications du brevet 875, il ne saurait être invalide pour cause de double brevet relatif à une « évidence ». [97-98] [100-101] [110-111] [113] [115] [117]

Jurisprudence

Arrêts appliqués : *In re I. G. Farbenindustrie A. G.'s Patents* (1930), 47 R.P.C. 289; *Synthon B.V. c. SmithKline Beecham plc*, [2006] 1 All E.R. 685, [2005] UKHL 59; *Windsurfing International Inc. c. Tabur Marine (Great Britain) Ltd.*, [1985] R.P.C. 59; *Pozzoli SPA c. BDMO SA*, [2007] F.S.R. 37 (p. 872), [2007] EWCA Civ 588; *Whirlpool Corp. c. Camco Inc.*, [2000] 2 R.C.S. 1067, 2000 CSC 67; *Monsanto Co. c. Commissaire des brevets*, [1979] 2 R.C.S. 1108; **arrêts mentionnés :** *Commissioner of Patents c. Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning*, [1964] R.C.S. 49; *Free World Trust c. Électro Santé Inc.*, [2000] 2 R.C.S. 1024, 2000 CSC 66; *Beloit Canada Ltée c. Valmet OY*, [1986] A.C.F. nº 87 (QL); *General Tire & Rubber Co. c. Firestone Tyre & Rubber Co.*, [1972] R.P.C. 457; *Hills c. Evans* (1862), 31 L.J. Ch. (N.S.) 457; *E. I. Du Pont de Nemours & Co. (Witsiepe's) Application*, [1982] F.S.R. 303; *Halliburton Energy Services Inc. c. Smith International (North Sea) Ltd.*, [2006] EWCA Civ 1715 (BAILII);

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Ltd., [2007] EWHC 2636 (BAILII); *Application of Tomlinson*, 363 F.2d 928 (1966); *In re O'Farrell*, 853 F.2d 894 (1988); *KSR International Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007); *Johns-Manville Corporation's Patent*, [1967] R.P.C. 479; *H. Lundbeck A/S v. Generics (UK) Ltd.*, [2008] R.P.C. 19 (p. 437), [2008] EWCA Civ 311; *Angiotech Pharmaceuticals Inc. v. Conor Medsystems Inc.*, [2007] R.P.C. 20 (p. 487), [2007] EWCA Civ 5, rev'd [2008] R.P.C. 28 (p. 716), [2008] UKHL 49; *Saint-Gobain PAM SA v. Fusion Provida Ltd.*, [2005] EWCA Civ 177 (BAILII); *Apotex Inc. v. Wellcome Foundation Ltd.*, [2002] 4 S.C.R. 153, 2002 SCC 77; *Ciba-Geigy AG v. Commissioner of Patents* (1982), 65 C.P.R. (2d) 73; *May & Baker Ltd. v. Boots Pure Drug Co.* (1950), 67 R.P.C. 23.

Statutes and Regulations Cited

Food and Drug Regulations, C.R.C. 1978, c. 870, s. C.08.004.
Patent Act, R.S.C. 1985, c. P-4, ss. 2, 27, 34(1)(*b*) [rep. 1993, c. 15, s. 36], 55.2(4), 59.
Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, ss. 5, 6(1).
Patents Act 1977 (U.K.), 1977, c. 37.

Treaties and Other International Instruments

Convention on the Grant of European Patents, 1065 U.N.T.S. 199.

Authors Cited

Vaver, David. *Intellectual Property Law: Copyright, Patents, Trade-marks.* Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Federal Court of Appeal (Richard C.J. and Noël and Evans JJ.A.) (2006), 282 D.L.R. (4th) 179, 358 N.R. 135, 59 C.P.R. (4th) 46, [2006] F.C.J. No. 1945 (QL), 2006 CarswellNat 4587, 2006 FCA 421, affirming a decision of Shore J. (2005), 271 F.T.R. 159, 39 C.P.R. (4th) 202, [2005] R.P.C. 34 (p. 855), [2005] F.C.J. No. 482 (QL), 2005 CarswellNat 726, 2005 FC 390. Appeal dismissed.

Harry B. Radomski, *Richard Naiberg*, *Andrew R. Brodkin* and *Miles Hastie*, for the appellant.

Anthony G. Creber and *Cristin A. Wagner*, for the respondents Sanofi-Synthelabo Canada Inc. and Sanofi-Synthelabo.

Wobben c. Vestas-Celtic Wind Technology Ltd., [2007] EWHC 2636 (BAILII); *Application of Tomlinson*, 363 F.2d 928 (1966); *In re O'Farrell*, 853 F.2d 894 (1988); *KSR International Co. c. Teleflex Inc.*, 127 S. Ct. 1727 (2007); *Johns-Manville Corporation's Patent*, [1967] R.P.C. 479; *H. Lundbeck A/S c. Generics (UK) Ltd.*, [2008] R.P.C. 19 (p. 437), [2008] EWCA Civ 311; *Angiotech Pharmaceuticals Inc. c. Conor Medsystems Inc.*, [2007] R.P.C. 20 (p. 487), [2007] EWCA Civ 5, inf. par [2008] R.P.C. 28 (p. 716), [2008] UKHL 49; *Saint-Gobain PAM SA c. Fusion Provida Ltd.*, [2005] EWCA Civ 177 (BAILII); *Apotex Inc. c. Wellcome Foundation Ltd.*, [2002] 4 R.C.S. 153, 2002 CSC 77; *Ciba-Geigy AG c. Canada (Commissaire des brevets)*, [1982] A.C.F. nº 425 (QL); *May & Baker Ltd. c. Boots Pure Drug Co.* (1950), 67 R.P.C. 23.

Lois et règlements cités

Loi sur les brevets, L.R.C. 1985, ch. P-4, art. 2, 27, 34(1)*b*) [abr. 1993, ch. 15, art. 36], 55.2(4), 59.
Patents Act 1977 (R.-U.), 1977, ch. 37.
Règlement sur les aliments et drogues, C.R.C. 1978, ch. 870, art. C.08.004.
Règlement sur les médicaments brevetés (avis de conformité), DORS/93-133, art. 5, 6(1).

Traités et autres instruments internationaux

Convention sur la délivrance de brevets européens, 1065 R.T.N.U. 199.

Doctrine citée

Vaver, David. *Intellectual Property Law : Copyright, Patents, Trade-marks.* Concord, Ont. : Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel fédérale (le juge en chef Richard et les juges Noël et Evans) (2006), 282 D.L.R. (4th) 179, 358 N.R. 135, 59 C.P.R. (4th) 46, [2006] A.C.F. nº 1945 (QL), 2006 CarswellNat 5335, 2006 CAF 421, qui a confirmé une décision du juge Shore (2005), 271 F.T.R. 159, 39 C.P.R. (4th) 202, [2005] R.P.C. 34 (p. 855), [2005] A.C.F. nº 482 (QL), 2005 CarswellNat 4380, 2005 CF 390. Pourvoi rejeté.

Harry B. Radomski, *Richard Naiberg*, *Andrew R. Brodkin* et *Miles Hastie*, pour l'appelante.

Anthony G. Creber et *Cristin A. Wagner*, pour les intimées Sanofi-Synthelabo Canada Inc. et Sanofi-Synthelabo.

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No one appeared for the respondent the Minister of Health.

Edward Hore, for the intervener the Canadian Generic Pharmaceutical Association.

Peter Wilcox and *Jana Stettner*, for the intervener BIOTECanada.

Patrick E. Kierans, *Jason Markwell* and *Cynthia L. Tape*, for the intervener Canada's Research-Based Pharmaceutical Companies.

The judgment of the Court was delivered by

ROTHSTEIN J. —

I. Introduction

[1] This appeal raises questions relating to the validity of what are known as selection patents. In the context of chemical compounds, in general terms, a selection patent is one whose subject matter (compounds) is a fraction of a larger known class of compounds which was the subject matter of a prior patent.

[2] The appellant ("Apotex") challenges the validity of the selection patent in this case on the grounds of anticipation, obviousness and double patenting. I would dismiss the appeal.

II. Facts

[3] The parties have accepted that the Sanofi respondents ("Sanofi") are the relevant holders of patent 1,194,875 ('875 patent). This patent disclosed a genus or class of compounds useful in inhibiting platelet aggregation activity in the blood which is important in treating coronary artery, peripheral vascular and cerebral vascular diseases. This genus patent discloses over 250,000 possible different compounds useful for this purpose. One of the compounds is a racemate described as methyl alpha-5 (4,5,6,7-tetrahydro (3, 2-c)-thieno pyridyl) (2-chlorophenyl)-acetate (the "racemate").

[4] A racemate is a substance containing equal amounts of two structurally different compounds,

Personne n'a comparu pour l'intimé le ministre de la Santé.

Edward Hore, pour l'intervenante l'Association canadienne du médicament générique.

Peter Wilcox et *Jana Stettner*, pour l'intervenante BIOTECanada.

Patrick E. Kierans, *Jason Markwell* et *Cynthia L. Tape*, pour l'intervenante Les compagnies de recherche pharmaceutique du Canada.

Version française du jugement de la Cour rendu par

LE JUGE ROTHSTEIN —

I. Introduction

[1] Le présent pourvoi soulève des questions relatives à la validité de ce qu'on appelle un brevet de sélection. Dans le domaine des composés chimiques, l'objet d'un tel brevet s'entend généralement d'un composé faisant partie d'une catégorie plus grande visée par un brevet antérieur.

[2] L'appelante (« Apotex ») soutient que le brevet de sélection considéré en l'espèce est invalide pour cause d'antériorité, d'évidence et de double protection. Je suis d'avis de rejeter le pourvoi.

II. Les faits

[3] Les parties reconnaissent que l'intimée (« Sanofi ») est titulaire du brevet 1,194,875 (« brevet 875 »), qui divulgue un genre ou une catégorie de composés inhibant l'agrégation des plaquettes dans le sang, ce qui joue un rôle important dans le traitement des coronaropathies, des artériopathies périphériques et des maladies vasculaires cérébrales. Ce brevet de genre divulgue plus de 250 000 composés possibles ayant cet effet antiplaquettaire, dont le racémate alpha-5 (4,5,6,7-tétrahydro (3,2-c) thiénopyridyl)(2-chlorophényl)-acétate de méthyle (« racémate »).

[4] Un racémate est une substance constituée à parts égales de deux composés aux structures

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called enantiomers or optical isomers. The two isomers, the dextro-rotatory isomer and the levo-rotatory isomer, are mirror images of each other and rotate plane-polarized light in opposite directions.

[5] The parties have accepted that Sanofi is also the relevant holder of subsequent Canadian patent 1,336,777 ('777 patent), the patent in suit. It discloses and claims clopidogrel bisulfate, which is marketed by Sanofi under the trade name of Plavix as an anti-coagulant that inhibits platelet aggregation activity in the blood.

[6] Clopidogrel bisulfate is encompassed within the scope of the claims in the '875 patent. Clopidogrel is the dextro-rotatory isomer of the racemate, having beneficial properties over both the racemate and the levo-rotatory isomer. The dextro-rotatory isomer exhibits a platelet aggregation inhibiting activity and is less toxic and better tolerated than the levo-rotatory isomer and racemate. The salts of the dextro-rotatory isomer, such as clopidogrel bisulfate, have a better therapeutic index than the salts of the racemic mixture and in fact, the levo-rotatory isomer exhibits almost no platelet aggregation inhibiting activity, and its toxicity is markedly higher than that of the dextro-rotatory isomer.

[7] On March 10, 2003, Apotex served a notice of allegation under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 ("*NOC Regulations*"), on Sanofi for the purpose of obtaining a notice of compliance pursuant to s. C.08.004 of the *Food and Drug Regulations*, C.R.C. 1978, c. 870, from the Minister of Health for a generic version of Plavix. The basis of Apotex's notice of allegation was that it would not infringe Sanofi's '777 patent for Plavix because the '777 patent was invalid on account of anticipation, obviousness and double patenting. On April 28, 2003, Sanofi initiated proceedings under s. 6(1) of the *NOC Regulations* in the Federal Court seeking an order prohibiting the Minister of Health from issuing a notice of compliance to Apotex on the grounds that its generic version of Plavix would infringe the '777 patent. The Federal Court granted the order of

différentes appelés énantiomères ou isomères optiques. Les deux isomères, le dextrogyre et le lévogyre, sont l'image l'un de l'autre dans un miroir et font dévier le plan de la lumière polarisée dans des directions opposées.

[5] Les parties reconnaissent que Sanofi est aussi titulaire du brevet canadien 1,336,777 (« brevet 777 ») — l'objet du litige — délivré subséquemment. Le brevet divulgue et revendique le bisulfate de clopidogrel, qui est commercialisé sous l'appellation Plavix comme anticoagulant inhibiteur de l'agrégation plaquettaire.

[6] Le bisulfate de clopidogrel, soit l'isomère dextrogyre du racémate, est visé par les revendications du brevet 875 et présente des avantages par rapport au racémate et à l'isomère lévogyre. Non seulement l'isomère dextrogyre inhibe l'agrégation plaquettaire, mais il est aussi moins toxique et mieux toléré que l'isomère lévogyre et le racémate. Comme le bisulfate de clopidogrel, ses sels sont associés à un meilleur indice thérapeutique que les sels du mélange racémique. En fait, l'isomère lévogyre n'inhibe presque pas l'agrégation des plaquettes et il est nettement plus toxique que l'isomère dextrogyre.

[7] Le 10 mars 2003, Apotex a signifié à Sanofi un avis d'allégation en application du *Règlement sur les médicaments brevetés (avis de conformité)*, DORS/93-133 (« Règlement AC »), afin d'obtenir du ministre de la Santé un avis de conformité pour une version générique du Plavix suivant l'art. C.08.004 du *Règlement sur les aliments et drogues*, C.R.C. 1978, ch. 870. Dans cet avis, Apotex alléguait ne pas contrefaire le brevet 777 de Sanofi pour le Plavix, car ce brevet était invalide pour cause d'antériorité, d'évidence et de double protection. Le 28 avril 2003, Sanofi a saisi la Cour fédérale de la demande prescrite au par. 6(1) du Règlement AC pour l'obtention d'une ordonnance interdisant au ministre de la Santé de délivrer un avis de conformité à Apotex au motif que la version générique du Plavix contreferait son brevet 777. La Cour fédérale a rendu l'ordonnance d'interdiction

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prohibition ((2005), 271 F.T.R. 159, 2005 FC 390). The Federal Court of Appeal dismissed Apotex's appeal ((2006), 282 D.L.R. (4th) 179, 2006 FCA 421).

III. Selection Patents

[8] This appeal requires the Court to determine whether selection patents are invalid in principle or on the facts of this case on the grounds of anticipation, obviousness and double patenting.

[9] The *locus classicus* describing selection patents is the decision of Maugham J. in *In re I. G. Farbenindustrie A. G.'s Patents* (1930), 47 R.P.C. 289 (Ch. D.). At p. 321, he explained that in the field of chemical patents (which would of course include pharmaceutical compounds), there are often two "sharply divided classes". The first class of patents, which he called originating patents, are based on an originating invention, namely, the discovery of a new reaction or a new compound. The second class comprises patents based on a selection of compounds from those described in general terms and claimed in the originating patent. Maugham J. cautioned that the selected compounds cannot have been made before, or the selection patent "would fail for want of novelty". But if the selected compound is "novel" and "possess[es] a special property of an unexpected character", the required "inventive" step would be satisfied (p. 321). At p. 322, Maugham J. stated that a selection patent "does not in its nature differ from any other patent".

[10] While not exhaustively defining a selection patent, he set out (at pp. 322-23) three conditions that must be satisfied for a selection patent to be valid.

1. There must be a substantial advantage to be secured or disadvantage to be avoided by the use of the selected members.

2. The whole of the selected members (subject to "a few exceptions here and there") possess the advantage in question.

([2005] A.C.F. nº 482 (QL), 2005 CF 390). La Cour d'appel fédérale a rejeté l'appel d'Apotex ([2006] A.C.F. nº 1945 (QL), 2006 CAF 421).

III. Les brevets de sélection

[8] Dans le présent pourvoi, notre Cour doit déterminer si le brevet de sélection est invalide en soi ou en l'espèce pour cause d'antériorité, d'évidence et de double protection.

[9] La description classique du brevet de sélection figure dans l'arrêt *In re I. G. Farbenindustrie A. G.'s Patents* (1930), 47 R.P.C. 289 (Ch. D.), où le juge Maugham explique à la p. 321 que les brevets portant sur des produits chimiques (dont bien sûr les composés pharmaceutiques) se divisent souvent en deux [TRADUCTION] « catégories nettement distinctes ». La première, celle des brevets d'origine, formée des brevets protégeant une invention source, à savoir la découverte d'une nouvelle réaction ou d'un nouveau composé. La seconde catégorie, celle des brevets visant une sélection des composés décrits en termes généraux et revendiqués dans le brevet d'origine. Le juge Maugham précise que les composés sélectionnés ne doivent pas avoir été réalisés auparavant, sinon le brevet de sélection [TRADUCTION] « ne satisfait pas à l'exigence de nouveauté ». Cependant, le composé sélectionné qui est « nouveau » et qui « possède une propriété particulière imprévue » remplit l'exigence de l'étape inventive. Le juge Maugham ajoute à la p. 322 que le brevet de sélection [TRADUCTION] « ne diffère pas en soi de tout autre brevet ».

[10] Le juge Maugham ne définit pas le brevet de sélection de manière exhaustive, mais il énonce trois conditions essentielles à sa validité (p. 322-323).

1. L'utilisation des éléments sélectionnés permet d'obtenir un avantage important ou d'éviter un inconvénient important.

2. Tous les éléments sélectionnés (« à quelques exceptions près ») présentent cet avantage.

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3. The selection must be in respect of a quality of a special character peculiar to the selected group. If further research revealed a small number of unselected compounds possessing the same advantage, that would not invalidate the selection patent. However, if research showed that a larger number of unselected compounds possessed the same advantage, the quality of the compound claimed in the selection patent would not be of a special character.

[11] Although much has been written about selection patents since *I. G. Farbenindustrie*, Maugham J.'s analysis is consistently referred to and is well accepted. I find it is a useful starting point for the analysis to be conducted in this case.

IV. The Regulatory Scheme Under Which the Matter Proceeded

[12] At the outset, it is appropriate to refer to the words of Judson J. for this Court in *Commissioner of Patents v. Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning*, [1964] S.C.R. 49, at p. 57:

There is no inherent common law right to a patent. An inventor gets his patent according to the terms of the *Patent Act*, no more and no less.

The most recent reference to the law of patents being wholly statutory are the words of Lord Walker in *Synthon B.V. v. SmithKline Beecham plc*, [2006] 1 All E.R. 685, [2005] UKHL 59, at paras. 57-58:

The law of patents is wholly statutory, and has a surprisingly long history. . . . In the interpretation and application of patent statutes judge-made doctrine has over the years done much to clarify the abstract generalities of the statutes and to secure uniformity in their application.

Nevertheless it is salutary to be reminded, from time to time, that the general concepts which are the common currency of patent lawyers are founded on a statutory text, and cannot have any other firm foundation.

3. La sélection vise une qualité particulière propre aux composés en cause. Une recherche plus poussée révélant qu'un petit nombre de composés non sélectionnés présentent le même avantage ne permettrait pas d'invalider le brevet de sélection. Toutefois, si la recherche démontrait qu'un grand nombre de composés non sélectionnés présentent le même avantage, la qualité du composé revendiqué dans le brevet de sélection ne serait pas particulière.

[11] Même si les brevets de sélection ont fait couler beaucoup d'encre depuis la décision *I. G. Farbenindustrie*, les principes dégagés par le juge Maugham sont régulièrement cités et reconnus. J'estime qu'ils offrent un bon point de départ pour l'analyse que requiert le présent pourvoi.

IV. Le cadre législatif applicable en l'espèce

[12] Il convient d'abord de citer le juge Judson s'exprimant au nom de notre Cour dans l'arrêt *Commissioner of Patents c. Farbwerke Hoechst Artiengesellschaft Vormals Meister Lucius & Bruning*, [1964] R.C.S. 49, p. 57 :

[TRADUCTION] Il n'existe pas, en common law, de droit inhérent à un brevet. L'inventeur obtient son brevet conformément à la *Loi sur les brevets*. Un point c'est tout.

L'affirmation la plus récente voulant que le droit des brevets soit entièrement issu de la loi est celle de lord Walker dans l'arrêt *Synthon B.V. c. SmithKline Beecham plc*, [2006] 1 All E.R. 685, [2005] UKHL 59, par. 57-58 :

[TRADUCTION] L'origine du droit des brevets est purement législative et étonnamment ancienne. [. . .] Eu égard à l'interprétation et à l'application des dispositions législatives sur les brevets, la doctrine jurisprudentielle a largement contribué au fil des ans à clarifier les notions abstraites des lois et à en assurer l'application uniforme.

Il est tout de même salutaire de se faire rappeler de temps à autre que les concepts généraux auxquels se réfèrent les avocats spécialisés en droit des brevets prennent appui sur un texte législatif et ne sauraient avoir aucun autre véritable fondement.

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I therefore turn to the regulatory scheme applicable in this case.

[13] The procedure under the *NOC Regulations* pursuant to which a manufacturer of drugs may apply to the Minister of Health for a notice of compliance is well known. A manufacturer, usually a generic manufacturer, wishes to compare its drug with that of a patent holder for which a patent list has been submitted to the Minister by the patent holder. The generic manufacturer's purpose is to establish the safety and efficacy of its drug for the purposes of securing marketing approval from the Minister. The process of comparison saves the generic competitor time and resources. However, the Minister will not issue a notice of compliance unless the patent on the comparator drug has expired, is invalid, or the generic's product will not otherwise infringe the patent. Thus the *NOC Regulations* create a connection between government approval to market a generic drug and the issue of patent validity and infringement.

[14] Section 5(1)(*b*) of the *NOC Regulations* states that the generic manufacturer, in its submission for a notice of compliance, may allege that the patent has expired, is not valid or will not be infringed. The patent holder may then apply to the Federal Court for an order prohibiting the Minister from issuing a notice of compliance to the generic manufacturer until after expiration of the patent that is the subject of the notice of allegation. The court will grant the prohibition order if it finds that the allegation of invalidity, expiry or non-infringement is not justified. If it finds the allegation justified, it will dismiss the application for prohibition and the Minister may then issue a notice of compliance to the generic manufacturer if all other requirements are met.

[15] The *NOC Regulations* do not provide guidance about how an allegation of "not valid" as stated in s. 5(1)(*b*)(iii) is to be considered and determined by the court. For this purpose, reference must be made to the relevant version of the *Patent Act*, which is R.S.C. 1985, c. P-4, applicable to patent applications filed prior to October 1, 1989.

Je passe donc au cadre législatif applicable en l'espèce.

[13] La procédure réglementaire permettant l'obtention — généralement par un fabricant de médicaments génériques — d'un avis de conformité délivré par le ministre de la Santé est bien connue. Le fabricant cherche à comparer son médicament avec celui d'un breveté pour lequel ce dernier a déposé une liste de brevets. L'objectif du fabricant est d'établir l'innocuité et l'efficacité de son produit et d'obtenir du ministre l'autorisation de le commercialiser. Ce processus de comparaison épargne temps et ressources au concurrent générique. Cependant, le ministre ne délivre un avis de conformité que si le brevet du produit de comparaison est expiré ou invalide ou que le produit générique ne le contrefait pas par ailleurs. Le Règlement AC lie donc l'autorisation de commercialiser un médicament générique à la validité d'un brevet et à sa contrefaçon.

[14] L'alinéa 5(1)*b*) du Règlement AC dispose que dans sa demande d'avis de conformité, le fabricant d'un générique peut alléguer que le brevet est expiré, qu'il n'est pas valide ou qu'il ne sera pas contrefait. Le breveté peut ensuite demander à la Cour fédérale de rendre une ordonnance interdisant au ministre de délivrer un avis de conformité au fabricant du générique avant l'expiration du brevet visé par l'avis d'allégation. La Cour fédérale fait droit à la demande lorsqu'elle conclut que l'allégation d'invalidité, d'expiration ou d'absence de contrefaçon n'est pas fondée. Lorsqu'elle conclut au fondement de l'allégation, elle rejette la demande, et le ministre peut alors délivrer un avis de conformité au fabricant du générique qui satisfait par ailleurs aux exigences.

[15] Le Règlement AC ne précise pas à l'issue de quelle démarche la Cour fédérale se prononce sur l'allégation d'invalidité du brevet formulée en application du sous-al. 5(1)*b*)(iii). Il faut donc s'en remettre à la version de la *Loi sur les brevets* applicable aux demandes de brevet présentées avant le 1er octobre 1989, soit celle figurant dans les L.R.C. 1985, ch. P-4.

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[16] The application for the '875 patent was filed in 1983. The patent was issued in 1985 and expired in 2002. The application for the '777 patent was filed in 1988. The patent was issued in 1995 and unless found to be invalid, will expire in 2012.

[17] The use of the term "not valid" in s. 5 of the *NOC Regulations* parallels what would otherwise be a defence to an infringement action referred to in s. 59 of the Act:

> The defendant, in any action for infringement of a patent may plead as matter of defence any fact or default which by this Act or by law renders the patent void, and the court shall take cognizance of that pleading and of the relevant facts and decide accordingly.

The *NOC Regulations* are promulgated under s. 55.2(4) of the Act, and it seems apparent that the determination of the invalidity of a patent must be based on "any fact or default which by this Act or by law renders the patent void". In this case, Apotex relies on anticipation, obviousness and double patenting to allege that the '777 patent is invalid. These allegations implicate both the Act and the judge-made doctrine based on the Act.

V. Anticipation

(a) *Relevant Legislation*

[18] For purposes of anticipation, it is necessary to have regard to s. 27 of the Act which sets forth the basic conditions necessary for obtaining a patent. The invention must not have been previously known or used nor described in any patent or other publication printed in any country more than two years before the filing of the patent application and must not have been in public use or sale in Canada more than two years prior to the filing of the patent application. Section 27(1) provided:

> **27.** (1) Subject to this section, any inventor or legal representative of an inventor of an invention that was
>
> (*a*) not known or used by any other person before he invented it,

[16] Dans le cas du brevet 875, la demande a été déposée en 1983. Le brevet a été délivré en 1985 et il a expiré en 2002. En ce qui concerne le brevet 777, la demande a été déposée en 1988, et le brevet a été délivré en 1995. À moins qu'il ne soit frappé de nullité, il expirera en 2012.

[17] L'invalidité visée à l'art. 5 du Règlement AC doit être mise en parallèle avec ce qui constitue par ailleurs un moyen de défense dans une action en contrefaçon suivant l'art. 59 de la Loi, dont voici le texte :

> Dans toute action en contrefaçon de brevet, le défendeur peut invoquer comme moyen de défense tout fait ou manquement qui, d'après la présente loi ou en droit, entraîne la nullité du brevet; le tribunal prend connaissance de cette défense et des faits pertinents et statue en conséquence.

Le Règlement AC a été pris en vertu du par. 55.2(4) de la Loi et il appert que la déclaration d'invalidité d'un brevet doit s'appuyer sur « tout fait ou manquement qui, d'après la présente loi ou en droit, entraîne la nullité du brevet ». Dans la présente affaire, Apotex allègue que le brevet 777 est invalide pour cause d'antériorité, d'évidence et de double protection. Ces allégations font jouer tant la Loi que la doctrine jurisprudentielle qui en est issue.

V. L'antériorité

a) *Dispositions législatives pertinentes*

[18] Se prononcer sur l'antériorité exige que l'on se penche sur l'art. 27 de la Loi, qui énonce les principales conditions d'obtention du brevet. L'invention ne doit avoir été ni connue ou utilisée par une autre personne, ni décrite dans un brevet ou une publication imprimée dans quelque pays plus de deux ans avant le dépôt de la demande de brevet, ni en usage public ou en vente au Canada plus de deux ans avant le dépôt de la demande de brevet. Le paragraphe 27(1) prévoyait :

> **27.** (1) Sous réserve des autres dispositions du présent article, l'auteur de toute invention ou le représentant légal de l'auteur d'une invention peut, sur présentation au commissaire d'une pétition exposant les faits, appelée dans la présente loi le « dépôt de la demande », et

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(*b*) not described in any patent or in any publication printed in Canada or in any other country more than two years before presentation of the petition hereunder mentioned, and

(*c*) not in public use or on sale in Canada for more than two years prior to his application in Canada,

may, on presentation to the Commissioner of a petition setting out the facts, in this Act termed the filing in the application, and on compliance with all other requirements of this Act, obtain a patent granting to him an exclusive property in the invention.

[19] It is with s. 27 in mind that the law of anticipation must be considered. Apotex's arguments based on anticipation are not that the applications judge erred in his analysis of the law of anticipation or its application to the facts of this case. Rather, Apotex implies that the current understanding of the law sets the bar for proving anticipation too high and that the acceptance of a system of genus and selection patents necessarily, or at least on the facts of this case, involves anticipation and therefore invalidity. I would reject the broader objection. A system of genus and selection patents is acceptable in principle, on the line of authority stemming from *I. G. Farbenindustrie*. The real question is whether, on the facts of this case, the particular selection patent has been anticipated.

(b) *Reasons of the Applications Judge*

[20] In his reasons after referring to s. 27(1) of the Act, the applications judge defined anticipation as meaning "that the exact invention had already been made and publicly disclosed" (para. 55). Shore J. cited this Court's decision in *Free World Trust v. Électro Santé Inc.*, [2000] 2 S.C.R. 1024, 2000 SCC 66, at para. 26, which approved of the test for anticipation described in *Beloit Canada Ltd. v. Valmet OY* (1986), 8 C.P.R. (3d) 289 (F.C.A.), at p. 297:

One must, in effect, be able to look at a prior, single publication and find in it all the information which, for practical purposes, is needed to produce the claimed invention without the exercise of any inventive skill. *The prior publication must contain so clear a direction that a skilled person reading and following it would in every case and without possibility of error be led to*

en se conformant à toutes les autres prescriptions de la présente loi, obtenir un brevet qui lui accorde l'exclusive propriété d'une invention qui n'était pas :

a) connue ou utilisée par une autre personne avant que lui-même l'ait faite;

b) décrite dans un brevet ou dans une publication imprimée au Canada ou dans tout autre pays plus de deux ans avant la présentation de la pétition ci-après mentionnée;

c) en usage public ou en vente au Canada plus de deux ans avant le dépôt de sa demande au Canada.

[19] C'est en fonction de l'art. 27 qu'il convient de définir le critère de l'antériorité. Apotex ne soutient pas que le juge de première instance a commis une erreur dans l'interprétation du critère ou dans son application aux faits de l'espèce. Elle laisse plutôt entendre que l'interprétation actuelle du critère rend trop difficile la preuve de l'antériorité et que l'existence d'un système de brevets de genre et de sélection implique nécessairement l'antériorité, du moins dans la présente affaire, et partant, l'invalidité. Je rejette un argument aussi général. Le courant jurisprudentiel s'inscrivant dans la foulée de l'arrêt *I. G. Farbenindustrie* admet en principe le système des brevets de genre et de sélection. La véritable question qui se pose est celle de savoir si, au vu des faits de l'espèce, le brevet de sélection en cause était antériorisé.

b) *Motifs du juge de première instance*

[20] Après renvoi au par. 27(1) de la Loi, le juge de première instance opine qu'il y a antériorité « [lorsque] l'invention exacte a déjà été faite et a été divulguée au public » (par. 55). Il cite un extrait de l'arrêt *Free World Trust c. Électro Santé Inc.*, [2000] 2 R.C.S. 1024, 2000 CSC 66, où notre Cour approuve le critère de l'antériorité énoncé dans l'arrêt *Beloit Canada Ltée c. Valmet OY*, [1986] A.C.F. nº 87 (QL) (C.A.), par. 30 :

Il faut en effet pouvoir s'en remettre à une seule publication antérieure et y trouver tous les renseignements nécessaires, en pratique, à la production de l'invention revendiquée sans l'exercice de quelque génie inventif. *Les instructions contenues dans la publication antérieure doivent être d'une clarté telle qu'une personne au fait de l'art qui en prend connaissance et s'y*

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the claimed invention. [Emphasis added by the applications judge.]

[21] The applications judge noted that the English Court of Appeal stated in *General Tire & Rubber Co. v. Firestone Tyre & Rubber Co.*, [1972] R.P.C. 457, at p. 486:

> *If, on the other hand, the prior publication contains a direction which is capable of being carried out in a manner which would infringe the patentee's claim, but would be at least as likely to be carried out in a way which would not do so, the patentee's claim will not have been anticipated, although it may fail on the ground of obviousness.* To anticipate the patentee's claim the prior publication must contain clear and unmistakable directions to do what the patentee claims to have invented . . . . [Emphasis added by the applications judge.]

He then noted that in *Free World*, at para. 26, this Court approved the following statement from *General Tire*:

> A signpost, however clear, upon the road to the patentee's invention will not suffice. The prior inventor must be clearly shown to have planted his flag at the precise destination before the patentee. [p. 486]

[22] The law of anticipation as explained in *Beloit* and *General Tire* has been accepted in Canada without reservation: see *Free World*, at para. 26. In his application of the law to the facts, there is no doubt that Shore J. was using the test as set out in *Beloit* when he stated, at para. 57:

> Based on the law, the question before the Court is whether a person skilled in the art was given such a clear direction that, by reading and following the '875 patent (or its U.S. or French equivalents) would in every case and without possibility of error make a compound or pharmaceutical composition within the claims of the '777 patent (e.g. the bisulfate salt of clopidogrel).

(c) *Recent United Kingdom Jurisprudence*

[23] For the reasons that follow, and in light of recent jurisprudence, I am of the respectful opinion that the applications judge overstated the stringency

conforme arrivera infailliblement à l'invention revendiquée. [Souligné par le juge de première instance.]

[21] Le juge signale que dans l'arrêt *General Tire & Rubber Co. c. Firestone Tyre & Rubber Co.*, [1972] R.P.C. 457, la Cour d'appel d'Angleterre a dit ce qui suit à la p. 486 :

> [TRADUCTION] *Si, par contre, la publication antérieure renferme des instructions qui sont susceptibles d'être exécutées de façon à contrevenir à la revendication du breveté, mais qui seraient à tout le moins aussi susceptibles d'être exécutées de façon à ne pas y contrevenir, la revendication du breveté ne se heurterait pas à une antériorité, bien qu'elle puisse être jugée non valide pour cause d'évidence.* Pour constituer une antériorité opposable à la revendication du breveté, la publication antérieure doit contenir des instructions claires et non équivoques permettant d'obtenir ce que le breveté prétend avoir inventé . . . [Souligné par le juge de première instance.]

Il précise ensuite qu'au par. 26 de l'arrêt *Free World*, notre Cour a approuvé l'extrait suivant de l'arrêt *General Tire* :

> [TRADUCTION] Aussi clair qu'il soit, un poteau indicateur placé sur la voie menant à l'invention du breveté ne suffit pas. Il faut prouver clairement que l'inventeur préalable a pris possession de la destination précise en y laissant sa marque avant le breveté. [p. 486]

[22] Les tribunaux canadiens ont adhéré sans réserve au critère de l'antériorité défini dans les arrêts *Beloit* et *General Tire* : *Free World*, par. 26. Lorsqu'il affirme ce qui suit au par. 57, il est clair que le juge Shore s'appuie sur le critère énoncé dans l'arrêt *Beloit* pour appliquer le droit aux faits de l'espèce :

> La Cour doit, en se fondant sur le droit applicable, décider si une personne versée dans l'art a reçu des instructions d'une clarté telle que, lorsqu'elle prend connaissance du brevet '875 (ou de ses équivalents américains ou français) et s'y conforme, elle arrivera infailliblement à un composé ou à une composition pharmaceutique visé par les revendications du brevet '777 (c.-à-d. le bisulfate de clopidogrel).

c) *Jurisprudence britannique récente*

[23] Pour les motifs qui suivent et au vu de la jurisprudence récente, j'estime respectueusement que le juge de première instance a exagéré la rigueur du

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of the test for anticipation that the "exact invention" has already been made and publicly disclosed.

[24] In the 2005 decision of the House of Lords in *Synthon*, Lord Hoffmann has brought some further clarity to the law of anticipation as understood since *General Tire*. His reference at para. 20 to the "unquestionable authority" of Lord Westbury in *Hills v. Evans* (1862), 31 L.J. Ch. (N.S.) 457, at p. 463, makes it plain that his analysis does not depend on any change on English law flowing from the enactment of the *Patents Act 1977* (U.K.), 1977, c. 37, or the U.K.'s adoption of the *Convention on the Grant of European Patents*, 1065 U.N.T.S. 199 (entered into force October 7, 1977). He distinguishes between two requirements for anticipation that were not theretofore expressly considered separately, prior disclosure and enablement.

[25] He explains that the requirement of prior disclosure means that the prior patent must disclose subject matter which, if performed, would necessarily result in infringement of that patent, and states, at para. 22:

> If I may summarise the effect of these two well-known statements [from *General Tire* and *Hills v. Evans*], the matter relied upon as prior art must disclose subject matter which, if performed, would necessarily result in an infringement of the patent. . . . It follows that, whether or not it would be apparent to anyone at the time, whenever subject matter described in the prior disclosure is capable of being performed and is such that, if performed, it must result in the patent being infringed, the disclosure condition is satisfied.

When considering the role of the person skilled in the art in respect of disclosure, the skilled person is "taken to be trying to understand what the author of the description [in the prior patent] meant" (para. 32). At this stage, there is no room for trial and error or experimentation by the skilled person. He is simply reading the prior patent for the purposes of understanding it.

[26] If the disclosure requirement is satisfied, the second requirement to prove anticipation is

critère de l'antériorité en considérant que l'« invention exacte » devait déjà avoir été faite et avoir été rendue publique.

[24] En 2005, dans l'arrêt *Synthon* de la Chambre des lords, lord Hoffmann a apporté quelques précisions supplémentaires sur le critère de l'antériorité et sur son interprétation depuis l'arrêt *General Tire*. Le fait qu'il a qualifié d'inattaquable le passage cité des motifs de lord Westbury dans *Hills c. Evans* (1862), 31 L.J. Ch. (N.S.) 457, p. 463, indique clairement que son analyse ne tient pas à quelque modification du droit anglais découlant de l'adoption de la *Patents Act 1977* (R.-U.), 1977, ch. 37, non plus qu'à la ratification de la *Convention sur la délivrance de brevets européens*, 1065 R.T.N.U. 199 (entrée en vigueur le 7 octobre 1977) par le Royaume-Uni. Il établit une distinction entre deux exigences en la matière qui, jusqu'alors, ne faisaient pas expressément l'objet d'un examen distinct, à savoir la divulgation antérieure et le caractère réalisable.

[25] Lord Hoffmann explique que suivant l'exigence de la divulgation antérieure, le brevet antérieur doit divulguer ce qui, une fois réalisé, contreferait nécessairement le brevet (par. 22) :

> [TRADUCTION] Si je puis me permettre de résumer ce qui découle de ces deux énoncés fort connus [tirés de *General Tire* et de *Hills c. Evans*], l'objet de l'antériorité alléguée doit divulguer ce qui, une fois réalisé, contreferait le brevet. [. . .] Il s'ensuit que, peu importe que cela aurait sauté ou non aux yeux de quiconque au moment considéré, lorsque ce qui est décrit dans la divulgation antérieure est réalisable et une fois réalisé, contreferait nécessairement le brevet, la condition de la divulgation antérieure est remplie.

En ce qui concerne la divulgation, la personne versée dans l'art [TRADUCTION] « est censée tenter de comprendre ce que l'auteur de la description [dans le brevet antérieur] a voulu dire » (par. 32). À cette étape, les essais successifs sont exclus. La personne versée dans l'art se contente de lire le brevet antérieur pour en comprendre la teneur.

[26] Lorsque l'exigence de la divulgation est remplie, le second élément établissant l'antériorité

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"enablement" which means that the person skilled in the art would have been able to perform the invention (para. 26). Lord Hoffmann held that the test for enablement for purposes of anticipation was the same as the test for sufficiency under the relevant United Kingdom legislation. (Enablement for the purposes of sufficiency of the patent specification under the Canadian *Patent Act*, s. 34(1)(*b*) of the pre-October 1, 1989 Act, now s. 27(3)(*b*), is not an issue to be decided in this case and my analysis of enablement is solely related to the test for anticipation. The question of whether enablement for purposes of sufficiency is identical in Canada is better left to another day.)

[27] Once the subject matter of the invention is disclosed by the prior patent, the person skilled in the art is assumed to be willing to make trial and error experiments to get it to work. While trial and error experimentation is permitted at the enablement stage, it is not at the disclosure stage. For purposes of enablement, the question is no longer what the skilled person would think the disclosure of the prior patent meant, but whether he or she would be able to work the invention.

[28] The *Beloit* decision by which the applications judge rightly felt bound dealt with only one aspect of anticipation, that is, whether or not the invention in a patent had been disclosed in a single prior publication or patent. In that decision, Hugessen J.A. held that it had not. He had no need to consider the further point whether or not, had there been such a clear disclosure, the working of the invention was also enabled by that disclosure. That point was not in issue in *Beloit*. Explicitly separating disclosure and enablement is a refinement of the approach set out in *Beloit*. It explains the process a person skilled in the art would follow if the original patent anticipated the invention of the subsequent patent. I would adopt this approach.

est le « caractère réalisable », à savoir la possibilité qu'une personne versée dans l'art ait pu réaliser l'invention (par. 26). Lord Hoffmann conclut que le volet du critère de l'antériorité correspondant au caractère réalisable équivaut au critère du caractère suffisant suivant les dispositions législatives pertinentes du Royaume-Uni. (Notre Cour n'a pas à statuer en l'espèce sur l'incidence du caractère réalisable de l'invention sur le caractère suffisant du mémoire descriptif du brevet pour les besoins de l'al. 34(1)*b*) de la *Loi sur les brevets* du Canada dans sa version antérieure au 1er octobre 1989, devenu l'actuel al. 27(3)*b*), et mon analyse du caractère réalisable ne vaut que pour le critère de l'antériorité. La question de savoir si, au Canada, le caractère réalisable de l'invention et le caractère suffisant du mémoire descriptif se confondent l'un et l'autre devra être tranchée une autre fois.)

[27] Dès lors que l'objet de l'invention est divulgué dans un brevet antérieur, on suppose que la personne versée dans l'art est disposée à procéder par essais successifs pour arriver à l'invention. Bien que de tels essais soient exclus à l'étape de la divulgation, ils ne le sont pas pour les besoins du caractère réalisable, car la question n'est plus de savoir si la personne versée dans l'art saisit la teneur de la divulgation du brevet antérieur, mais bien si elle est en mesure de réaliser l'invention.

[28] Le juge de première instance a conclu à juste titre qu'il était lié par l'arrêt *Beloit*, lequel ne portait que sur un volet de l'antériorité : l'invention visée par le brevet en cause avait-elle déjà été divulguée en totalité dans une même publication ou un même brevet. Le juge Hugessen y a conclu qu'elle ne l'avait pas été. Dès lors, il ne lui incombait pas de se demander en outre si, à supposer que la divulgation ait été claire, elle aurait en outre permis la réalisation de l'invention. Cette question ne faisait pas l'objet du litige. L'analyse consistant à isoler expressément le volet de la divulgation et celui du caractère réalisable apporte une nuance au raisonnement sous-tendant l'arrêt *Beloit*. Elle explique la démarche qu'une personne versée dans l'art adopterait si le brevet d'origine antériorisait l'invention visée par le brevet subséquent. Je suis enclin à la faire mienne.

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[29] Subject to any limitations expressed in the *Patent Act*, I see no reason why the discussion of anticipation should not apply to other prior art than merely genus patents. Again, subject to limitations in the *Patent Act*, the discussion of anticipation and obviousness would seem applicable to patents generally.

[30] Two questions now must be answered: (1) what constitutes disclosure at the first stage of the test for anticipation, and (2) how much trial and error or experimentation is permitted at the enablement stage?

i. Disclosure

[31] Section 27(1) of the Act requires as a condition for obtaining a patent that the invention was not "known or used" and was not "described" in any patent or any publication more than two years before the patent application was filed. In the context of genus and selection patents, in *E. I. Du Pont de Nemours & Co. (Witsiepe's) Application*, [1982] F.S.R. 303 (H.L.), Lord Wilberforce stated, at p. 311:

> It is the absence of the discovery of the special advantages, as well as the fact of non-making, that makes it possible for such persons to make an invention related to a member of the class.

The compound made for the selection patent was only soundly predicted at the time of the genus patent. It was not made and its special advantages were not known. It is for those reasons that a patent should not be denied to the inventor who made and discovered the special advantages of the selection compound for the first time.

[32] In the context of disclosure as explained in *Synthon*, "the absence of the discovery of the special advantages" to which Lord Wilberforce was referring in *Witsiepe's* means that the genus patent does not disclose the special advantages of the invention covered by the selection patent. Where there is no such disclosure, there is no discovery of the special advantages of the selection patent as compared to the genus patent, and the disclosure requirement to prove anticipation fails. At

[29] Sous réserve de toute restriction prévue dans la *Loi sur les brevets*, je ne vois pas pourquoi l'analyse relative à l'antériorité ne s'appliquerait qu'aux brevets de genre. Toujours sous réserve de la *Loi sur les brevets*, l'analyse de l'antériorité et de l'évidence paraît valoir pour les brevets en général.

[30] Deux questions se posent dès lors en ce qui concerne le critère de l'antériorité : (1) en quoi consiste la divulgation antérieure et (2) dans quelle mesure le caractère réalisable admet-il les essais successifs?

i. Divulgation

[31] Le paragraphe 27(1) de la Loi dispose qu'un brevet ne peut être délivré que pour une invention qui n'était pas « connue ou utilisée » ni « décrite » dans un brevet ou une publication plus de deux ans avant la demande. Se prononçant dans le contexte des brevets de genre et de sélection, lord Wilberforce a dit ce qui suit dans l'arrêt *E. I. Du Pont de Nemours & Co. (Witsiepe's) Application*, [1982] F.S.R. 303 (H.L.), p. 311 :

> [TRADUCTION] C'est l'absence de découverte des avantages particuliers, ainsi que la non-réalisation, qui permettent à ces personnes de faire une invention liée à un élément de la catégorie.

Le composé réalisé pour les besoins du brevet de sélection n'a été que valablement prédit lors de l'obtention du brevet de genre. Il n'avait pas été réalisé et ses avantages particuliers n'étaient pas connus. C'est pourquoi on ne saurait refuser un brevet à celui qui, le premier, réalise le composé et découvre ses avantages particuliers.

[32] Pour ce qui est de la divulgation au sens de l'arrêt *Synthon*, « l'absence de découverte des avantages particuliers » dont fait mention lord Wilberforce dans l'arrêt *Witsiepe's* s'entend de la non-divulgation dans le brevet de genre des avantages particuliers de l'invention visée par le brevet de sélection. Dès lors, les avantages particuliers de l'objet du brevet de sélection par rapport à l'objet du brevet de genre n'ont pas été découverts, de sorte qu'il n'y a pas d'antériorité. À cette étape, la

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this stage, the person skilled in the art is reading the prior patent to understand whether it discloses the special advantages of the second invention. No trial and error is permitted. If in reading the genus patent the special advantages of the invention of the selection patent are not disclosed, the genus patent does not anticipate the selection patent.

ii. Enablement

[33] What amount of trial and error or experimentation is permitted before a prior disclosure will not constitute enabling disclosure? Certainly, if the applications judge finds that an inventive step was required to get to the invention of the second patent, the specification of the first patent will not have provided enabling disclosure. But even if no inventive step is required, the skilled person must still be able to perform or make the invention of the second patent without undue burden.

[34] Two recent United Kingdom decisions are of assistance. In *Halliburton Energy Services Inc. v. Smith International (North Sea) Ltd.*, [2006] EWCA Civ 1715 (BAILII), Jacob L.J., a highly experienced patent judge, states at para. 18:

> Patents are meant to teach people how to do things. If what is "taught" involves just too much [work] to be reasonable allowing for all the circumstances including the nature of the art, then the patent cannot be regarded as an "enabling disclosure." . . . The setting of a gigantic project, even if merely routine, will not do.

[35] Jacob L.J. characterizes the problem at para. 20 as: "[H]ow is one to say when the work involved to perform the invention is too much?" The determination of how much work is too much is inevitably a line-drawing exercise. His answer to the problem is at para. 21:

> The answer is that the line is one to be drawn by an exercise of judgment, taking into account all of the relevant factors, one of which is of course the nature of the invention itself and its field of technology. But

personne versée dans l'art lit le mémoire descriptif du brevet antérieur pour déterminer s'il divulgue les avantages particuliers de l'invention subséquente. Les essais successifs ne sont pas admis. Lorsque la lecture du brevet de genre ne permet pas de connaître les avantages particuliers de l'invention visée par le brevet de sélection, celui-ci n'est pas antériorisé par le brevet de genre.

ii. Le caractère réalisable

[33] Après combien d'essais successifs conclut-on au caractère non réalisable de l'invention déjà divulguée? Lorsque le juge de première instance conclut qu'une étape inventive était nécessaire pour parvenir à l'invention du deuxième brevet, le mémoire descriptif du premier brevet ne rend assurément pas l'invention réalisable. Cependant, même lorsque aucune étape inventive n'est nécessaire, la personne versée dans l'art doit tout de même être capable d'exécuter ou de réaliser l'invention du deuxième brevet sans trop de difficultés.

[34] Deux décisions britanniques récentes valent d'être citées. Dans *Halliburton Energy Services Inc. c. Smith International (North Sea) Ltd.*, [2006] EWCA Civ 1715 (BAILII), le lord juge Jacob, très expérimenté dans le domaine des brevets, dit au par. 18 :

> [TRADUCTION] Le brevet a pour but d'enseigner aux gens comment faire quelque chose. Lorsque l'« enseignement » exige trop [d'efforts] eu égard à l'ensemble des circonstances, y compris la nature de l'art, le brevet ne peut être considéré comme une « divulgation permettant la réalisation ». [. . .] Une entreprise colossale, même constituée d'opérations usuelles, n'est pas acceptable.

[35] Pour lui, la question est de savoir [TRADUCTION] « à quel moment les efforts requis pour parvenir à l'invention deviennent excessifs » (par. 20), d'où la nécessité d'une ligne de démarcation. Il avance une piste de solution au par. 21 :

> [TRADUCTION] La solution consiste à exercer son jugement au regard de l'ensemble des facteurs pertinents, dont bien sûr la nature de l'invention et le domaine technique. Mais il y en a d'autres, comme la

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there are other factors too — for instance, the width of the patent claim or whether it has functional limitations which require too much work to explore.

[36] A more extensive review of the law of enablement as defined in *Synthon* is contained in a decision of Kitchin J. in *Wobben v. Vestas-Celtic Wind Technology Ltd.*, [2007] EWHC 2636 (Pat.) (BAILII), at paras. 196-97. Although *Wobben* was a case in which the alleged infringer raised as one of its defences insufficiency under the United Kingdom legislation, I think guidance is provided as to what will or will not constitute enablement for purposes of anticipation.

[37] Drawing from this jurisprudence, I am of the opinion that the following factors should normally be considered. The list is not exhaustive. The factors will apply in accordance with the evidence in each case.

1. Enablement is to be assessed having regard to the prior patent as a whole including the specification and the claims. There is no reason to limit what the skilled person may consider in the prior patent in order to discover how to perform or make the invention of the subsequent patent. The entire prior patent constitutes prior art.

2. The skilled person may use his or her common general knowledge to supplement information contained in the prior patent. Common general knowledge means knowledge generally known by persons skilled in the relevant art at the relevant time.

3. The prior patent must provide enough information to allow the subsequently claimed invention to be performed without undue burden. When considering whether there is undue burden, the nature of the invention must be taken into account. For example, if the invention takes place in a field of technology in which trials and experiments are generally carried out, the threshold for undue burden will tend to be higher than in circumstances

portée de la revendication du brevet ou l'existence de limites fonctionnelles dont l'exploration exige trop de travail.

[36] Dans *Wobben c. Vestas-Celtic Wind Technology Ltd.*, [2007] EWHC 2636 (Pat.) (BAILII), par. 196-197, le juge Kitchin analyse plus avant le critère du caractère réalisable défini dans l'arrêt *Synthon*. Même si, dans cette affaire britannique, l'insuffisance était l'un des moyens de défense invoqués dans une action en contrefaçon, je suis d'avis que la décision permet de circonscrire le caractère réalisable pour les besoins de l'antériorité.

[37] Au vu de cette jurisprudence, j'estime que les facteurs suivants — dont l'énumération n'est pas exhaustive et l'applicabilité dépend de la preuve — doivent normalement être considérés.

1. Le caractère réalisable est apprécié au regard du brevet antérieur dans son ensemble, mémoire descriptif et revendications compris. Il n'y a aucune raison de limiter les éléments du brevet antérieur dont tient compte la personne versée dans l'art pour découvrir comment exécuter ou réaliser l'invention que vise le brevet subséquent. L'antériorité est constituée de la totalité du brevet antérieur.

2. La personne versée dans l'art peut faire appel à ses connaissances générales courantes pour compléter les données du brevet antérieur. Les connaissances générales courantes s'entendent des connaissances que possède généralement une personne versée dans l'art en cause au moment considéré.

3. Le brevet antérieur doit renfermer suffisamment de renseignements pour permettre l'exécution du brevet subséquent sans trop de difficultés. Le caractère excessif des difficultés dépend de la nature de l'invention. Par exemple, lorsque celle-ci relève d'un domaine technique où les essais sont monnaie courante, le seuil de ce qui constitue une difficulté excessive tend à être plus élevé que lorsque des efforts moindres sont la norme. Lorsqu'il est nécessaire de franchir

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in which less effort is normal. If inventive steps are required, the prior art will not be considered as enabling. However, routine trials are acceptable and would not be considered undue burden. But experiments or trials and errors are not to be prolonged even in fields of technology in which trials and experiments are generally carried out. No time limits on exercises of energy can be laid down; however, prolonged or arduous trial and error would not be considered routine.

4. Obvious errors or omissions in the prior patent will not prevent enablement if reasonable skill and knowledge in the art could readily correct the error or find what was omitted.

(d) *Application to the Facts of This Case*

i. Disclosure for the Purposes of Anticipation

[38] The '875 genus patent covered over 250,000 possible different compounds. Obviously, every compound was not made or tested. The patent covering those compounds was based on sound prediction. From the specification, it is apparent that 21 examples were made and tested, one of which was the racemate relevant in this case. According to the applications judge, there was no disclosure in the '875 patent of the specific beneficial properties associated with the dextro-rotatory isomer of this racemate, nor was there disclosure of any advantages which flow from using the bisulfate salt in combination with the dextro-rotatory isomer (para. 71).

[39] It was open to Shore J. on the record before him to conclude that a person skilled in the art and reading the '875 patent would not be able to come up with the invention of the '777 patent. Nothing in the '875 patent distinguished this dextro-rotatory isomer as having beneficial properties different from the racemate or the levo-rotatory isomer or from any of the other compounds made and tested and referred to in the '875 patent, let alone the compounds based only on sound prediction. At para. 72 of his reasons, he found:

une étape inventive, la divulgation antérieure ne satisfait pas au critère du caractère réalisable. Les essais courants sont toutefois admis et il n'en résulte pas de difficultés excessives. L'expérimentation ou les essais successifs ne doivent cependant pas se prolonger, et ce, même dans un domaine technique où ils sont monnaie courante. Aucune limite n'est fixée quant à la durée des efforts consacrés; toutefois, les essais successifs prolongés ou ardus ne sont pas tenus pour courants.

4. Les erreurs ou omissions manifestes du brevet antérieur ne font pas obstacle au caractère réalisable lorsque des habiletés et des connaissances raisonnables permettaient d'y remédier.

d) *Application aux faits de l'espèce*

i. L'antériorité au regard de la divulgation

[38] Le brevet de genre 875 couvre plus de 250 000 composés qui n'ont évidemment pas tous été synthétisés ou analysés. Ce brevet s'appuyait sur une prédiction valable. Il appert de son mémoire descriptif que 21 composés ont été synthétisés et analysés, dont le racémate visé en l'espèce. Selon le juge de première instance, le brevet 875 ne divulgue aucun avantage particulier de l'isomère dextrogyre de ce racémate, ni quelque avantage de l'utilisation du bisulfate avec l'isomère dextrogyre (par. 71).

[39] Au vu du dossier, le juge Shore pouvait conclure qu'une personne versée dans l'art n'aurait pu, après avoir pris connaissance du brevet 875, arriver à l'invention visée par le brevet 777. Aucun élément du brevet 875 n'indique que l'isomère dextrogyre présente des avantages différents de ceux du racémate, de l'isomère lévogyre ou de l'un des autres composés synthétisés et analysés dont il est fait mention, et encore moins de l'un des composés faisant seulement l'objet d'une prédiction valable. Au paragraphe 72 de ses motifs, le juge conclut :

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The Court also notes that, although Dr. Klibanov agreed with Apotex' experts that a skilled person could have ascertained the activity and characteristics of two isomers and of different salts using well-known methods at the time, they did not say that the beneficial properties of these isomers and of their salts — let alone of the dextro-rotatory isomer and of its bisulfate salt — would be known with certitude before conducting the tests designed to identify the respective properties of the isomers and of the salt.

[40] There was no evidence that the person skilled in the art would know from reading the '875 patent that the more active dextro-rotatory isomer would be less toxic than the racemate or levo-rotatory isomer or any of the other compounds made and tested. Indeed, Dr. McClelland's evidence was that while you "often" get more activity by separating isomers, the answer to the question whether this increased activity was to be found in the levo-rotatory isomer or the dextro-rotatory isomer was unknown. (Affidavit, at para. 42, and cross-examination, at pp. 928-30 and question 322).

[41] Since the '875 patent did not disclose the special advantages of the dextro-rotatory isomer and of its bisulfate salt, as compared to the levo-rotatory isomer or the racemate and their salts, or the other compounds made and tested or otherwise referred to in the '875 patent, the invention of the '777 patent cannot be said to have been disclosed and therefore it cannot be said to have been anticipated.

ii. Enablement for the Purposes of Anticipation

[42] It is not strictly necessary to discuss enablement since anticipation requires proof of both disclosure and enablement, and disclosure has not been proven. However, for future guidance, I would make the following few observations about enablement on the facts of this case.

[43] The applications judge was of the opinion that "the skilled reader following the prior art must be able to arrive at the invention claimed in

La Cour fait en outre remarquer que, même si M. Klibanov était d'accord avec les experts d'Apotex pour dire qu'une personne versée dans l'art aurait pu constater l'activité et les caractéristiques des deux isomères et de divers bisulfates au moyen de méthodes qui étaient bien connues à l'époque, ces experts n'ont pas affirmé que les propriétés avantageuses de ces isomères et de leurs bisulfates — à plus forte raison celles de l'isomère dextrogyre et de son bisulfate — auraient été connues avec certitude avant la tenue des essais visant à déterminer les propriétés respectives des isomères et du bisulfate.

[40] Aucun élément n'établissait qu'en prenant connaissance du brevet 875, une personne versée dans l'art aurait su que l'isomère dextrogyre plus actif serait moins toxique que le racémate, l'isomère lévogyre ou n'importe lequel des autres composés synthétisés et analysés. Le D[r] McClelland a en effet témoigné que même si on obtient « souvent » plus d'activité après séparation des isomères, on ne savait pas lequel de l'isomère lévogyre ou de l'isomère dextrogyre serait le plus actif (affidavit, par. 42; contre-interrogatoire, p. 928-930; question 322).

[41] Puisque le brevet 875 ne divulgue pas les avantages particuliers de l'isomère dextrogyre et de son bisulfate par rapport à l'isomère lévogyre, au racémate et à ses sels, ou aux autres composés synthétisés et analysés ou par ailleurs mentionnés, l'invention correspondant au brevet 777 n'a pas été divulguée et, de ce fait, elle n'est pas antériorisée.

ii. L'antériorité au regard du caractère réalisable

[42] Il n'est pas absolument nécessaire de se pencher sur le caractère réalisable, car l'antériorité exige à la fois la divulgation et le caractère réalisable, et la première n'a pas été établie. Toutefois, afin d'offrir des repères pour l'avenir, je me permets quelques observations sur le caractère réalisable en l'espèce.

[43] Le juge de première instance a estimé que « la personne versée dans l'art qui se conforme au brevet constituant une antériorité doit être en

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the impugned patent *the first time he or she tries and every time thereafter*" (para. 65 (emphasis in original)). However, under the test for enablement as described in these reasons, some trial and error is permitted.

[44] For anticipation, the genus patent must provide enough information so as to allow the selected invention to be performed without undue burden. In this case, the applications judge concluded that the '875 patent did not specifically lead to the claimed invention. He noted, on the record before him, that if one were to follow the teachings of the prior art, one would obtain racemates, never their isomers.

[45] However, Apotex argues that the methods for separating the isomers were well known to persons skilled in the art at the time of the invention. According to Apotex, such a person could eventually obtain the isomer through what amounts to routine tests.

[46] In determining whether the enablement step for proving anticipation has been met, it is important to note that routine trials are acceptable but inventive steps are not permitted. Also, reasonable skill and knowledge of the art is expected in order to correct omissions in the original patent if a means of determining what is missing can readily be found. The skilled person may use his or her common general knowledge to supplement information contained in the patent.

[47] Even though Shore J. referred to the excessively stringent anticipation test "in every case", his findings are relevant to trial and error. He found that the evidence with respect to the methods of separation, including the evidence of the inventor, shows that the identification of clopidogrel, its bisulfate salt and their advantageous properties required extensive investigation over a period of months (paras. 68-70).

[48] One might infer that, had the applications judge been asked to decide if these investigations constituted an undue burden for the skilled person,

mesure d'arriver à l'invention revendiquée dans le brevet contesté *la première fois qu'elle tente d'y arriver et chaque fois par la suite* » (par. 65 (souligné dans l'original)). Or, le caractère réalisable défini dans les présents motifs admet un certain nombre d'essais successifs.

[44] Pour constituer une antériorité, le brevet de genre doit être suffisamment détaillé pour permettre la réalisation de l'objet du brevet de sélection sans trop de difficultés. En l'espèce, le juge de première instance conclut que le brevet 875 ne mène pas explicitement à l'invention revendiquée. Il signale qu'au vu du dossier, les enseignements du brevet antérieur ne permettaient d'obtenir qu'un racémate, en aucun cas ses isomères.

[45] Apotex fait toutefois valoir que les méthodes de séparation des isomères étaient bien connues des personnes versées dans l'art au moment de l'invention. À son avis, de telles personnes auraient pu un jour obtenir l'isomère à l'issue de simples essais courants.

[46] Pour que soit respecté le volet du critère de l'antériorité correspondant au caractère réalisable, les essais courants sont admis, mais non les étapes inventives. Aussi, lorsqu'un moyen de déterminer les lacunes du brevet d'origine peut aisément être découvert, des compétences et des connaissances raisonnables dans le domaine devraient suffire à combler ces lacunes. La personne versée dans l'art peut faire appel à ses connaissances générales courantes pour compléter les données du brevet.

[47] Certes, le juge Shore mentionne la notion excessivement stricte d'« infaillibilité », mais ses conclusions sur le respect du critère de l'antériorité se fondent sur les essais successifs. Il conclut que les éléments relatifs aux méthodes de séparation, y compris le témoignage de l'inventeur, prouvent que la découverte du clopidogrel, de son bisulfate et de leurs avantages ont nécessité des mois de recherche approfondie (par. 68-70).

[48] Si le juge de première instance avait été appelé à déterminer si cette recherche constituait une difficulté excessive pour la personne versée

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he would have held that they did. However, in view of my earlier conclusion on disclosure, it is unnecessary for me to pursue this point further.

(e) *Conclusion on Anticipation*

[49] As indicated above, in the context of anticipation, the two-step approach, disclosure and enablement, is a refinement of the approach set out in *Beloit* and should be adopted.

[50] In the case at bar, the invention of the '777 patent was not disclosed by the '875 patent and was therefore not anticipated. The allegation of anticipation has not been justified.

VI. Obviousness

(a) *Relevant Legislation*

[51] The definition of invention in s. 2 of the Act is relevant because at the time the pre-October 1, 1989 version of the Act was in force, there was no statutory provision expressly providing that obvious inventions were unpatentable. As explained by Professor D. Vaver in *Intellectual Property Law: Copyright, Patents, Trade-marks* (1997), at p. 136:

> Until very recently, the *Patent Act* did not expressly say that obvious inventions were unpatentable. Courts implied this criterion from the notion of "invention". Inventions implied inventive ingenuity, without which an advance was obvious; and patents are not granted for the obvious.

The definition of invention in s. 2 of the Act provided:

> "invention" means any new and useful . . . composition of matter, or any new and useful improvement in any . . . composition of matter;

(b) *Reasons of the Applications Judge*

[52] Shore J. first correctly observed that at the relevant time obviousness was not mentioned expressly in the Act. He then cited the well-known test for obviousness in *Beloit* (at p. 294):

dans l'art, on peut penser qu'il aurait conclu par l'affirmative. Vu ma conclusion précédente sur la divulgation, il est cependant inutile d'examiner la question plus avant.

e) *Conclusion relative à l'antériorité*

[49] Je le répète, j'estime qu'il faut tenir compte des deux volets de l'antériorité — la divulgation et le caractère réalisable — et affiner ainsi la démarche préconisée dans l'arrêt *Beloit*.

[50] En l'espèce, l'invention revendiquée dans le brevet 777 n'a pas été divulguée dans le brevet 875, de sorte qu'elle n'est pas antériorisée. L'allégation d'antériorité n'est pas fondée.

VI. L'évidence

a) *Dispositions législatives pertinentes*

[51] La définition du mot « invention » figurant à l'art. 2 de la Loi est pertinente, car dans la version antérieure au 1er octobre 1989, aucune disposition n'écartait expressément la brevetabilité d'une invention évidente. Comme l'explique le professeur D. Vaver dans *Intellectual Property Law : Copyright, Patents, Trade-marks* (1997), p. 136 :

> [TRADUCTION] Jusqu'à tout récemment, la *Loi sur les brevets* n'écartait pas expressément la brevetabilité d'une invention évidente. Les tribunaux ont déduit le critère de la notion d'« invention ». Une invention était le fruit de l'ingéniosité, et sans celle-ci, une découverte constituait une évidence. Et nul brevet n'est délivré pour ce qui est évident.

Voici la définition du mot « invention » qui figurait à l'art. 2 de la Loi :

> Toute réalisation, tout[e] [. . .] composition de matières, ainsi que tout perfectionnement de l'un d'eux, présentant le caractère de la nouveauté et de l'utilité.

b) *Motifs du juge de première instance*

[52] Le juge Shore signale d'abord à juste titre qu'au moment considéré, l'évidence n'était pas expressément mentionnée dans la Loi. Il renvoie ensuite à l'arrêt *Beloit*, qui énonce le critère bien connu de l'évidence (par. 18) :

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The test for obviousness is not to ask what competent inventors did or would have done to solve the problem. Inventors are by definition inventive. The classical touchstone for obviousness is the technician skilled in the art but having no scintilla of inventiveness or imagination; a paragon of deduction and dexterity, wholly devoid of intuition; a triumph of the left hemisphere over the right. The question to be asked is *whether this mythical creature (the man in the Clapham omnibus of patent law) would, in the light of the state of the art and of common general knowledge as at the claimed date of invention, have come directly and without difficulty to the solution taught by the patent*. It is a very difficult test to satisfy. [Emphasis added by the applications judge; para. 75.]

In the view of Shore J., the *Beloit* test would not accommodate a "worth a try" test by the skilled person.

[53] The applications judge accepted that there were five well-known separation techniques in order to obtain the dextro-rotatory isomer of the racemate. At para. 80, he stated:

. . . what the experts are really saying from a legal perspective is that separating the racemate was worth a try. Having to try different methods, though they be well-known, in order to discover which one will yield the desired result cannot mean that the desired result, in this case, the compounds in claims 1 and 3 and their pharmaceutical compositions, was obvious.

[54] He further held that the dextro-rotatory isomer and its salts had to be tested for their beneficial properties to be discovered and that the isomer and its beneficial properties were therefore not known before the racemate was separated into its isomers. He stated, at para. 81:

Here again, having to try different separation techniques with uncertainty as to whether each or some specific techniques would actually result in a successful separation and then having to perform tests to discover what the properties of the dextro-rotatory isomer of the racemate were, cannot mean that this compound and its beneficial properties were obvious.

Pour établir si une invention est évidente, il ne s'agit pas de se demander ce que des inventeurs compétents ont ou auraient fait pour solutionner le problème. Un inventeur est par définition inventif. La pierre de touche classique de l'évidence de l'invention est le technicien versé dans son art mais qui ne possède aucune étincelle d'esprit inventif ou d'imagination; un parangon de déduction et de dextérité complètement dépourvu d'intuition; un triomphe de l'hémisphère gauche sur le droit. Il s'agit de se demander si, *compte tenu de l'état de la technique et des connaissances générales courantes qui existaient au moment où l'invention aurait été faite, cette créature mythique (monsieur tout-le-monde du domaine des brevets) serait directement et facilement arrivée à la solution que préconise le brevet*. C'est un critère auquel il est très difficile de satisfaire. [Souligné par le juge de première instance; par. 75.]

De l'avis du juge Shore, le critère établi dans l'arrêt *Beloit* n'admet pas le critère de quelque chose « valant d'être tenté » du point de vue de la personne versée dans l'art.

[53] Le juge de première instance reconnaît qu'il existe cinq techniques bien connues de séparation du racémate permettant d'obtenir l'isomère dextrogyre :

Ce que les experts disent, en fait, du point de vue juridique, c'est qu'il vaut la peine de tenter de séparer les isomères constituant le racémate : voilà ce qui ressort de cette preuve. Le fait de devoir essayer différentes méthodes, bien qu'il s'agisse de méthodes bien connues, pour découvrir laquelle donnera le résultat souhaité, ne peut signifier que le résultat souhaité, dans ce cas l'obtention des composés décrits aux revendications 1 et 3 et leurs compositions pharmaceutiques, était évident. [par. 80]

[54] Il conclut en outre qu'il fallait analyser l'isomère dextrogyre et ses sels pour découvrir leurs avantages, de sorte qu'on ne pouvait connaître l'isomère et ses avantages avant que les isomères du racémate ne soient isolés. Voici ce qu'il dit au par. 81 :

Ici encore, le fait de devoir utiliser différentes techniques de séparation sans savoir avec certitude si chaque technique ou certaines techniques bien précises permettraient en fait de séparer efficacement les isomères, puis le fait de devoir procéder à des essais pour déterminer les propriétés de l'isomère dextrogyre du racémate, ne peuvent signifier que ce composé et ses propriétés avantageuses étaient évidents.

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(c) *United Kingdom and United States Approach to Obviousness*

[55] Apotex says that the *Beloit* approach is excessively rigid and is out of step with the tests for obviousness in the United Kingdom and the United States, where "worth a try" has been accepted.

[56] Generally, in the United States, it appears that at the Court of Appeals level, the "obvious to try" test had not been accepted. In *Application of Tomlinson*, 363 F.2d 928 (C.C.P.A. 1966), Rich J. wrote, at p. 931:

> Slight reflection suggests, we think, that there is usually an element of "obviousness to try" in any research endeavor, that is not undertaken with complete blindness but rather with some semblance of a chance of success, and that patentability determinations based on that as the test would not only be contrary to statute but result in a marked deterioration of the entire patent system as an incentive to invest in those efforts and attempts which go by the name of "research".

See also *In re O'Farrell*, 853 F.2d 894 (Fed. Cir. 1988), at p. 903.

[57] However, in *KSR International Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007), Kennedy J., for a unanimous court, rejected the restrictive approach that the Court of Appeals had taken in that case. He stated, at p. 1739:

> Throughout this Court's engagement with the question of obviousness, our cases have set forth an expansive and flexible approach inconsistent with the way the Court of Appeals applied its TSM [Teaching-Suggestion-Motivation] test here. To be sure, *Graham* recognized the need for "uniformity and definiteness." Yet the principles laid down in *Graham* reaffirmed the "functional approach" of *Hotchkiss*. To this end, *Graham* set forth a broad inquiry and invited courts, where appropriate, to look at any secondary considerations that would prove instructive.

[58] At p. 1742, he was clear that "obvious to try" could be a relevant test in an obviousness inquiry:

c) *Notion d'évidence au Royaume-Uni et aux États-Unis*

[55] Apotex soutient que le critère de l'évidence énoncé dans l'arrêt *Beloit* est trop strict et qu'il est en décalage avec ceux appliqués au Royaume-Uni et aux États-Unis, où l'on admet l'idée de quelque chose « valant d'être tenté ».

[56] De façon générale, aux États-Unis, les cours d'appel paraissent ne pas avoir fait leur le critère de « l'essai allant de soi ». Dans *Application of Tomlinson*, 363 F.2d 928 (C.C.P.A. 1966), le juge Rich a dit ce qui suit à la p. 931 :

> [TRADUCTION] À notre avis, quand on y réfléchit un peu, il y a habituellement un élément d'« essai allant de soi » dans toute recherche qui n'est pas effectuée à l'aveuglette, mais bien avec certaines chances de réussite, et une décision sur la brevetabilité fondée sur ce critère serait non seulement contraire à la loi, mais entraînerait une détérioration marquée de l'ensemble du système de brevets, lequel est censé encourager l'investissement dans les efforts et les essais que l'on regroupe sous le vocable « recherche ».

Voir également *In re O'Farrell*, 853 F.2d 894 (Fed. Cir. 1988), p. 903.

[57] Toutefois, dans *KSR International Co. c. Teleflex Inc.*, 127 S. Ct. 1727 (2007), le juge Kennedy a rejeté au nom des juges unanimes l'interprétation restrictive à laquelle s'était livrée la cour d'appel dans la même affaire (p. 1739) :

> [TRADUCTION] Au fil de ses décisions sur la question de l'évidence, la Cour a établi une démarche large et flexible incompatible avec la manière dont la *Court of Appeals* a appliqué en l'espèce le critère « *TSM* » [*Teaching-Suggestion-Motivation*] (enseignement, indice ou motivation). La décision *Graham* a assurément reconnu la nécessité de l'uniformité et de la certitude. Néanmoins, les principes qui y ont été établis ont confirmé l'« approche fonctionnelle » de la décision *Hotchkiss*. *Graham* préconise en effet un examen de large portée et invite les tribunaux, lorsque l'affaire s'y prête, à tenir compte de toute considération accessoire pouvant se révéler éclairante.

[58] À la p. 1742, il dit clairement que le critère de l'« essai allant de soi » peut être appliqué dans le cadre de l'examen portant sur l'évidence :

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The same constricted analysis led the Court of Appeals to conclude, in error, that a patent claim cannot be proved obvious merely by showing that the combination of elements was "obvious to try." . . . When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under §103.

[59] In the United Kingdom the "obvious to try" test has been accepted since at least 1967: see *Johns-Manville Corporation's Patent*, [1967] R.P.C. 479 (C.A.). The current state of the law in the United Kingdom was summarized in *H. Lundbeck A/S v. Generics (UK) Ltd.*, [2008] R.P.C. 19 (p. 437), [2008] EWCA Civ 311. Lord Hoffmann stated the following, at paras. 24-25, in response to the argument that the trial judge in that case, Kitchin J., had refused to consider the "obvious to try" test:

[The trial judge] cited from *Angiotech Pharmaceuticals Inc. v. Conor Medsystems Inc.* [2007] R.P.C. 20, which represents this [Court of Appeal's] last word on the extent to which the notion of some step being obvious to try is helpful in deciding whether an invention is obvious. The judge then summed up (at para. 72) the current state of the law:

> "The question of obviousness must be considered on the facts of each case. The court must consider the weight to be attached to any particular factor in the light of all the relevant circumstances. These may include such matters as the motive to find a solution to the problem the patent addresses, the number and extent of the possible avenues of research, the effort involved in pursuing them and the expectation of success."

No criticism has been made of this statement of principle . . . .

See also *Angiotech Pharmaceuticals Inc. v. Conor Medsystems Inc.*, [2007] R.P.C. 20 (p. 487), [2007] EWCA Civ 5, at para. 45 (rev'd [2008] R.P.C. 28 (p. 716), [2008] UKHL 49). The passage at para. 45 in the decision of the Court of Appeal remains relevant and uncontested.

[TRADUCTION] La même interprétation étroite a amené la Court of Appeals à conclure erronément que l'évidence de la revendication d'un brevet ne peut être établie par le seul fait que la combinaison des éléments constituait un « essai allant de soi ». [. . .] Lorsqu'un besoin précis ou la pression du marché incite à résoudre un problème et qu'il existe un nombre limité de solutions connues et prévisibles, la personne dotée de compétences usuelles a une bonne raison d'opter pour celles qui, parmi ces solutions, sont techniquement à sa portée. Si le résultat escompté est obtenu, il est sans doute attribuable à des compétences usuelles et au bon sens, et non à l'innovation. Dans ce cas, le fait que la combinaison des éléments constituait un essai allant de soi en démontrerait peut-être le caractère évident au sens de l'art. 103.

[59] Au Royaume-Uni, le critère de l'« essai allant de soi » est reconnu depuis au moins 1967 : voir l'arrêt *Johns-Manville Corporation's Patent*, [1967] R.P.C. 479 (C.A.). L'état actuel du droit au Royaume-Uni est résumé dans l'arrêt *H. Lundbeck A/S c. Generics (UK) Ltd.*, [2008] R.P.C. 19 (p. 437), [2008] EWCA Civ 311. En réponse à la prétention qu'en première instance, le juge Kitchin avait refusé de considérer le critère de l'« essai allant de soi », lord Hoffmann a dit ce qui suit (par. 24-25) :

[TRADUCTION] [Le juge de première instance] cite l'arrêt *Angiotech Pharmaceuticals Inc. c. Conor Medsystems Inc.*, [2007] R.P.C. 20, qui énonce la position actuelle de [la Cour d'appel] sur la mesure dans laquelle l'idée qu'une étape donnée allait de soi joue dans la détermination du caractère évident ou non évident d'une invention. Il résume ensuite l'état actuel du droit (par. 72) :

> « L'évidence doit s'apprécier selon les faits de l'espèce. La cour doit considérer l'importance de tout facteur à la lumière des circonstances pertinentes, dont la motivation derrière la recherche d'une solution au problème qui sous-tend le brevet, le nombre et l'étendue des recherches possibles, les efforts requis par elles et les chances de réussite. »

Cet énoncé de principe n'a fait l'objet d'aucune critique . . .

Voir aussi *Angiotech Pharmaceuticals Inc. c. Conor Medsystems Inc.*, [2007] R.P.C. 20 (p. 487), [2007] EWCA Civ 5, par. 45 (inf. par [2008] R.P.C. 28 (p. 716), [2008] UKHL 49). L'énoncé figurant au par. 45 de la décision de la Cour d'appel demeure pertinent et incontesté.

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[60] There is a similarity between the current state of the law in the United Kingdom and the United States in respect of "obvious to try". It is now clear that both jurisdictions accept that an "obvious to try" test can be relevant in an obviousness inquiry. The United States Supreme Court has now stated so explicitly in *KSR*. The convergence of the United Kingdom and the United States law on this issue suggests that the restrictiveness with which the *Beloit* test has been interpreted in Canada should be re-examined.

(d) *Approach to Obviousness in Canada*

[61] I take as a starting point the words of Diplock L.J. in *Johns-Manville*, at pp. 493-94:

> Patent law can too easily be bedevilled by linguistics, and the citation of a plethora of cases about other inventions of different kinds. The correctness of a decision upon an issue of obviousness does not depend upon whether or not the decider has paraphrased the words of the Act in some particular verbal formula. I doubt whether there is any verbal formula which is appropriate to all classes of claims.

Although we are not here dealing with obviousness provided by an express statutory test, but rather by necessary implication based on the requirement for invention in the *Patent Act*, the words of Diplock L.J. are nonetheless apt because the courts have often tended to treat the word formulation of *Beloit* as if it were a statutory prescription that limits the obviousness inquiry.

[62] I do not think that Hugessen J.A. in *Beloit* intended that the rather colourful description of obviousness that he coined be applied in an acontextual manner applicable to all classes of claims. I note particularly that "obvious to try" is not a mandatory test in the United Kingdom or in the United States. It is one factor of a number that should be considered, having regard to the context and the nature of the invention.

[63] In *KSR*, Kennedy J. warns against an overly rigid rule that limits the obviousness inquiry. Rather, an expansive and flexible approach that

[60] L'état actuel du droit relatif à l'« essai allant de soi » est semblable au Royaume-Uni et aux États-Unis. Il est désormais manifeste que les deux pays reconnaissent la pertinence de ce facteur dans le cadre de l'examen portant sur l'évidence. La Cour suprême des États-Unis l'a reconnu expressément dans l'arrêt *KSR*. La convergence du droit britannique et du droit américain sur ce point donne à penser qu'il convient de remettre en question la manière restrictive dont les tribunaux canadiens ont interprété le critère établi dans l'arrêt *Beloit*.

d) *La notion d'évidence au Canada*

[61] Je cite d'emblée les propos du lord juge Diplock dans l'arrêt *Johns-Manville* (p. 493-494) :

> [TRADUCTION] Le droit des brevets peut trop facilement être embrouillé par la terminologie employée et par le renvoi à une foule de décisions relatives à d'autres inventions de catégories différentes. Lorsque l'évidence est en cause, le bien-fondé de la décision ne dépend pas de ce que son auteur a paraphrasé ou non le texte de la loi d'une certaine manière. Je doute qu'il existe un libellé convenant à toutes les catégories de revendication.

Même si, en l'espèce, l'évidence ne s'apprécie pas au regard d'un critère expressément prévu dans la loi, mais bien par déduction nécessaire au vu des exigences de la *Loi sur les brevets* applicables à l'invention, les propos du lord juge Diplock sont néanmoins à-propos, car les tribunaux ont souvent vu dans le libellé de l'arrêt *Beloit* une prescription légale limitant l'examen de l'évidence.

[62] Je ne pense pas que dans cet arrêt, le juge Hugessen a voulu conférer un caractère universel à la définition plutôt colorée qu'il y donne de l'évidence, de façon qu'elle s'applique indépendamment du contexte à toute catégorie de revendication. Je remarque en particulier que le critère de l'« essai allant de soi » n'est obligatoire ni au Royaume-Uni ni aux États-Unis. Il s'agit d'un élément parmi d'autres selon le contexte et la nature de l'invention.

[63] Dans l'arrêt *KSR*, le juge Kennedy met en garde contre l'application d'une règle trop rigide qui restreint l'examen portant sur l'évidence. Une

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would include "any secondary considerations that [will] prove instructive" will be useful (p. 1739). I read *KSR* as teaching that as in most matters in which a judge or a jury is called upon to make a factual determination, rigid rules are inappropriate unless mandated by statute.

[64] While I do not think the list is exhaustive, the factors set forth by Kitchin J. and adopted by Lord Hoffmann in *Lundbeck*, referred to at para. 59 of these reasons, are useful guides in deciding whether a particular step was "obvious to try". However, the "obvious to try" test must be approached cautiously. It is only one factor to assist in the obviousness inquiry. It is not a panacea for alleged infringers. The patent system is intended to provide an economic encouragement for research and development. It is well known that this is particularly important in the field of pharmaceuticals and biotechnology.

[65] In *Saint-Gobain PAM SA v. Fusion Provida Ltd.*, [2005] EWCA Civ 177 (BAILII), Jacob L.J. stated, at para. 35:

> Mere possible inclusion of something within a research programme on the basis you will find out more and something might turn up is not enough. If it were otherwise there would be few inventions that were patentable. The only research which would be worthwhile (because of the prospect of protection) would be into areas totally devoid of prospect. The "obvious to try" test really only works where it is more-or-less self-evident that what is being tested ought to work.

In *General Tire*, Sachs L.J. said, at p. 497:

> "Obvious" is, after all, a much-used word and it does not seem to us that there is any need to go beyond the primary dictionary meaning of "very plain".

In *Intellectual Property Law*, at p. 136, Professor Vaver also equates "obvious" to "very plain". I am of the opinion that the "obvious to try" test will work only where it is very plain or, to use the words of Jacob L.J., more or less self-evident that what is being tested ought to work.

[66] For a finding that an invention was "obvious to try", there must be evidence to convince a

démarche large et flexible englobant [TRADUCTION] « toute considération accessoire pouvant se révéler éclairante » convient davantage (p. 1739). J'en déduis que dans la plupart des cas où il est appelé à statuer sur les faits, le juge ou le jury ne doit appliquer une règle rigide que si la loi l'y oblige.

[64] À mon avis, les facteurs énoncés par le juge Kitchin, puis repris par lord Hoffmann dans l'arrêt *Lundbeck* (par. 59), ne sont pas exhaustifs, mais offrent des repères pour déterminer si une étape donnée « allait de soi ». Cependant, la notion d'« essai allant de soi » commande la prudence. Ce n'est qu'un des éléments à considérer pour statuer sur l'évidence. Elle ne saurait permettre de réfuter toute allégation de contrefaçon. Le régime des brevets vise à favoriser le financement de la recherche et du développement, ce qui est assurément d'une importance capitale dans le domaine pharmaceutique et celui de la biotechnologie.

[65] Dans l'arrêt *Saint-Gobain PAM SA c. Fusion Provida Ltd.*, [2005] EWCA Civ 177 (BAILII), le lord juge Jacob a dit ce qui suit au par. 35 :

> [TRADUCTION] La seule inclusion possible de quelque chose dans un programme de recherche dans l'optique d'en apprendre davantage et de faire une découverte ne suffit pas. S'il en allait autrement, peu d'inventions seraient brevetables. L'éventualité d'une protection ne justifierait la recherche que dans des domaines n'offrant aucune chance de découverte. La notion d'« essai allant de soi » ne s'applique vraiment que lorsqu'il est plus ou moins évident que l'essai sera fructueux.

Dans l'arrêt *General Tire*, le lord juge Sachs dit à la p. 497 :

> [TRADUCTION] Après tout, la locution « aller de soi » est très usitée et il ne nous paraît pas nécessaire d'étoffer la principale définition du dictionnaire, à savoir quelque chose de « très clair ».

Dans *Intellectual Property Law*, le professeur Vaver convient de ce sens (p. 136). J'estime que la notion d'« essai allant de soi » n'est applicable que lorsqu'il est très clair ou, pour reprendre les termes employés par le lord juge Jacob, qu'il est plus ou moins évident, que l'essai sera fructueux.

[66] Pour conclure qu'une invention résulte d'un « essai allant de soi », le tribunal doit être convaincu

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judge on a balance of probabilities that it was more or less self-evident to try to obtain the invention. Mere possibility that something might turn up is not enough.

[67] It will be useful in an obviousness inquiry to follow the four-step approach first outlined by Oliver L.J. in *Windsurfing International Inc. v. Tabur Marine (Great Britain) Ltd.*, [1985] R.P.C. 59 (C.A.). This approach should bring better structure to the obviousness inquiry and more objectivity and clarity to the analysis. The *Windsurfing* approach was recently updated by Jacob L.J. in *Pozzoli SPA v. BDMO SA*, [2007] F.S.R. 37 (p. 872), [2007] EWCA Civ 588, at para. 23:

> In the result I would restate the *Windsurfing* questions thus:
>
> (1) (a) Identify the notional "person skilled in the art";
>
> (b) Identify the relevant common general knowledge of that person;
>
> (2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;
>
> (3) Identify what, if any, differences exist between the matter cited as forming part of the "state of the art" and the inventive concept of the claim or the claim as construed;
>
> (4) Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention? [Emphasis added.]

It will be at the fourth step of the *Windsurfing/Pozzoli* approach to obviousness that the issue of "obvious to try" will arise.

i. When Is the "Obvious to Try" Test Appropriate?

[68] In areas of endeavour where advances are often won by experimentation, an "obvious to try" test might be appropriate. In such areas, there may be numerous interrelated variables with which to experiment. For example, some inventions in the pharmaceutical industry might warrant an "obvious

selon la prépondérance des probabilités qu'il allait plus ou moins de soi de tenter d'arriver à l'invention. La seule possibilité d'obtenir quelque chose ne suffit pas.

[67] Lors de l'examen relatif à l'évidence, il y a lieu de suivre la démarche à quatre volets d'abord énoncée par le lord juge Oliver dans l'arrêt *Windsurfing International Inc. c. Tabur Marine (Great Britain) Ltd.*, [1985] R.P.C. 59 (C.A.). La démarche devrait assurer davantage de rationalité, d'objectivité et de clarté. Le lord juge Jacob l'a récemment reformulée dans l'arrêt *Pozzoli SPA c. BDMO SA*, [2007] F.S.R. 37 (p. 872), [2007] EWCA Civ 588, par. 23 :

> [TRADUCTION] Par conséquent, je reformulerais comme suit la démarche préconisée dans l'arrêt *Windsurfing* :
>
> (1) a) Identifier la « personne versée dans l'art ».
>
> b) Déterminer les connaissances générales courantes pertinentes de cette personne;
>
> (2) Définir l'idée originale de la revendication en cause, au besoin par voie d'interprétation;
>
> (3) Recenser les différences, s'il en est, entre ce qui ferait partie de « l'état de la technique » et l'idée originale qui sous-tend la revendication ou son interprétation;
>
> (4) Abstraction faite de toute connaissance de l'invention revendiquée, ces différences constituent-elles des étapes évidentes pour la personne versée dans l'art ou dénotent-elles quelque inventivité? [Je souligne.]

La question de l'« essai allant de soi » se pose à la quatrième étape de la démarche établie dans les arrêts *Windsurfing* et *Pozzoli* pour statuer sur l'évidence.

i. Dans quels cas la notion d'« essai allant de soi » est-elle pertinente?

[68] Dans les domaines d'activité où les progrès sont souvent le fruit de l'expérimentation, le recours à la notion d'« essai allant de soi » pourrait être indiqué. Dans ces domaines, de nombreuses variables interdépendantes peuvent se prêter à l'expérimentation. Par exemple, certaines inventions

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to try" test since there may be many chemically similar structures that can elicit different biological responses and offer the potential for significant therapeutic advances.

ii. "Obvious to Try" Considerations

[69] If an "obvious to try" test is warranted, the following factors should be taken into consideration at the fourth step of the obviousness inquiry. As with anticipation, this list is not exhaustive. The factors will apply in accordance with the evidence in each case.

1. Is it more or less self-evident that what is being tried ought to work? Are there a finite number of identified predictable solutions known to persons skilled in the art?

2. What is the extent, nature and amount of effort required to achieve the invention? Are routine trials carried out or is the experimentation prolonged and arduous, such that the trials would not be considered routine?

3. Is there a motive provided in the prior art to find the solution the patent addresses?

[70] Another important factor may arise from considering the actual course of conduct which culminated in the making of the invention. It is true that obviousness is largely concerned with how a skilled worker would have acted in the light of the prior art. But this is no reason to exclude evidence of the history of the invention, particularly where the knowledge of those involved in finding the invention is no lower than what would be expected of the skilled person.

[71] For example, if the inventor and his or her team reached the invention quickly, easily, directly and relatively inexpensively, in light of the prior art and common general knowledge, that may be evidence supporting a finding of obviousness, unless

du secteur pharmaceutique pourraient justifier son application étant donné l'existence possible de nombreuses compositions chimiques semblables pouvant donner lieu à des réponses biologiques différentes et être porteuses de progrès thérapeutiques notables.

ii. « Essai allant de soi » : éléments à considérer

[69] Lorsque l'application du critère de l'« essai allant de soi » est justifiée, les éléments énumérés ci-après doivent être pris en compte à la quatrième étape de l'examen de l'évidence. Tout comme ceux pertinents pour l'antériorité, ils ne sont pas exhaustifs et s'appliquent selon la preuve offerte dans le cas considéré.

1. Est-il plus ou moins évident que l'essai sera fructueux? Existe-t-il un nombre déterminé de solutions prévisibles connues des personnes versées dans l'art?

2. Quels efforts — leur nature et leur ampleur — sont requis pour réaliser l'invention? Les essais sont-ils courants ou l'expérimentation est-elle longue et ardue de telle sorte que les essais ne peuvent être qualifiés de courants?

3. L'antériorité fournit-elle un motif de rechercher la solution au problème qui sous-tend le brevet?

[70] Les mesures concrètes ayant mené à l'invention peuvent constituer un autre facteur important. Il est vrai que l'évidence tient en grande partie à la manière dont l'homme du métier aurait agi à la lumière de l'antériorité. Mais on ne saurait pour autant écarter l'historique de l'invention, spécialement lorsque les connaissances des personnes qui sont à l'origine de la découverte sont au moins égales à celles de la personne versée dans l'art.

[71] Par exemple, le fait pour l'inventeur et les membres de son équipe de parvenir à l'invention rapidement, facilement, directement et à relativement peu de frais, compte tenu de l'antériorité et des connaissances générales courantes, pourrait étayer

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the level at which they worked and their knowledge base was above what should be attributed to the skilled person. Their course of conduct would suggest that a skilled person, using his/her common general knowledge and the prior art, would have acted similarly and come up with the same result. On the other hand, if time, money and effort was expended in research looking for the result the invention ultimately provided before the inventor turned or was instructed to turn to search for the invention, including what turned out to be fruitless "wild goose chases", that evidence may support a finding of non-obviousness. It would suggest that the skilled person, using his/her common general knowledge and the prior art, would have done no better. Indeed, where those involved including the inventor and his or her team were highly skilled in the particular technology involved, the evidence may suggest that the skilled person would have done a lot worse and would not likely have managed to find the invention. It would not have been obvious to him/her to try the course that led to the invention.

(e) *Application to the Facts of This Case*

[72] Applying the four steps of *Windsurfing/Pozzoli*, I accept the applications judge's findings of fact where they are unaffected by his rejection of the "obvious to try" test. Where application of the obvious to try test requires further consideration of the evidence, it will be necessary for this Court to make some findings of fact. In this case, I think it is preferable to remitting the matter to the trial judge for redetermination and subjecting his decision to further possible appeals.

[73] Apotex filed its notice of allegation in 2002. It is now some six years later. If the '777 patent is invalid, and provided all other requirements are met, Apotex should be entitled to a notice of compliance from the Minister without any further delay. Indeed, the *NOC Regulations* are intended to be a summary procedure. I think it is time that this matter finally be resolved. I would conduct the following analysis:

une conclusion d'évidence, sauf lorsque leurs efforts et leurs connaissances se sont révélés plus grands que ceux attribués à la personne versée dans l'art. Leur démarche tendrait à indiquer qu'une personne versée dans l'art, grâce à ses connaissances générales courantes et à l'antériorité, aurait agi de même et serait arrivée au même résultat. Par contre, lorsque temps, fonds et efforts ont été consacrés à la recherche ayant finalement mené à l'invention, et ce, avant que l'inventeur ne se mette à la recherche de l'invention ou qu'on ne lui enjoigne de le faire, y compris les démarches qui se sont révélées vaines et inutiles, une conclusion de non-évidence pourrait être fondée. On pourrait en déduire que la personne versée dans l'art n'aurait pas fait mieux en s'appuyant sur ses connaissances générales courantes et sur l'antériorité. En fait, lorsque les intéressés, y compris l'inventeur et les membres de son équipe, avaient de grandes compétences dans le domaine technique en cause, la preuve pourrait indiquer que la personne versée dans l'art aurait obtenu des résultats bien pires et ne serait vraisemblablement pas parvenue à l'invention. Il ne lui aurait pas paru évident d'emprunter le parcours ayant mené à l'invention.

e) *Application aux faits de l'espèce*

[72] Au vu des quatre étapes établies dans les arrêts *Windsurfing* et *Pozzoli*, je fais miennes les conclusions factuelles du juge de première instance dans la mesure où elles ne sont pas touchées par son rejet du critère de l'essai allant de soi. Lorsque l'application de ce critère commande un examen plus poussé de la preuve, notre Cour doit tirer certaines conclusions de fait. En l'espèce, j'estime cela préférable au renvoi du dossier au juge de première instance pour qu'il rende une nouvelle décision qui pourrait à nouveau donner lieu à des appels.

[73] Apotex a déposé son avis d'allégation en 2002. Six ans se sont écoulés depuis. Si le brevet 777 est invalide et que toutes les autres conditions sont remplies, le ministre devrait lui délivrer un avis de conformité sans délai. La procédure que prévoit le Règlement AC se veut en effet sommaire, et je crois qu'il est temps que l'affaire connaisse enfin un dénouement. Je passe maintenant à l'analyse.

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i. Identify the Notional Person Skilled in the Art

[74] Both parties agreed that a trained pharmachemist is that person.

ii. Identify the Relevant Common General Knowledge of That Person

[75] Apotex reiterates its submissions made with respect to anticipation, insisting that, since the methods of separation were well known, the claimed invention and its advantages would have been obvious to the person skilled in the art. Shore J. found on the evidence before him that there were five well-known methods to separate this racemate into its isomers. However, he did not find that the relative advantage of the dextro-rotatory isomer would have been known by the skilled person.

iii. Identify the Inventive Concept of the Claim in Question or, if That Cannot Readily Be Done, Construe It

[76] The construction of the claims in the '777 patent is not an issue. It is agreed that they constitute the dextro-rotatory isomer of the racemate and its pharmaceutically acceptable salts and processes for obtaining them.

[77] The inventive concept of the claims is not readily discernable from the claims themselves. A bare chemical formula in a patent claim may not be sufficient to determine its inventiveness. In such cases, I think it must be acceptable to read the specification in the patent to determine the inventive concept of the claims. Of course, it is not permissible to read the specification in order to construe the claims more narrowly or widely than the text will allow.

[78] In the present case, it is apparent that the inventive concept of the claims in the '777 patent is a compound useful in inhibiting platelet aggregation which has greater therapeutic effect and less toxicity than the other compounds of the '875 patent and the methods for obtaining that compound.

i. Identifier la personne versée dans l'art

[74] Les deux parties conviennent que la personne versée dans l'art est le chimiste pharmaceutique de formation.

ii. Déterminer les connaissances générales courantes pertinentes de cette personne fictive

[75] Apotex présente les mêmes observations que pour l'antériorité en insistant sur le fait que, les méthodes de séparation étant bien connues, l'invention revendiquée et ses avantages auraient été évidents pour la personne versée dans l'art. Au vu du dossier, le juge de première instance a conclu que cinq méthodes bien connues permettaient d'isoler les isomères du racémate. Il n'a toutefois pas estimé que la personne versée dans l'art aurait connu l'avantage relatif de l'isomère dextrogyre.

iii. Définir l'idée originale de la revendication en cause, au besoin par voie d'interprétation

[76] L'interprétation des revendications du brevet 777 n'est pas en cause. Il est entendu que celles-ci visent l'isomère dextrogyre du racémate, ses sels pharmaceutiquement acceptables et leurs procédés d'obtention.

[77] Il n'est pas facile de saisir l'idée originale à partir ses seules revendications. La seule présence d'une formule chimique ne permet pas de déterminer l'inventivité de la revendication. J'estime donc que l'on doit pouvoir se fonder sur le mémoire descriptif pour définir l'idée originale qui sous-tend les revendications. On ne saurait cependant s'appuyer sur le mémoire descriptif pour interpréter le texte des revendications de façon plus restrictive ou plus extensive.

[78] En l'espèce, il est clair que l'idée originale à la base des revendications du brevet 777 est un antiplaquettaire à l'effet thérapeutique supérieur et à la toxicité moindre comparativement aux autres composés couverts par le brevet 875, et les méthodes permettant de l'obtenir.

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iv. Identify What if Any Differences Exist Between the '875 Patent and the '777 Patent

[79] The '875 patent disclosed over 250,000 possible different compounds predicted to inhibit platelet aggregation. Twenty-one compounds were made and tested. Nothing distinguishes the racemate in this case from other compounds disclosed or tested in terms of therapeutic effect or toxicity. As stated above, there is no disclosure in the '875 patent of the specific beneficial properties associated with the dextro-rotatory isomer of this racemate in isolation; nor was there disclosure of any advantages which flow from using the bisulfate salt of the dextro-rotatory isomer. The '875 patent did not differentiate between the properties of the racemate, its dextro-rotatory isomer and levo-rotatory isomer or indeed the other compounds made and tested or predicted to work.

[80] On the other hand, the '777 patent claims that the invention of the dextro-rotatory isomer of the racemate, clopidogrel, and its bisulfate salt discloses their beneficial properties over the levo-rotatory isomer and the racemate and expressly describes how to separate the racemate into its isomers.

v. Viewed Without Any Knowledge of the '777 Patent, Do Those Differences Constitute Steps Which Would Have Been Obvious to the Person Skilled in the Art or Do They Require a Degree of Inventiveness?

[81] At this stage, it must be determined whether the nature of the invention in this case is such as to warrant an "obvious to try" test. The discovery of the dextro-rotary isomer and its bisulfate salt came after experimentation. There were interrelated variables with which Mr. Badorc had to experiment. An "obvious to try" test in this case would recognize the evidence of the expert witnesses as to the discovery of the beneficial properties of the dextro-rotary isomer and its bisulfate salt and the methods for finding them.

iv. Recenser les différences, s'il en est, entre les brevets 875 et 777

[79] Le brevet 875 divulgue plus de 250 000 composés possibles dont il prédit l'effet antiplaquettaire. Vingt et un ont été synthétisés et analysés. Rien ne distingue le racémate visé en l'espèce des autres composés divulgués ou analysés quant à leur effet thérapeutique ou à leur toxicité. Je rappelle que le brevet 875 ne divulgue aucun avantage particulier associé à l'isomère dextrogyre de ce racémate, une fois isolé, ni aucun avantage découlant de l'utilisation du bisulfate de l'isomère dextrogyre. Il n'établit aucune différence entre les propriétés du racémate, celles de l'isomère dextrogyre et celles de l'isomère lévogyre, non plus qu'entre les avantages des autres composés synthétisés, analysés ou dont il prédit l'efficacité.

[80] En revanche, le brevet 777 revendique l'invention de l'isomère dextrogyre du racémate, le clopidogrel et de son bisulfate, divulgue leurs avantages par rapport à l'isomère lévogyre et au racémate, et énonce expressément le procédé de séparation des isomères du racémate.

v. Abstraction faite de toute connaissance de l'invention revendiquée dans le brevet 777, ces différences constituent-elles des étapes évidentes pour la personne versée dans l'art ou dénotent-elles quelque inventivité?

[81] La question est maintenant de savoir si la nature de l'invention en cause justifie l'application du critère de l'« essai allant de soi ». La découverte de l'isomère dextrogyre et de son bisulfate est issue de l'expérimentation. Il y avait des variables interdépendantes avec lesquelles M. Badorc devait faire des expériences. L'application du critère de l'« essai allant de soi » en l'espèce rendrait recevable le témoignage des témoins experts sur la découverte des avantages de l'isomère dextrogyre et de son bisulfate ainsi que sur leurs procédés d'obtention.

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[82] The applications judge cannot be faulted for the analysis he conducted as far as it went. However, he erred in not allowing for the application of the "obvious to try" test, which is warranted in this case.

[83] The following factors are therefore relevant at this fourth step of the obviousness inquiry:

(1) *Is It More or Less Self-Evident That What Is Being Tried Ought to Work?*

[84] As I have observed earlier, Shore J. found that the skilled person would not know, before separating this particular racemate into its isomers and then testing the separated isomers, that the properties of the dextro-rotatory isomer would be different from the properties of the racemate or the levo-rotatory isomer (para. 81). Similarly, he found that the person skilled in the art would not know before trying the different salts in combination with the dextro-rotatory isomer what the bisulfate salt's beneficial properties would be (para. 82).

[85] Just because there are known methods of separating a racemate into its isomers does not mean that a person skilled in the art would necessarily apply them. The fact that there are such known methods of separation will be of no account if the evidence does not prove that it was more or less self-evident to try them. It is true that at the relevant time there was evidence that a skilled person would know that the properties of a racemate and its isomers might be different. However, a possibility of finding the invention is not enough. The invention must be self-evident from the prior art and common general knowledge in order to satisfy the "obvious to try" test. That is not the evidence in this case.

(2) *What Is the Extent, Nature and Amount of Effort Required to Achieve the Invention?*

[86] As indicated, the applications judge found that there were five well-known techniques for separating this racemate into its isomers. He also found that there was no evidence that at the relevant time, a person skilled in the art would know

[82] On ne peut reprocher quoi que ce soit à l'analyse que le juge de première instance a cru bon d'effectuer. Cependant, il aurait dû en outre permettre l'application — justifiée en l'espèce — du critère de l'« essai allant de soi ».

[83] Les considérations suivantes sont donc pertinentes à cette quatrième étape de l'examen portant sur l'évidence.

(1) *Est-il plus ou moins évident que l'essai sera fructueux?*

[84] Comme je le fais remarquer précédemment, le juge Shore conclut que la personne versée dans l'art n'aurait pu savoir que l'isomère dextrogyre présentait des avantages différents de ceux du racémate et de l'isomère lévogyre avant d'isoler les isomères du racémate et d'analyser chacun d'eux (par. 81). Il ajoute que la personne versée dans l'art n'aurait pu connaître les avantages du bisulfate avant de combiner les différents sels avec l'isomère dextrogyre (par. 82).

[85] La seule existence de procédés connus permettant d'isoler les isomères d'un racémate ne signifie pas qu'une personne versée dans l'art y recourerait nécessairement. Il n'est d'ailleurs pas tenu compte de l'existence de tels procédés lorsque aucun élément n'établit qu'il allait plus ou moins de soi d'y recourir. Il est vrai que, selon la preuve, à l'époque considérée, une personne versée dans l'art aurait su que les avantages d'un racémate pouvaient différer de ceux de ses isomères. Toutefois, la possibilité de découvrir l'invention ne suffit pas. Pour satisfaire au critère de l'« essai allant de soi », l'invention doit être évidente au regard de l'antériorité et des connaissances générales courantes, ce que la preuve n'établit pas en l'espèce.

(2) *Quels efforts — leur nature et leur ampleur — sont requis pour réaliser l'invention?*

[86] Je le rappelle, le juge de première instance a conclu que cinq techniques connues permettaient d'isoler les isomères du racémate. Il a aussi estimé que rien n'établissait qu'à l'époque considérée, une personne versée dans l'art aurait su laquelle aurait

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which one would work with the racemate at issue in this case. The evidence was that a skilled person would eventually find the right technique.

[87] As earlier indicated, Shore J. also found that there was no evidence that at the relevant time a person skilled in the art would know before separating the racemate and testing the isomers what their properties would be, although the specific properties of the isomers could be discovered. There was evidence that, using known techniques, the properties of different pharmaceutically acceptable salts to be used with the dextro-rotatory isomer could be discovered.

[88] However, in considering whether it was "obvious to try" to find the invention, once it was decided to isolate the dextro-rotatory isomer, the methods for doing so were known, the methods for testing the properties of the isomers were known and the method for determining the beneficial properties of the salts to be used with the isomer would also have been known.

[89] According to Mr. Badorc's affidavit, it took from November 1985 to April 1986 to find the '777 invention, and he was already familiar with the '875 invention. Potentially five different methods to separate the racemate would have had to have been tried and tested before determining the properties of the dextro-rotatory isomer. As in the case of anticipation, one might infer that the applications judge, if asked to decide this question, would have held that the investigation here was not routine, but rather was prolonged and arduous. In any event, on the facts of this case, this factor would assume small significance in view of the finding I make with respect to the whole course of conduct discussed at para. 91 below.

(3) *Is There a Motive From the Prior Art to Find the Solution That the '777 Patent Addresses?*

[90] It is well known that the pharmaceutical industry is intensely competitive. Market participants are continuously in search of new and

fonctionné pour le racémate en cause. Suivant la preuve, une personne versée dans l'art aurait fini par trouver la bonne.

[87] Comme je l'ai déjà signalé, le juge Shore a par ailleurs conclu qu'aucun élément n'établissait qu'à l'époque considérée, une personne versée dans l'art aurait connu les avantages des isomères avant de les séparer du racémate et de les analyser, même si ces avantages pouvaient être découverts. Suivant la preuve, en recourant à des techniques connues, il était possible de découvrir les avantages de différents sels pharmaceutiquement acceptables combinés avec l'isomère dextrogyre.

[88] Cependant, pour ce qui est de savoir s'il « allait de soi » de tenter de découvrir l'invention, une fois prise la décision d'isoler l'isomère dextrogyre, les méthodes pour y parvenir étaient connues, celles permettant d'analyser les avantages des isomères étaient également connues et le procédé pour déterminer les avantages des sels combinés avec l'isomère l'était lui aussi.

[89] Selon l'affidavit du D^r^ Badorc, les travaux entrepris en novembre 1985 pour découvrir l'invention visée par le brevet 777 se sont poursuivis jusqu'en avril 1986, et le témoin connaissait déjà l'invention protégée par le brevet 875. Il aurait pu être nécessaire de recourir à cinq méthodes de séparation du racémate avant de déterminer les avantages de l'isomère dextrogyre. Comme pour l'antériorité, on pourrait déduire que s'il avait été appelé à trancher cette question, le juge aurait conclu qu'il ne s'agissait pas d'essais courants, mais bien d'une expérimentation longue et ardue. Quoi qu'il en soit, dans la présente affaire, il s'agit d'une élément négligeable étant donné la conclusion que je tire concernant l'ensemble de la démarche analysée ci-après au par. 91.

(3) *L'antériorité fournit-elle un motif de rechercher la solution au problème qui sous-tend le brevet 777?*

[90] Le secteur pharmaceutique est sans conteste extrêmement concurrentiel. Les entreprises sont toujours à l'affût de médicaments nouveaux et

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improved medications and want to reach the market with them as soon as possible. So demand for an effective and non-toxic product to inhibit platelet aggregation might be assumed to exist. However, nothing in the '875 patent or common general knowledge provided a specific motivation for the skilled person to pursue the '777 invention. The prior patent was a genus patent, and selection might be expected. However, the prior patent did not differentiate between the efficacy and the toxicity of any of the compounds it covered. This suggests that what to select or omit was not then self-evident to the person skilled in the art.

(4) *What Is the Course of Conduct Which Was Followed Which Culminated in the Making of the Invention?*

[91] Mr. Badorc's affidavit reveals that for several years prior to November 1985, Sanofi was in the process of developing the racemate in its salified form. In November 1985, the racemate was being tested in preliminary human clinical trials. It was at that time that Mr. Badorc was asked to separate the racemate into its isomers. After he discovered that the dextro-rotatory isomer was active and non-toxic and that the levo-rotatory isomer was non-active and toxic, Sanofi decided to develop the dextro-rotatory isomer and abandon its work on the racemate. However, this was after it had "spent millions of dollars and several years developing [the racemate] up to the point of preliminary human clinical trials" without at least trying to see if the dextro-rotatory isomer had advantageous properties to those of the racemate (Affidavit of Mr. Badorc, at para. 25). This evidence was uncontradicted.

(5) *Was the Invention of the '777 Patent "Obvious to Try"?*

[92] The methods to obtain the invention of the '777 patent were common general knowledge. It can be assumed that there was a motive to find a non-toxic efficacious product to inhibit platelet aggregation in the blood. However, it was not self-evident from the '875 patent or common general knowledge what the properties of the dextro-rotatory isomer of

améliorés qu'elles veulent commercialiser dès que possible. La demande d'un antiplaquettaire efficace et non-toxique peut donc être présumée. Toutefois, ni le brevet 875 ni ses connaissances générales courantes ne donnaient à la personne versée dans l'art un motif de rechercher l'objet du brevet 777. Le brevet antérieur était un brevet de genre, de sorte qu'une sélection était prévisible. Il n'établissait cependant pas de distinction entre les composés quant à leur efficacité et à leur toxicité, ce qui donne à penser que ce qu'il y avait lieu de retenir ou d'omettre n'était alors pas évident pour la personne versée dans l'art.

(4) *Quelle démarche a mené à l'invention?*

[91] L'affidavit du D^r^ Badorc révèle que plusieurs années avant novembre 1985, Sanofi était à mettre au point la forme salifiée du racémate. En novembre 1985, le racémate a fait l'objet d'essais cliniques préliminaires chez l'humain. C'est alors qu'on a demandé au D^r^ Badorc d'isoler les isomères du racémate. Après la découverte de l'activité et de la non-toxicité de l'isomère dextrogyre et de la non-activité et de la toxicité de l'isomère lévogyre, les travaux de Sanofi ont porté non plus sur le racémate, mais sur l'isomère dextrogyre. Cette décision a toutefois été prise après que Sanofi eut « consacré des millions de dollars et des années de travaux à la mise au point [du racémate] et à la tenue d'essais cliniques préliminaires chez l'humain » sans au moins tenter de déterminer si l'isomère dextrogyre avait des avantages par rapport au racémate (affidavit du D^r^ Badorc, par. 25). Ce témoignage n'a pas été contredit.

(5) *L'invention visée par le brevet 777 « allait-elle de soi »?*

[92] Les moyens de parvenir à l'objet du brevet 777 faisaient partie des connaissances générales courantes. On peut supposer qu'il existait un motif de chercher un produit efficace et non toxique inhibant l'agrégation des plaquettes dans le sang. Cependant, ni le brevet 875 ni les connaissances générales courantes ne rendaient évidents les

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this racemate would be or what the bisulfate salt's beneficial properties would be and therefore that what was being tried ought to work. The course of conduct and the time involved throughout demonstrate that the advantage of the dextro-rotatory isomer was not quickly or easily predictable. Had the dextro-rotatory isomer been "obvious to try", it is difficult to believe that Sanofi would not have opted for it before unnecessary time and investment were spent on the racemate. I conclude that the prior art and common general knowledge of persons skilled in the art at the relevant time were not sufficient for it to be more or less self-evident to try to find the dextro-rotatory isomer.

(f) *Conclusion on Obviousness*

[93] As I have earlier explained, there was a significant difference between the '875 genus patent and the '777 selection patent. The difference was not obvious. Having regard to the foregoing analysis, I conclude that the allegation of obviousness is not justified.

VII. Double Patenting

[94] Apotex also bases its challenge to the validity of the '777 patent on double patenting. Apotex also challenges the validity of the doctrine of selection patents itself on this basis.

[95] There may only be one patent covering an invention (*Whirlpool Corp. v. Camco Inc.*, [2000] 2 S.C.R. 1067, 2000 SCC 67, at para. 63). Apotex says that a selection patent claims the same invention as the original class or genus patent and as a result, the selection patent cannot be valid.

[96] The concern expressed by Apotex is that the doctrine of selection patents allows a patent holder to "evergreen" an invention. The original genus patent is granted for a finite period of years. If a selection patent is later obtained by the owner of the genus patent covering the same invention as the genus patent, the number of years the owner is entitled to exclude others from making or using the invention is extended, contrary to the limited period of exclusivity provided by the original patent.

propriétés de l'isomère dextrogyre du racémate ou les avantages du bisulfate, de sorte qu'il n'était pas évident que l'essai serait fructueux. Les efforts et le temps consacrés démontrent qu'il n'était pas possible de prédire rapidement ou aisément l'avantage que présentait l'isomère dextrogyre. S'il était allé de soi d'isoler l'isomère dextrogyre, il est difficile de croire que Sanofi ne l'aurait pas fait au lieu de consacrer en vain temps et argent au racémate. Je conclus que l'antériorité et les connaissances générales courantes des personnes versées dans l'art à l'époque considérée n'étaient pas suffisantes pour qu'il aille plus ou moins de soi de tenter d'isoler l'isomère dextrogyre.

f) *Conclusion sur le caractère évident*

[93] Je le répète, le brevet de genre 875 se distinguait sensiblement du brevet de sélection 777. La différence n'était pas évidente. Eu égard à l'analyse qui précède, je conclus que l'allégation d'évidence n'est pas fondée.

VII. La double protection

[94] Apotex attaque la validité du brevet 777 en alléguant également la double protection. Elle conteste aussi le bien-fondé de la notion de brevet de sélection pour le même motif.

[95] Un seul brevet peut être accordé pour une invention (*Whirlpool Corp. c. Camco Inc.*, [2000] 2 R.C.S. 1067, 2000 CSC 67, par. 63). Apotex soutient qu'un brevet de sélection revendique la même invention que le brevet initial ou brevet de genre, en sorte que le brevet de sélection ne peut être valide.

[96] Apotex déplore en fait que la notion de brevet de sélection permette la « perpétuation » d'un brevet. Le brevet de genre d'origine est délivré pour un nombre d'années déterminé. Si son titulaire obtient ultérieurement un brevet de sélection pour la même invention, le nombre d'années pendant lesquelles il jouit d'un monopole pour la fabrication ou l'utilisation de l'invention en est accru, ce qui est incompatible avec la durée limitée du monopole accordé initialement.

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[97] Evergreening is a legitimate concern and, depending on the circumstances, strategies that attempt to extend the time limit of exclusivity of a patent may be contrary to the objectives of the *Patent Act*. The Act aims to promote inventiveness by conferring exclusivity for a limited period of time while providing for public disclosure of the invention to enable others to make or use it after expiry of the period of exclusivity.

[98] However, a generalized concern about evergreening is not a justification for an attack on the doctrine of selection patents for two reasons. First, a selection patent may be sought by a party other than the inventor or owner of the original genus patent. In such a case, anticipation or obviousness may be an issue, but evergreening does not arise.

[99] At the hearing, counsel for Apotex submitted that, in the pharmaceutical industry, the only party that would ever attempt to obtain a selection patent would be the genus patent holder. This is a highly competitive industry and a market participant who is able to develop a more effective product might be expected to be anxious to do so and seek patent protection through a selection patent even if it requires the making of an agreement with the holder of the genus patent to allow for the marketing of the selected product. However, even if counsel is correct, the doctrine of genus and selection patents is not restricted to the pharmaceutical industry. It is of general applicability.

[100] Second and more importantly, selection patents encourage improvements by selection. The inventor selects only a bit of the subject matter of the original genus patent because that bit does something better than and different from what was claimed in the genus patent.

[101] The applications judge found that the claims of the ‘777 and ‘875 patents were not identical or coterminous. I agree with him. Apotex’s factum compares claims 1, 8, 14 and 15 of the ‘875 patent with claims 1 and 3 of the ‘777 patent.

[97] La perpétuation du brevet est une préoccupation légitime. Selon les circonstances, les stratégies visant à accroître la durée du monopole peuvent aller à l’encontre de l’objectif de la *Loi sur les brevets*, qui est de favoriser l’inventivité par l’octroi d’une exclusivité pour un temps tout en assurant la divulgation de l’invention pour permettre sa réalisation et son utilisation par autrui une fois le brevet expiré.

[98] Cependant, cette préoccupation générale ne justifie pas la remise en question du brevet de sélection en soi, et ce, pour deux raisons. Premièrement, l’obtention d’un brevet de sélection peut intéresser une autre personne que l’inventeur ou le titulaire du brevet de genre d’origine, auquel cas la question de l’antériorité ou de l’évidence peut se poser, mais non celle de la perpétuation.

[99] À l’audience, les avocats d’Apotex ont fait valoir que dans le domaine pharmaceutique, la seule personne susceptible de demander un brevet de sélection est le titulaire du brevet de genre. Dans un secteur d’activité aussi concurrentiel, une entreprise qui est en mesure de mettre au point un produit plus efficace pourrait être impatiente de le faire et demander un brevet de sélection, même s’il lui fallait conclure un accord avec le titulaire du brevet de genre pour la commercialisation du produit en cause. Et même si Apotex a raison, des brevets de genre et de sélection sont accordés dans d’autres secteurs que celui de la pharmaceutique. Le principe qui les sous-tend a vocation générale.

[100] Deuxièmement et surtout, le brevet de sélection favorise le perfectionnement par voie de sélection. L’inventeur ne sélectionne qu’un élément de l’objet du brevet de genre d’origine parce qu’il obtient ainsi quelque chose de mieux et de différent par rapport à ce qui est revendiqué dans le brevet initial.

[101] Le juge de première instance a conclu que les revendications des brevets 777 et 875 n’étaient pas identiques. Je suis d’accord avec lui. Dans son mémoire, Apotex compare les revendications 1, 8, 14 et 15 du brevet 875 et les revendications 1 et 3 du brevet 777.

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'875 Patent

Claim 1 "A process for the preparation of derivatives of general formula (I): . . . as well as the 2 enantiomers or their mixture [racemate] of these compounds of formula (I); wherein: . . . if desired, its enantiomers are separated *and/or it is salified by mineral or organic acid action*; . . ." (page 14)

Claim 8 "Process according to claim 1 for the preparation of methyl ∝-[4,5,6,7-tetrahydro-thieno[3,2-c]-5-pyridyl]-o.chlorophenylacetate, wherein the 4,5,6,7-tetrahydro thieno[3,2-c]pyridine is condensed over the methyl 2-chloro-o.chlorophenylacetate, and the derivative sought, which is isolated, is obtained." (page 15)

Claim 14 "Derivatives of general formula (I): . . . as well as the 2 enantiomers or their mixture of these compounds of formula (I). . .

Claim 15 "Methyl ∝-[4,5,6,7-tetrahydro-thieno[3,2-c]-5-pyridyl]-o. chlorophenylacetate, each time it is obtained by the process of claim 8 or its manifest chemical equivalents." (page 16)

(Underlining in trial reasons; italics added by Apotex.)

'777 Patent

1. Dextro-rotatory isomer of methyl alpha-5 (4, 5, 6, 7-tetrahydro (3, 2-c) thieno pyridyl) (2-chlorophenyl)-acetate *and its pharmaceutically acceptable salts.*

3. *Hydrogen sulfate* of the dextro-rotatory isomer of methyl alpha-5 (4, 5, 6, 7-tetrahydro (3, 2-c) thieno pyridyl) (2-chlorophenyl)-acetate.

(Underlining and italics added by Apotex.)

[102] Although Apotex does not expressly state which of the '875 and '777 claims it is comparing, it is apparent, for double patenting purposes, that there is no identity between the product claims 1 and 3 of the '777 patent and claims 1, 8 and 15 of the '875 patent because claims 1 and 8 are process claims and claim 15 is a product by process claim. The only comparison that need be considered is between claim 14 of the '875 patent and claim 1 of the '777 patent. Claim 3 of the '777 patent reflects

Brevet 875

[Revendication] 1. Procédé pour la préparation de dérivés de formule générale (I) : [. . .] ainsi que les deux énantiomères ou leur mélange [racémate], de ces composés de formule (I); [. . .] dans laquelle [. . .] si désiré, [on] sépare ses énantiomères *et/ou le salifie par action des bases minerales*; . . . [p. 16-17]

[Revendication] 8. Procédé selon la revendication 1, pour la préparation de l'[alpha]-[tétrahydro-4,5,6,7 thiéno [3,2-c] pyridyl-5] o-chlorophénylacétate de méthyle, caractérisé en ce que l'on condense la tétrahydro-4,5,6,7 thiéno [3,2-c] pyridine sur le chloro-2 o-chlorophénylacétate de méthyle, et obtient le dérivé cherché que l'on isole. [p. 19]

[Revendication] 14. Dérivés de formule générale (I) : [. . .] ainsi que les deux énantiomères ou leur mélange de ces composés de formule (I) . . . [p. 20-21]

[Revendication] 15. [alpha]-(tétrahydro-4,5,6,7 thiéno [3,2-c] pyridyl-5] o-chlorophénylacétate de méthyle, chaque fois qu'il est obtenu par le procédé de la revendication 8 ou ses équivalents chimiques manifestes. [page 21]

(Soulignements par le juge de première instance; italiques ajoutés par Apotex.)

Brevet 777

[TRADUCTION]

1. L'isomère dextrogyre de l'alpha-5 (4,5,6,7-tétrahydro (3,2-c) thiénopyridyl) (2-chlorophényl) acétate de méthyle *et ses sels acceptables du point de vue pharmaceutique.*

3. L'hydrogénosulfate de l'isomère dextrogyre de l'alpha-5 (4,5,6,7-tétrahydro (3,2-c) thiénopyridyl) (2-chlorophényl) acétate de méthyle.

(Soulignements et italiques ajoutés par Apotex.)

[102] Bien qu'Apotex ne dise pas expressément quelles revendications des brevets 875 et 777 elle compare, il est évident qu'en ce qui concerne la question de la double protection, les revendications de produit 1 et 3 du brevet 777 et les revendications 1, 8 et 15 du brevet 875 ne sont pas identiques, car les revendications 1 et 8 visent des procédés, et la revendication 15, un produit obtenu grâce à l'un de ces procédés. La seule comparaison à considérer est celle de la revendication 14 du brevet 875 et de

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the hydrogen sulfate of claim 1 of the '777 patent, so that if claim 1 is not invalid, claim 3 will not be invalid either.

[103] Claim 14 of the '875 patent claims all derivatives of general formula (I) as well as the two isomers and the racemic mixture. It is a broad claim for a class or genus. Claim 1 of the '777 patent is specific. It claims only the dextro-rotatory isomer of the racemate. This is a typical selection patent.

[104] Sound prediction was the basis for granting the original genus patent. That had to be the case when the genus involved over 250,000 possible compounds. Not every compound would itself have been tested. But there was, to the satisfaction of the Commissioner of Patents, sound prediction that what was included in the original genus patent was new, useful and not obvious. It was later determined that some of the subject matter of the original genus patent did not work or did not work as well as the subject matter of the selection patent. That information is valuable.

[105] The doctrine of "sound prediction", explicitly adopted by this Court in *Monsanto Co. v. Commissioner of Patents*, [1979] 2 S.C.R. 1108, balances the public interest in early disclosure of new and useful inventions even before their utility has been fully verified by tests, and the public interest in avoiding cluttering the public domain with useless patents and granting monopoly rights in exchange for misinformation: see *Apotex Inc. v. Wellcome Foundation Ltd.*, [2002] 4 S.C.R. 153, 2002 SCC 77, at para. 66. In *Monsanto*, Pigeon J., writing for the majority, drew the following conclusion, at p. 1117:

I have quoted again the passage quoted by the [Patent Appeal] Board because I consider the last sentence of the paragraph of some importance as it does clearly indicate what is meant by a "sound prediction". It cannot mean a certainty since it does not exclude all

la revendication 1 du brevet 777. La revendication 3 du brevet 777 correspond à l'hydrogénosulfate de l'objet de la revendication 1 du brevet 777, de sorte que si la revendication 1 n'est pas invalide, la revendication 3 ne l'est pas non plus.

[103] La revendication 14 du brevet 875 vise tous les dérivés de formule générale I, ainsi que les deux isomères et le mélange racémique. Elle est générale et vise une catégorie ou un genre. La revendication 1 du brevet 777 est spécifique et ne vise que l'isomère dextrogyre du racémate. C'est un brevet de sélection type.

[104] La délivrance du brevet de genre d'origine avait pour fondement la prédiction valable, ce qui est nécessairement le cas lorsque plus de 250 000 composés possibles sont en cause. Ces composés n'avaient pas tous été analysés. Cependant, le commissaire aux brevets a estimé qu'on pouvait raisonnablement conclure que l'objet du brevet de genre d'origine était nouveau, utile et non évident. On a ultérieurement déterminé que l'efficacité de certains éléments de l'objet du brevet de genre d'origine était nulle ou, du moins, inférieure à celle de l'objet du brevet de sélection. Il s'agit d'une donnée très utile.

[105] Retenu expressément par notre Cour dans l'arrêt *Monsanto Co. c. Commissaire des brevets*, [1979] 2 R.C.S. 1108, le critère de la « prédiction valable » met en balance le souci de divulguer rapidement, dans l'intérêt public, toute invention nouvelle et utile avant même que son utilité n'ait été confirmée sans réserve par des essais et le souci, toujours dans l'intérêt public, de ne pas encombrer le domaine public de brevets inutiles et de ne pas accorder un monopole pour une mésinformation : voir *Apotex Inc. c. Wellcome Foundation Ltd.*, [2002] 4 R.C.S. 153, 2002 CSC 77, par. 66. Dans l'arrêt *Monsanto*, au nom des juges majoritaires, le juge Pigeon a tiré les conclusions suivantes (p. 1117) :

Si j'ai cité de nouveau le passage cité par la Commission [d'appel des brevets], c'est que je suis d'avis que la dernière phrase est importante parce qu'elle indique clairement ce que l'on entend par « prédiction valable ». Il ne peut s'agir d'une certitude puisqu'elle n'exclut

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risk that some of the area covered may prove devoid of utility. It thus appears to me that the test formulated by Graham J. [in *Olin Mathieson Chemical Corp. v. Biorex Laboratories Ltd.,* [1970] R.P.C. 157 (Ch. D.)] involves just two possible reasons for rejecting claims such as those in issue.

> 1. There is evidence of lack of utility in respect of some of the area covered; [or]
>
> 2. It is not a sound prediction. [Emphasis added.]

This approach has been consistently accepted by courts in Canada (see for example *Ciba-Geigy AG v. Commissioner of Patents* (1982), 65 C.P.R. (2d) 73 (F.C.A.)).

[106] In the present case, it was found that the levo-rotatory isomer did not work at all and was toxic. The racemate did not work as well as the dextro-rotatory isomer. Isolating the dextro-rotatory isomer as being more effective and less toxic than other compounds of the genus patent is a valuable advance to be encouraged as a matter of patent policy.

[107] It is true that the sound prediction of the '875 patent that the racemate and the levo-rotatory isomer produced the same results as the dextro-rotatory isomer was not borne out. That may leave parts of the original genus patent open to challenge. But it does not affect the validity of the selection patent.

[108] Apotex argues that the focus in a double patenting challenge is on the claims of the two patents rather than on the disclosure. I agree. In *Whirlpool*, Binnie J. stated, at para. 63:

> It is clear that the prohibition against double patenting involves a comparison of the claims rather than the disclosure, because it is the claims that define the monopoly.

Whirlpool was not a selection patent case. However, because selection patents are to be subject to the same considerations as other patents, the clear statement of Binnie J. in *Whirlpool* must apply to selection patents.

pas tout risque qu'une partie du domaine visé puisse se révéler inutile. Le critère formulé par le juge Graham [dans la décision *Olin Mathieson Chemical Corp. c. Biorex Laboratories Ltd.,* [1970] R.P.C. 157 (Ch. D.)] me paraît donc présenter seulement deux motifs possibles pour rejeter des revendications comme celles en litige.

> 1. Il y a preuve de l'inutilité d'une partie du domaine visé; [ou]
>
> 2. Ce n'est pas une prédiction valable. [Je souligne.]

Telle a toujours été la position des tribunaux canadiens (voir p. ex. *Ciba-Geigy AG c. Canada (Commissaire des brevets)*, [1982] A.C.F. nº 425 (QL) (C.A.)).

[106] Dans la présente affaire, on a constaté que l'isomère lévogyre était inefficace et toxique. Le racémate n'était pas aussi efficace que l'isomère dextrogyre. La découverte que l'isomère dextrogyre était plus efficace et moins toxique que les autres composés du brevet de genre représente un progrès appréciable digne d'être encouragé par la politique en matière de brevet.

[107] Il est vrai que la prédiction valable du brevet 875 selon laquelle le racémate et l'isomère lévogyre produiraient les mêmes résultats que l'isomère dextrogyre ne s'est pas avérée. Certains éléments du brevet de genre d'origine pourraient de ce fait être contestés, mais le brevet de sélection demeure valide.

[108] Apotex fait valoir qu'une allégation de double protection s'attache aux revendications des deux brevets, et non à la divulgation. J'en conviens. Dans l'arrêt *Whirlpool*, le juge Binnie a dit ce qui suit au par. 63 :

> Il est clair que l'interdiction du double brevet implique une comparaison des revendications plutôt que des divulgations, car ce sont les revendications qui définissent le monopole.

Dans cette affaire, le litige ne portait pas sur un brevet de sélection. Mais puisque le brevet de sélection doit être considéré comme tout autre brevet, les propos sans équivoque du juge Binnie s'appliquent aussi à son égard.

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[109] I agree with Apotex that a challenge to patent validity based on double patenting does not require the existence of identical language in the two patent claims. Even so, the wording of the claims, however different, must claim the same invention.

[110] The invention defined by claim 14 of the '875 patent is not the same as the invention claimed by claim 1 of the '777 patent because the former is broader than the latter. Although not a selection patent case, there is a striking passage in the judgment of Lord Simonds in *May & Baker Ltd. v. Boots Pure Drug Co.* (1950), 67 R.P.C. 23 (H.L.), at p. 32. It describes a scenario very much the same as in the case at bar:

> Is there then a difference in the inventions claimed in the original and amended specifications? On the one hand a vast range of possible compounds, a fragment no doubt in the whole sphere of organic chemistry yet so numerous that the number becomes meaningless, within which no one can say what hidden things might be brought to light, what benefits discovered for the relief of humanity. On the other hand two specific drugs. Are these inventions the same or different inventions? My Lords, I hesitate to appeal to common sense, lest others should take a different view of the case. Yet in the consensus of opinion of all the learned judges who have dealt with this matter I find justification for the view which I most emphatically hold that it is plain common sense to say that the inventions are not the same but different: and I think that, if they are different, the substantial difference could not be denied.

I think Lord Simonds' comments cover this case precisely.

[111] To this point, the issue has been what is sometimes called "same invention" double patenting. This is the main thrust of Apotex's double patenting argument. The applications judge found that the claims in the '777 and '875 patents were not identical or coterminous, requirements to prove same invention double patenting: see *Whirlpool*, at paras. 64-65.

[112] Apotex also relies on "obviousness" double patenting. Binnie J. explains in *Whirlpool*, at para. 66, that "obviousness" double patenting

[109] Je conviens avec Apotex que l'existence de la double protection n'exige pas que les revendications soient formulées de la même manière dans les deux brevets. Néanmoins, le libellé des revendications, même s'il est différent, doit décrire la même invention.

[110] L'invention correspondant à la revendication 14 du brevet 875 n'est pas la même que celle visée par la revendication 1 du brevet 777, car la première a une plus grande portée que la seconde. Dans l'arrêt *May & Baker Ltd. c. Boots Pure Drug Co.* (1950), 67 R.P.C. 23 (H.L.), qui ne porte pas sur un brevet de sélection, Lord Simonds décrit néanmoins de manière saisissante un scénario très semblable à celui de la présente espèce (p. 32) :

> [TRADUCTION] Y a-t-il alors une différence entre les inventions revendiquées dans le mémoire descriptif d'origine et le mémoire descriptif modifié? D'un côté, une vaste gamme de composés possibles, représentant sans doute une parcelle de la chimie organique considérée dans sa totalité, mais si nombreux que leur nombre ne veut plus rien dire, chacun étant susceptible de receler quelque secret ou de présenter des avantages pour le genre humain. De l'autre, deux médicaments spécifiques. Ces inventions sont-elles identiques ou différentes? J'hésite, chers collègues, à faire appel au sens commun de crainte que d'autres diffèrent d'opinion en l'espèce. Néanmoins, l'unanimité des juges saisis de la question me conforte dans l'opinion bien arrêtée qu'il tombe sous le sens que les inventions ne sont pas identiques, mais différentes. Et si elles sont différentes, je crois que leur différence essentielle ne peut être niée.

À mon avis, les remarques de lord Simonds s'appliquent en tous points à la présente espèce.

[111] À cet égard, le litige porte sur ce que l'on appelle parfois le double brevet relatif à la « même invention ». C'est l'essentiel de la thèse de la double protection d'Apotex. Le juge de première instance a conclu qu'il n'y avait pas « identité » des revendications des brevets 777 et 875, ce qu'exige la preuve du double brevet relatif à la même invention : voir *Whirlpool*, par. 64-65.

[112] Apotex invoque par ailleurs le double brevet relatif à une « évidence ». Dans l'arrêt *Whirlpool*, le juge Binnie explique au par. 66 :

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is a more flexible and less literal test that prohibits the issuance of a second patent with claims that are not "patentably distinct" from those of the earlier patent.

In *Commissioner of Patents v. Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning*, it was held that even though the claims were not identical nor coterminous, the dilution of a new substance once its medical uses were established in the first patent did not result in a further invention justifying a second patent. Even though the claims were not identical or coterminous, the subsequent patent was found to be invalid.

[113] A selection patent that claims a compound that is patentably distinct from the genus patent will not be invalid for obviousness double patenting. Here, out of the many compounds predicted to be effective as exhibiting platelet aggregation inhibiting activity in the '875 patent, it was found that the dextro-rotatory isomer of the racemate relevant in this case had beneficial properties over both the racemate and the levo-rotatory isomer. As I have explained above, the claims in the '777 patent reflect a patentably distinct compound from the compounds in the '875 patent. As a result, there is no basis for a challenge based on "obviousness" double patenting.

[114] While double patenting requires a comparison of the claims of a genus and selection patent, it is necessary that the specification of the selection patent define in clear terms the nature of the characteristic which the patentee alleges to be possessed by the selection for which he claims a monopoly. See *I. G. Farbenindustrie*, at p. 323. Here the '777 specification satisfies this requirement by providing, at p. 1:

> In an unexpected manner only the dextro-rotatory enantiomer I_d exhibits a platelet aggregation inhibiting activity, the levo-rotatory enantiomer I_l being inactive. Moreover, the inactive levo-rotatory enantiomer I_l is the less well tolerated of the two enantiomers. [A.R., at p. 156]

[115] For these reasons, I do not find Apotex's challenge to selection patents on the grounds of

Il s'agit d'un critère plus souple et moins littéral qui interdit la délivrance d'un deuxième brevet dont les revendications ne visent pas un « élément brevetable distinct » de celui visé par les revendications du brevet antérieur.

Dans l'arrêt *Commissioner of Patents c. Farbwerker Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning*, notre Cour a statué que même s'il n'y avait pas « identité » des revendications, la dilution d'une nouvelle substance une fois ses usages médicaux déterminés dans le brevet initial ne donnait pas lieu à une nouvelle invention justifiant un deuxième brevet. Malgré l'absence d'« identité » des revendications, le brevet subséquent a été invalidé.

[113] Le brevet de sélection revendiquant un composé brevetable distinct de celui visé par les revendications du brevet de genre ne saurait être invalidé pour cause de double brevet relatif à une évidence. En l'espèce, parmi les nombreux composés dont le brevet 875 a prédit l'effet antiplaquettaire, l'isomère dextrogyre du racémate s'est révélé plus avantageux que le racémate et l'isomère lévogyre. Comme je l'ai déjà expliqué, les revendications du brevet 777 visent un composé brevetable distinct de ceux visés par les revendications du brevet 875. En conséquence, l'allégation du double brevet relatif à une « évidence » n'est pas fondée.

[114] Bien qu'une allégation de double protection exige la comparaison des revendications du brevet de genre et du brevet de sélection, le mémoire descriptif du brevet de sélection doit définir clairement la nature de la caractéristique du composé sélectionné pour lequel le breveté revendique un monopole. Voir l'arrêt *I. G. Farbenindustrie*, p. 323. En l'espèce, le mémoire descriptif du brevet 777 satisfait à cette exigence en ce qu'il précise à la p. 1 :

> [TRADUCTION] Contre toute attente, seul l'énantiomère dextrogyre I_d présente une activité inhibitrice de l'agrégation des plaquettes, l'énantiomère lévogyre I_l étant inactif à cet égard. De plus, l'énantiomère lévogyre I_l inactif est celui des deux énantiomères qui est le moins bien toléré. [d.a., p. 156]

[115] J'estime donc que l'allégation d'Apotex selon laquelle les brevets de sélection sont invalides

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double patenting, and in particular that Sanofi has engaged in double patenting in the case of the '777 and '875 patents, to be well founded.

VIII. Disposition

[116] It follows from the findings above that claims 1 and 3 of the '777 patent are neither anticipated nor obvious. The composition claims 10 and 11 of the '777 patent are therefore also neither anticipated nor obvious. Finally, I find that Apotex's arguments in respect of double patenting are not well founded. In the result, the allegations that the '777 patent is invalid for anticipation, obviousness and double patenting are not justified.

[117] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Goodmans, Toronto.

Solicitors for the respondents Sanofi-Synthelabo Canada Inc. and Sanofi-Synthelabo: Gowling Lafleur Henderson, Ottawa.

Solicitors for the intervener the Canadian Generic Pharmaceutical Association: Hazzard & Hore, Toronto.

Solicitors for the intervener BIOTECanada: Torys, Toronto.

Solicitors for the intervener Canada's Research-Based Pharmaceutical Companies: Ogilvy Renault, Toronto.

pour cause de double protection et, plus particulièrement, que les brevets 777 et 875 de Sanofi sont invalides pour le même motif, n'est pas fondée.

VIII. Dispositif

[116] Il s'ensuit que les revendications 1 et 3 du brevet 777 ne sont ni antériorisées ni évidentes, de sorte que les revendications 10 et 11 relatives à une composition ne le sont pas non plus. Enfin, je conclus que la thèse d'Apotex relative à la double protection n'est pas fondée. En conséquence, les allégations d'invalidité du brevet 777 pour cause d'antériorité, d'évidence et de double protection n'ont aucun fondement.

[117] Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Goodmans, Toronto.

Procureurs des intimées Sanofi-Synthelabo Canada Inc. et Sanofi-Synthelabo : Gowling Lafleur Henderson, Ottawa.

Procureurs de l'intervenante l'Association canadienne du médicament générique : Hazzard & Hore, Toronto.

Procureurs de l'intervenante BIOTECanada : Torys, Toronto.

Procureurs de l'intervenante Les compagnies de recherche pharmaceutique du Canada : Ogilvy Renault, Toronto.

2008 SCC 61 (CanLII)

Kelemen v. El-Homeira, 1999 ABCA 315

Date: 19991109
Docket: 9803-0045-AC

1999 ABCA 315 (CanLII)

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MADAM JUSTICE HUNT

BETWEEN:

GARY KELEMEN and CHRISTINE KELEMEN

Plaintiffs/Appellants
(Defendants/Appellants by Counterclaim)

- and -

CHAWKI EL-HOMEIRA and YOLLA EL-HOMEIRA

Defendants/Respondents
(Plaintiffs/Respondents by Counterclaim)

- and -

NICHOLAS RUNKA

(Not a party to Appeal)

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MADAM JUSTICE BIELBY
DATED DECEMBER 4, 1997, FILED JANUARY 19, 1998

MEMORANDUM OF JUDGMENT

COUNSEL:

R.J. Gilborn
For the Plaintiffs/Appellants
(Defendants/Appellants by Counterclaim)

M.A. Kirk
For the Defendants/Respondents
(Plaintiffs/Respondents by Counterclaim

1999 ABCA 315 (CanLII)

MEMORANDUM OF JUDGMENT

1999 ABCA 315 (CanLII)

THE COURT:

[1] A purchaser interested in buying property owned and listed by a realtor told him he needed to consult with another realtor whom he had used in the past and trusted. The vendor-realtor said he did not want the other realtor involved and said he would set up a meeting with a friend who could give the purchaser help and advice about the property. The vendor-realtor did not tell the purchaser that the person was a fellow realtor working for the same company. The purchaser met with the fellow realtor, bought the property and later discovered he had paid far too much for it. The trial judge found the vendor liable for the tort of deceit and awarded damages. The vendor appeals that decision. The purchaser appeals the damage award.

The Facts

[2] Mr. Kelemen and his wife, the appellants, owned the property, a house situated on seven acres on a ravine in southwest Edmonton. There was a sign on it giving the name of the real estate company for whom he worked and his name. Mr. El-Homeira, one of the respondents, saw the sign and called Kelemen. El-Homeira was a restaurant owner who told Kelemen he did not read or write English. While the title to the property and the pleadings name the spouses of Kelemen and El-Homeira, it was the men who had discussions about the property, its price and potential for development.

[3] The trial judge examined the testimony of the parties carefully because there were significant differences in the evidence on important points and credibility was critical. She rejected Kelemen's evidence where it conflicted with that of El-Homeira.

[4] The trial judge found that during negotiations, El-Homeira made it clear to Keleman that he required advice about the merits of the purchase and specifically about the value of the property. She found that El-Homeira said that he wanted to involve Mr. Rudge, a realtor he knew and trusted. She also found that Kelemen refused to have Rudge involved. El-Homeira testifed to that effect both in chief and on cross-examination. Instead, Kelemen offered to take the El-Homeiras to see a friend of his who "was a good guy and he'll help you". Kelemen then set up a meeting for El-Homeira with Mr. Runka, a realtor who worked with him. At that meeting, Runka said the property was worth over a million dollars and had greater potential value. El-Homeira did not contact Rudge and entered into the contract to purchase the property. The purchase price of $710,000 was paid with some cash, the equity in the El-Homeira home and a mortgage back to the Kelemens. Approximately three years later, when the El-Homeiras confirmed by an appraisal that they had paid too much for the property, they ceased making mortgage payments and were sued by the Kelemens. There was evidence that, at the time of the sale, the property

had a market value of between $450,000 and $500,000. The El-Homeiras counterclaimed on the basis of deceit and fraudulent misrepresentation.

The Law

[5] There are two bases upon which liability could be founded in this case, namely, on the tort of deceit or on the contract action of fraudulent misrepresentation inducing a contract. The causes of action are discrete, although they share some common features and, as the learned author Fleming says, one action tends to colour the other: J.G. Fleming, *The Law of Torts*, 9th ed. (New South Wales: LBC Information Services, 1998) at 695. The tort action is founded in law whereas the contract action is based in equity. The difference affects the remedies and defences. Either can be the basis for a claim for damages but it is only the contract action that allows rescission. The duty to mitigate is relevant to both.

[6] In this case, although misrepresentation (including innocent and negligent) was discussed, the trial judge said she was basing liability on "deceit" and her analysis is consistent with the tort action. It is important that this court not confuse the two and that it not critically analyze the trial decision on a different legal basis from that upon which it was made.

[7] The legal requirements for the tort of deceit come from the case of *Pasley v. Freeman* (1789), 3 T.R. 51. Salmond, in his text, *Salmond and Heuston on The Law of Torts*, 19th ed. (London: Sweet & Maxwell, 1987) describes, at p. 434, four main elements of the tort:

> (1) there must be a false representation of fact;
> (2) the representation must be made with knowledge of its falsity;
> (3) it must be made with the intention that it should be acted on by the plaintiff...in a manner which resulted in damage to him;
> (4) it must be proved that the plaintiff has acted upon the false statement, and has sustained damage by doing so.

[8] The learned author also discusses materiality in the tort of deceit. He states at p. 439:

> **"Materiality"**
>
> If the statement is actually relied on, it is no defence that the plaintiff was negligent or foolish in doing so, or that he had a full opportunity of discovering the truth for himself. Consent is no defence. Every man has in law a right to believe and act on all lies told him by others with intent to deceive him. Nor is it any defence to say that the representation is not "material", or would not have induced a reasonable man. The true question is whether the statement was a real

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> inducement to the plaintiff: a representation may be material as between the parties, though not to a normal man. (Footnotes not reproduced)
> [Emphasis added]

[9] In discussing reliance and materiality the learned authors of the text Clerk & Lindsell on Torts, 17th ed. (London: Sweet & Maxwell, 1995) state at p. 732:

> **Reliance and materiality**
>
> Reliance is an essential ingredient of the tort. However, as contributory negligence is inapplicable, it is no defence that the plaintiff had a full opportunity of discovering the truth for himself. It is thus no defence to claim that the representation is not material in the sense that it would not have induced a reasonable person to so act. The question is simply whether the representation was relied upon by this plaintiff. (Footnotes not reproduced)
> [Emphasis added]

[10] In other words, when dealing with the tort of deceit, the appropriate test to measure the materiality of the representation and reliance on it is a subjective not an objective test.

The Tort of Deceit and the Facts

[11] Applying the four elements of the tort of deceit to the facts as found by the trial judge, it is clear that she made no error in basing liability on this ground.

(1) False representation of fact

[12] The trial judge found that Kelemen represented that Runka was a reliable, independent expert without disclosing that he worked for the same employer.

(2) The representation was made with knowledge of its falsity

[13] The trial judge found that Kelemen made the representation knowingly. He well knew Runka was a co-employee and could not have believed he was independent. Further, she found that Kelemen knew that Runka was not an independent adviser.

(3) The representation was made with the intention it be acted on in the manner which resulted in the damage

[14] The trial judge found that Kelemen offered Runka only to forestall El-Homeira seeking an independent assessment from his trusted, usual realtor, Rudge. It was an intentional diversion of El-Homeira to someone who was not independent.

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(4) The person to whom the representation was made acted on it and sustained damage

[15] The trial judge found that El-Homeira did not understand that Runka was not an independent voice and relied on the representation that he would be. The action taken by El-Homeira that is the basis for the tort was that he did not seek the independent advice of Rudge. The consequence of failing to obtain independent advice was that the El-Homeiras were persuaded, by the non-independent advice, to make a decision from which they suffered a loss. That loss came as a consequence of entering into a contract to purchase the property.

[16] In the result, the trial judge concluded that there was liability on the basis of deceit.

The Basis for the Appeal

[17] The appellants allege a palpable and overriding error in the findings of fact by the trial judge. It is clear from the reasons that the trial judge had some difficulty with the evidence given by Kelemen and thus with his credibility. We see no basis for interference with her decision in this regard.

[18] The appellants challenge only one aspect of the application of the law of the tort of deceit to the facts. They allege that the trial judge misdirected herself with respect to the issue of materiality. However, the cases and authorities relied upon by the appellants all refer to the contract action where there is a test of materiality that does not exist in the tort action. See the memorandum of judgment of this court in *TWT Enterprises Ltd. v. Westgreen Developments* (1992), 3 Alta. L.R. (3d) 124 (C.A.); G.H.L. Fridman, *The Law of Contract*, 3rd ed. (Toronto: Carswell, 1994) at p. 293, and Di Castri, *Law of Vendor and Purchaser*, (Calgary: Carswell, 1998) at p. 7-14.

[19] In the contract action, it is a requirement that the representation be relevant or material to *the substance of the contract*. There is authority that, generally, that test is an objective one. But in the tort action the test for materiality is, as Salmond described, a subjective one and asks the true question, namely, *whether the statement was a true inducement to the plaintiff*, in this case El-Homeira. As the learned author goes on to say: *A representation may be material as between the parties, though not to a normal man: supra.*

[20] A critical question is: What was the action taken? In a fraudulent misrepresentation action it must be entering into a contract. In a tort action, that may be, but need not be, the action. Here the intention of Kelemen was to divert El-Homeira from consulting Rudge. He succeeded because El-Homeira's action was to consult Runka, who was not an independent advisor, instead of the independent adviser he wanted and required, Rudge.

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While it is true that he also entered into the contract, that fact is irrelevant in the tort action, although it would be critical in the contract action.

[21] Put briefly, the appellant challenges the analysis of the trial judge as if the basis for liability was contract, not tort.

[22] The trial judge made no error in using a subjective test to measure whether the representation that Runka was an independent adviser and whether the resultant diversion from the independent adviser was material and a real inducement to El-Homeira. The real question was not whether the representation would have caused a reasonable person to act but whether it was a real inducement to El-Homeira and whether he relied on it. The trial judge's analysis and conclusions on materiality and reliance are well supported by her findings of fact.

[23] Had liability been founded on the fraudulent representations by Runka as to value or development potential, then it would have been relevant to look at whether statements as to those topics would, to the reasonable person, be material to the substance of the contract.

[24] The appellant raised two other challenges. The first had to do with the timing of the misrepresentation; the second was an allegation that since El-Homeira was not actively prevented from contacting Rudge, he was precluded from recovery.

[25] As to the first, the trial judge found that El-Homeira's requirement for independent advice arose during negotiations and the diversion to Runka took place before the parties had reached an agreement. While it is not clear that timing is as relevant in the tort action as the contract action, the trial judge's finding is a complete answer.

[26] As to the second, the complete answer to the suggestion that El-Homeira should, and could, have consulted Rudge is contained in the quotation from Salmond set out above. Put shortly, he did not have to do so, and a failure to do so, does not preclude his recovery. Further, contributory negligence is not applicable in the deceit action.

[27] The appellants have raised a number of other grounds in this appeal, including improper pleadings, failure to apply a proper standard of proof and no basis upon which to find liability on the part of Kelemen's wife.

[28] A review of all the pleadings, including the statement of defence filed by the El-Homeiras and their counterclaim, supports a conclusion that they were adequate and that the appellants were certainly not unaware of the basis for the claim in deceit, nor taken by surprise.

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[29] While there is no third standard of proof and the civil standard of proof is applicable to this case, it is well-established that deceit or fraud must be supported by clear and convincing evidence. The thorough and careful analysis of the trial judge shows that she was aware of the seriousness of the finding of deceit. While concluding there was deceit because of the intentional diversion, she rejected a number of grounds as not meeting the standard of proof required. There is no error relative to the standard of proof.

[30] The record shows an accord between counsel that the failure of the spouses of Kelemen and El-Homeira to testify would not prejudice the position of either. It does not lie in the mouth of counsel to now seek to have an interpretation of the accord between counsel such that one of the appellants (for Mrs. Kelemen is on the record with Mr. Kelemen) is now declared immune from liability. In respect to both men, the wives apparently took no active role but were carried along on the record because they were parties whose names appeared on the title to the property. There is no merit in the appellants' argument on this ground.

[31] The last ground of challenge is the failure by the El-Homeiras to mitigate their loss. There is a duty to mitigate, and it is proper to assess whether losses suffered by the El-Homeiras could have been reasonably avoided: G.H.L. Fridman, *The Law of Torts in Canada* (Toronto: Carswell, 1989) at p. 405. It is elementary that the duty to mitigate arises only when the deceit or fraud is discovered.

[32] The trial judge found that by the time the El-Homeiras discovered the value of the land, it was too late to seek rescission in a contract action because properties involved in the trade-in had been sold to third parties. The appellants' suggestion that the lawyer hired by the El-Homeiras was a potential source of advice about the market value of the land is without merit. Thus there is no factual basis for concluding that the El-Homeiras did not act reasonably or that they failed to mitigate their loss.

[33] On their cross appeal, the El-Homeiras raise a number of issues. In view of our decision on the main appeal, we need deal only with one. The El-Homeiras say that the trial judge erred in her assessment of damages. On this issue, the trial judge had the evidence of two experts who did not agree; in addition, during the trial she heard evidence from the various parties on the value and potential of the property. It was within the discretion of the trial judge to evaluate the conflicting expert evidence and accept only portions of it. This court is not about to second-guess her decision. She made no reviewable error in assessing damages.

[34] In the result, we dismiss both the appeal and the cross-appeal.

[35] The respondents, the El-Homeiras, shall have costs of the appeal but not for their factum which was filed late. Rule 538(4) . Their costs need not be reduced because of their cross-appeal which did not extend the appeal significantly.

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APPEAL HEARD on September 8, 1999

MEMORANDUM FILED at EDMONTON, Alberta,
this 9th day of November, 1999

_____
PICARD J.A.

_____
CÔTÉ J.A.

_____
HUNT J.A.

COURT OF APPEAL FOR ONTARIO

CITATION: York University v. Markicevic, 2018 ONCA 893
DATE: 20181108
DOCKET: C62351

2018 ONCA 893 (CanLII)

Feldman, Pepall and Pardu JJ.A.

BETWEEN

York University

Plaintiff (Respondent)

and

Michael Markicevic, Janet Fleming, Mima Veronica Markicevic, Aleeyah Apparel Inc., operating as A-Tech Construction and Design Inc., Alleyah Inc., AFC Inc. operating as Arsenal Facility Consulting Inc., Toronto Engineering Company, Guga's International, Canadian & American Concrete Renovation & Drain-Layer Ltd., Roman Ritacca, Luigi Lato, Phil Brown, Riaz Jadavji, Helen Saoulli Georgiou, Vasos Georgiou, George Saoulli, Georgia Saoulli, Guram Sekhniashvili, Gia Sekhniashvili, John Doe #1, John Doe #2, John Doe #3, Jane Doe #1, Jane Doe #2, Jane Doe #3

Defendants (Appellant)

Jamie Spotswood and Daniel Zacks, for the appellant

William C. McDowell, Brian Kolenda and Laurel Hogg, for the respondent

Heard: October 16, 2018

On appeal from the judgment of Justice Barbara A. Conway of the Superior Court of Justice, dated June 6, 2016, with reasons reported at 2016 ONSC 3718, 33 C.C.E.L. (4th) 26.

Pardu J.A.:

A. BACKGROUND

[1] The appellant, Michael Markicevic, misappropriated nearly a million dollars from York University ("York"). At the time, he was the Assistant Vice President of Campus Services and Building Operations.

[2] Between 2007 and 2009, he devised a scheme to falsely invoice the university for work that was not actually done at the university. York paid $374,983.50 for these invoices and the appellant and his co-conspirators pocketed the cash.

[3] In 2009 the appellant inflated a quote for drain repair. The excess was applied to personal home improvements for the appellant and cash was also distributed to the appellant and his co-conspirators. York lost $515,461 as a result of this scheme.

[4] The appellant also had York employees perform work at his personal residences in 2008 and 2009. York paid these employees $23,000 for their time on these jobs.

[5] Finally, the appellant charged York for $61,241 worth of materials that he purchased for his own use.

[6] On February 1, 2010, before York was aware of the extent of the appellant's dishonesty, it terminated the appellant's employment without cause

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and negotiated and finalized a severance agreement with him that contained mutual releases. During those negotiations, the appellant vehemently denied any wrongdoing. York agreed to pay him 36 months' gross salary, amounting to $696,166. The appellant's continued employment had become untenable because York had to conduct an investigation into the rumours circulating about his financial impropriety and because of the complaints concerning his bullying behavior.

[7] As a result of the investigations undertaken after the appellant's departure, York learned of the full extent of the appellant's misconduct and sued to set aside the releases, recover the money stolen and for repayment of the severance package.

[8] Following a 25-day trial, the trial judge found in favour of York and rescinded the severance agreement including the releases. She held that, as a fiduciary, the appellant had a positive obligation to disclose his fraudulent activity before he entered into the severance agreement. She also found that the releases and the severance agreement were obtained by fraudulent misrepresentation. The appellant had materially misrepresented his innocence to York and if York had known of the fraud, they would not have terminated him without cause, paid him, and given him a release. In addition, the trial judge made a factual finding that January 29, 2010 was the earliest date York could

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have discovered its potential claim and, accordingly, its claim was not barred by the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B.

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B. ARGUMENTS ON APPEAL

[9] The appellant argues that the trial judge erred in concluding that his misrepresentations of innocence induced York to enter into the severance agreement and to release the appellant from any claims York might have against him.

[10] The appellant also argues that York's claim was barred by the *Limitations Act, 2002*. York issued the statement of claim on January 26, 2012. The appellant argues that York knew of the allegations of theft and fraud by the appellant as of January 19, 2010 and that, accordingly, the claim was issued after the expiry of the two-year limitations period.

C. TRIAL JUDGE'S FINDINGS

(1) Fraudulent misrepresentation

[11] The trial judge found at paras. 145-147 that the appellant had intentionally misled York when, just before the severance agreement was signed, he said he was innocent of any wrongdoing:

> [W]hen one party has induced another party to enter into an agreement by making a material misrepresentation, the principal remedy is rescission. A misrepresentation, to be material, must relate to a matter that would be considered by a reasonable

> person to be relevant to the decision to enter the agreement in question. It is not necessary for a plaintiff to establish that the misrepresentation was the sole inducement for acting and it does not matter if the misrepresentation was only one of several factors contributing to the plaintiff's decision.
>
> Mr. Markicevic made a material misrepresentation to both Mr. Brewer and Ms. Lewis when he denied any wrongdoing. There is no question that if Mr. Brewer had known of any [of] Mr. Markicevic's fraudulent activities, York would not have terminated him without cause, would not have paid him a large severance (or any severance at all), and would not have granted him the Release.
>
> The Severance Agreement, including the Release, must therefore be set aside.

(2) Limitations period

[12] The trial judge addressed the limitations issue in her reasons at paras. 148-151:

> Mr. Markicevic submits that York's action is barred pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24. The action was commenced on January 26, 2012. Mr. Markicevic argues that York cannot meet its burden of proving that it did not know, or could not have known with reasonable diligence, of the facts giving rise to the claim against Mr. Markicevic prior to January 26, 2010.
>
> Mr. Markicevic relies on the notes of Noel Badiou, York's Director of Human Resources. Those notes reveal that by mid-December 2009, various York employees had approached Mr. Badiou to complain about Mr. Markicevic's bullying management style. Some of those complaints also included allegations of financial impropriety. However, none of the potential witnesses were willing to come forward and go on the

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> record at that point. Mr. Badiou continued to speak to potential witnesses and gather information through the end of December and into the first three weeks of January.
>
> It was not until January 29, 2010 that the Whistleblower went on the record, met with Ms. Lewis and brought some documents to support the allegations of financial impropriety.
>
> In my view, that was the earliest date that York can be held to have "discovered" a potential claim against Mr. Markicevic, as defined in s. 5(1)(a) of the *Limitations Act*. Accordingly, the claim is not statute barred.

D. ANALYSIS

(1) Fraudulent misrepresentation

[13] By January 27, 2010 the appellant had heard of the circulation of rumours that he was having work done on his personal residences by York employees. He attributed these suggestions to animus on the part of the union for York tradespersons and in a letter copied to Brewer, his supervisor, described the allegations as unfounded, libelous, slanderous and "completely in line with previous unfounded accusations" emanating from the union. The appellant met with Brewer on January 27, 2010 and reacted with an attitude of absolute denial and "almost outrage".

[14] On January 28, 2010, the appellant wrote to Brewer, York's counsel and York's President, responding vigorously to the rumours:

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I will bring to your attention that it appears slander and libel seem to be common practice at York. General community sentiment is that the University is inclined to act upon such rumour and innuendo as it does not possess the courage to confront such issues in an open, objective and impartial manner.

While to date I do not share this view, I am left with being accused, my reputation and integrity questioned and my career jeopardized at all levels of both York's organizational structure and the community at large.

I would ask you to consider the organizational environment such unsubstantiated claims create and the negative impact they are having on myself on both a personal and occupational level.

…

As for the misallocation of University resources, I will remind you that one of my first management initiatives at York was to work with Procurement to vastly improve and tighten Procurement policy and procedures within CSBO.

The establishment of a separate and objective financial control process within CSBO has received numerous accolades from our Audit department.

My willingness to effectively steward and manage University resources in a consistent and prudent manner with the upmost of integrity, I suggest to you, is unquestionable.

While I understand, given the sense of entitlement that many members of the York community feel they may have relative to what they deem to be their rights, I am prepared to respectfully suggest to you that these rights do not include the systematic unsubstantiated assassination of both my character and livelihood.

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[15] The appellant does not argue that these were not fraudulent misrepresentations. Rather, he argues that York could not have reasonably relied on these to enter into the severance agreement.

[16] The allegations came to light when several employees spoke to Badiou, York's Director of Human Rights[1]. This was a position akin to an ombudsman. There was an expectation that confidentiality would be preserved unless the individual speaking to him agreed to waive that confidentiality.

[17] Badiou met with the President to discuss the allegations on December 17, 2009. He summarized them in his notes from that meeting:

> Dec 17/09
>
> Mtg w/ Pres re Internal/Informal investigation
>
> - Now met w/spoke to about dozen people
> - some union
> - some managers
> - some former employees
>
> …
>
> 3) Allegation of Theft/Fraud
>
> - One person has indicated that Mike has had staff purchase security and other electronic equipment by the University to be installed at his house or other properties.

[1] The trial judge misdescribed the position as Director of Human Resources.

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- Another person has said that Mike has ordered pain [sic] and other supplies paid by the University that a staff member was sent to his home to paint entire house – the invoices were noted as work at Glendon.

- Three people allege that in March 08 a bill was approved by Mike for rekeying of Ross Bldng – say this never done – one says was for work done in his home – another says company at the address is a Kitchen Cabinetry place. One person was not prepared to sign off as it was single source because emergency. All say not done and suspicious that either this is Mike's con company or it was for work done in his home.

- Search reveals

    1) no registered company at that address.
    2) Physical address has a Kitchen Cabinet business and 411 reverse address lookup reveals owner as C Adam and V. Georgvou.

[18] Badiou left the meeting with a plan to see if further information or details could be provided to "better assess and determine … what might be going on". Badiou met again with York's President on January 17, 2010 and with both York's President and Brewer on January 19, 2010, but no additional details or additional substantiation were available by that time.

[19] On January 29, 2010, Lewis, counsel for York, met with one of the individuals, the "whistleblower" who had made allegations against the appellant. The whistleblower was now prepared to come forward with a signed statement and also provided documents to support the allegations of financial misfeasance

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by the appellant. Lewis reviewed the allegations with the appellant and he angrily denied them.

[20] On February 1, 2010, Brewer told the appellant he did not believe any of the allegations against him. He testified that as of February 1 he still "firmly believed in the integrity" of the appellant. He testified that he would not have approached the severance negotiations in the same way had he known of the dishonesty.

[21] A contracting party who is induced to enter into a contract as a result of a fraudulent misrepresentation is entitled to rescission, and restoration of the benefits conferred on the other party to the contract: S.M. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters, 2017), at para. 421. The question of whether a contracting party did in fact rely on the misrepresentation, at least in part, to enter into the contract is "a question of fact to be inferred from all the circumstances of the case and evidence at the trial": G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 291.

[22] The trial judge's finding that York was induced to enter into the severance agreement by the appellant's fraudulent misrepresentation that he was innocent of any financial dishonesty is supported by the evidence and no palpable or overriding error has been shown. It is difficult to imagine circumstances in which

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an employer acting responsibly would pay three years severance pay to an employee it knew had misappropriated large sums of money from it.

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(2) Limitations period

[23] Section 5(1) of the *Limitations Act, 2002* provides:

> A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[24] The appellant argues that the trial judge focused only on the date on which York knew that the loss had occurred, and that she did not consider that s. 5(1) required her to consider the earliest of two dates: the date York knew the loss had occurred, and the date on which "a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known" of the loss.

[25] I do not agree. Consideration of both branches of this test is implicit in the trial judge's articulation of the appellant's argument at trial that "York cannot meet its burden of proving that it did not know, or could not have known with reasonable diligence, of the facts giving rise to the claim" (emphasis added).

[26] The appellant further argues that York knew it had a claim against the appellant as early as December 17, 2009 when Badiou informed York's President of the allegations by several employees, and at the latest when Badiou went to the President on January 19, 2010 to report in general terms the allegations reported to him about financial misfeasance by the appellant. However at that stage, neither Badiou nor the President knew York had suffered a loss or that the appellant was the person responsible. It had only allegations by persons unwilling to come forward publicly, which were firmly denied by the appellant. These allegations, as noted by the trial judge, were limited to "the use of door locks, hardwood flooring and paint in [the appellant's] house", valued at $23,320. The other fraudulent schemes were separate frauds only uncovered much later.

[27] The question of whether a claim was discovered and the limitations period triggered is a question of mixed fact and law entitled to deference absent palpable and overriding error: *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246, at para. 38. As indicated in *Longo*, at para. 44, certainty of a potential defendant's responsibility for an act that caused the loss is not required.

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Rather, what is required are *prima facie* grounds to infer that the defendant did the act that caused the loss. I agree with the trial judge that York did not have those *prima facie* grounds before January 29, 2010. The trial judge's conclusion that the claim was not discovered before two years preceding the date the statement of claim was issued was reasonably available to her on the evidence and is not affected by palpable and overriding error.

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(3) Other arguments

[28] Given that these two bases are sufficient to sustain the trial judge's decision, it is not necessary to consider the appellant's other argument that the trial judge erred in concluding that a fiduciary, like the appellant, was bound to look after York's interests while negotiating the severance agreement and secondly, his argument that the language of the release was broad enough to release the appellant from responsibility for the misappropriations. Here, even if the release was broad enough to bar any claim by York for recovery of the money misappropriated, the release was an integral part of the agreement induced by the misrepresentations as to his honesty. Once that agreement and release were rescinded, York was no longer barred from recovery. This result does not depend on whether or not the appellant was a fiduciary.

[29] For these reasons I would dismiss the appeal.

E. COSTS

[30] The trial judge awarded costs of the trial to York on a full indemnity basis. In light of the appellant's dishonesty I would award costs of the appeal to York on the same basis. I would award costs of the appeal to York in the sum of $105,527.

Released: "K.F." Nov 8 2018

"G. Pardu J.A."
"I agree. K. Feldman J.A."
"I agree. S.E. Pepall J.A."

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COURT FILE NO.: 02-B4883T
DATE: 20031219

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ROBERT JOHN CHAMBERLAIN and KAREN LEE CHAMBERLAIND	)	J.P. Carberry, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
KURT MEIERHANS and BARBARA MEIERHANS	)	B. Keating, for the Defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** December 10, 2003

LOGAN, J.

[1] The Plaintiffs bring this action against the Defendants for breach of contract and misappropriation of property. On February 1, 2000 the parties signed a contract of Purchase and Sale of land. The listing agreement for the land describes a lot of approximately 50 acres with a tree grove of "250+spruce trees", a ranch brick bungalow with garage attached, built in appliances and a pool.

[2] The legal description for the rural property in the County of Simcoe, Province of Ontario, is described in the Agreement of Purchase and Sale as the "East Part ¼ Lot 12, Concession 4, Township of Essa" with a frontage of 293 meters and a depth of 691 meters. In addition the agreement contains a number of provisions including:

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"No trees to be removed from the property"
"Chattels included: all built-in kitchen appliances, excluding oven"

"The vendor represents and warrants, to the best of his knowledge and belief that the pool and the pool liner is in good working condition and that all pumps and equipment related to the pool will be in good working condition on closing"

[3] I find that:

1) The Defendants breached the contract by not exercising a proper duty of care to prevent trees from being removed from the property in the Spring of the year 2000 prior to the closing date of the Agreement of Sale on April 28, 2000. Seventeen spruce trees had been dug up, loaded on trucks and removed. The Defendants are entitled to be compensated for the loss of the trees. The value of the lost trees is $10,200.00,

2) The Plaintiffs are not entitled to be compensated for the value of a refrigerator not left in the house at the time of closing. The refrigerator does not fall within the meaning of the built-in kitchen appliances' provision contained in the Agreement of Purchase and Sale. The evidence of intention of both parties to include the refrigerator is not clear or persuasive.

3) The Defendants breached their duty to have the the pool chlorination equipment and pool cover in good working condition at the time of closing. Replacements were necessary at a cost with tax of $281.75 for the chlorination equipment and $271.45 for the pool cover.

Trees

[4] The transaction closed on April 28, 2000 and the Plaintiffs moved into the house the next day. They discovered "…gouges all around [the property] where there had been activity from heavy equipment. There was a… swath path made right through the middle of where the tree stand had been…There were large holes…We were devastated." When asked about the number of holes, Karen Chamberlain answered twenty-five. They were 60 to 90 inches in radius. In her view 25 spruce trees had been removed from the property after the date the parties had signed the agreement and before the closing date. Barbara Meierhans was not aware of any trees being removed from the property in this period of time .

[5] Karen Chamberlain said they had visited the property for the first time in the month of December 1999. There was some snow on the on the ground. When looking around the lot, they walked back to the tree grove. There they observed a big spade truck removing trees from the ground. It concerned them.

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[6] The Plaintiffs returned to the house to discuss with the Defendants what they had seen. Barbara Meierhans advised the Plaintiffs "… they did have a contract for more, at that time, when we were looking at the property, five would be coming out." After some confusion about the number of trees, she mentioned five or six.

[7] Negotiations continued to progress and the parties signed the final Agreement of Purchase and Sale on February 1, 2000. The only tree provision that appears in the final agreement states: "No trees to be removed from the property." The five or six trees removal contract is not mentioned. It is important to make a distinction between this evidence and what occurred subsequent to the signing of the contract.

[8] There is no doubt that the discovery by the Plaintiffs immediately after the closing of the transaction of many large tree removal holes caused them to become very upset. The trees behind the house on the 50-acre lot had certainly attracted them to the property. The real estate information sheet indicated there was a grove on the lot of approximately 250 blue spruce trees.

[9] As much as they liked the trees, the plaintiffs did not count them. They were content with the beauty of the grove and with the information they had received. In addition to the beauty of the tree grove the Plaintiffs knew that it would provide a sound barrier from train noise. In her evidence Ms. Chamberlain pointed to the survey of the property and said, "…Right here was a grove of 250 plus planted …14 year old Colorado trees…beautiful." She also pointed out on the survey the location of the Canadian Pacific Railway line at the rear boundary of the lot.

[10] There were no expressed difficulties between the parties prior to and after the signing of the documents and the closing of the transaction at the end of April 2000. The Plaintiffs returned to the property mostly at night from time to time during this period to discuss various matters with the Defendants. It was winter and snow covered the ground. They did not go out to inspect the tree grove.

[11] The interest of the Defendants in the grove of spruce trees was different from those of the Plaintiffs. Generally speaking both parties appreciated them in different ways. The Defendants purchased the land in 1997. The family continued to live there until the lot was sold to the Plaintiffs in 2000. Potatoes had been grown on the back part of the 50-acre lot. Generally speaking the Defendants seemed to regard the trees more as a crop that could be sold than an item of beauty.

[12] In 1998 and 1999 the Defendants had agreed to the sale of trees to contractors. The Plaintiffs became interested in the property towards the end of December 1999 after it had been listed for sale. As mentioned the Plaintiffs expressed to the Defendants their anxiety about tree removal from the property when they discovered men using heavy equipment to remove trees from the grove.

[13] Unfortunately the Defendants did not appear to know how to deal with this type of business. They had not insisted upon any type of written document. The evidence about verbal agreements was sketchy at best. Trucks from the Clarkson Trees Company often arrived

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unannounced. They left loaded with trees without stopping. The drivers did not leave invoices; they did not tell the Defendants what they had done. The drivers just came and left at will.

[14] Even though the Defendants authorized the sale of trees, they did not keep accurate records. They did not double check information received from authorized purchasers. This led to an abuse of process. While walking around their property they often noticed holes left after trees with root balls had been dug up. They did not make a record of what they saw. The big trucks with spade lifting equipment often left tire marks on the land except when the ground was frozen.

[15] The machines or trucks came up or went down the Defendant's driveway and past their house at various times. In addition to the Clarkson Trees Company, Drysdale Tree Farms Limited also made arrangements with the Defendants to buy and remove trees from the property. The Defendants for no apparent reason trusted the companies and accepted their information. That remained their prerogative until they listed the property with a real estate company and signed an agreement. After that the Defendants owed a special duty of care to exercise greater control over their property. In not doing so they were unaware if unauthorized persons came to the property and removed trees.

[16] Their knowledge appeared to be limited to order/invoice forms received from Clarkson Trees and Drysdale Tree Farms Limited. One order/invoice form from Clarkson Trees, dated June/98, mentions the amount the company was prepared to pay for small, medium and large trees. A further form from Clarkson dated Nov/98 advised them of the amount to be paid for 24 small and large trees the company removed from the property. Invoice 011556 came from Drysdale Tree Farm Limited. It mentions payment for 5 trees in the amount of $1250.00. .

[17] The companies made a number of payments to the Defendants from time to time. Robert Meierhans said Clarkson Trees purchased 75 trees from the Defendants over a period from 1998 to December 1999. In the same period Drysdale Tree Farms Limited purchased and removed 55 trees. The evidence indicates that the vast majority of these trees were removed from the property before the Plaintiffs became interested in the lot. After the property was listed for sale in the month of November 1999, Mr. Higgins, the real estate agent, spoke to the Defendants about tree removal.

[18] The agent advised if trees were removed, it could affect the validity of the listing. Ms. Meierhans knew changes should not be made to the property once it had been listed for sale. The two hundred and fifty spruce trees were mentioned on the real estate information sheet. In December 1999 Ms Meierhans spoke to Angus Clarkson. She "told him that we have somebody interested in the property and I would like to ask [you] not to remove any trees until further notice."

[19] The evidence of Mrs. Meierhans is creditable, but at the same time, I find the lack of records and control over those who were removing trees from the property directly contributed to the tree removal issue in this action. Snow on the ground at this time of the year added to the difficulty.

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[20] Tree removal experts, Mr. Clarkson of Clarkson Trees, Mr. Drysdale of Drysdale Tree Farms Limited and Mr. Burton of Four Seasons Tree Farms gave evidence. Mr. Drysdale and Mr. Burton sent reports to Ms. Chamberlain. All three did business with one or both of the parties.

[21] The Defendants called Mr. Clarkson and Mr. Drysdale as witnesses. The Plaintiffs called Mr. Burton. Their partiality was questioned. In this case the risk of potential partiality goes to weight and not to admissibility. On some matters all three gave similar evidence. Further, the evidence of two neighbors, Karen Elizabeth Tettmar and Doris Ann Gibson supports the opinions expressed by Mr. Drysdale and Mr. Burton. Ms. Tettmar and Ms. Gibson did not waiver in their observations under an intense cross-examination.

[22] Ms. Tettmar lives on the adjacent property to the lot purchased by the Plaintiffs. She told the court that in the spring of 2000, early in the month of April she saw "big spade trucks going in and out of the lot [then owned by the Defendants] to remove trees." When asked how often, she replied, "It was often…we were always wondering what they were doing…they would go up the driveway and then they'd come back down the driveway with a big tree…" She did not know who owned the trucks. On cross-examination she confirmed that she could see from her place both the front and backyards of the property owned at that time by the Meierhans. She did not pay attention to the colour or possible markings on the truck.

[23] Doris Ann Gibson lived on property further back from the Tettmar lot, but also adjacent to the land purchased by the Plaintiffs. The Gibson lane was approximately 800 feet long. She pointed out that the Chamberlain and the Gibson properties used to be a 100-acre parcel of land. Her evidence about the time and trucks was similar to the evidence of Ms. Tettmar. Mrs. Gibson saw the big tree removal trucks. She told the Court: "…I seen the tree removal trucks coming and going back and taking – and getting the trees and bring them back out."

[24] Counsel for the Plaintiff asked Ms. Gibson if she received "a telephone call last night". She replied Angus Clarkson called her. When asked about the content of the call, Counsel for the Defendant properly objected to her answering the question on the grounds of hearsay. When asked how she felt after she received the call Ms. Gibson answered, "I was a little bit upset to see things go that far, to have to get that phone call." In Cross-examination Ms. Gibson confirmed that she could not describe the trucks other than to say that they had tree spades. She could not see behind the house so she did not know where the equipment was used to remove the trees.

[25] The Plaintiffs took possession of their new property at the end of April 2000. Most of the winter snow had melted. There were huge tire marks on their lane. Mr. Chamberlain thought the transport moving truck must have had large heavy tires. They spoke to Ms. Meierhans about the size of the truck. She told them that their goods came in a cube van. Mr.Chamberlain was interested in the trees, but he was also interested in the possibility of constructing an airplane runway on the large section of flat land beyond the spruce tree grove behind the house.

[26] The next morning the Plaintiffs went to the back of the property. Ms. Meierhans said, "We were devastated. There were gouges all around where there had been activity from heavy

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equipment." It was at this time that they discovered large holes left after 25 trees had been removed. She said the stand of trees was not in that condition when they had inspected the property before putting in their offer to purchase. On May 9, 2000 they took the pictures and a video of the holes left after the trees and root balls had been removed. They clearly confirm her concerns.

[27] The morning after they discovered the holes, the Plaintiffs heard a vehicle approaching along the driveway. A large tree spade truck arrived unannounced and uninvited. It drove past their kitchen window heading behind the house towards the trees. They both went out and Mr. Chamberlain caused the driver to stop. They spoke to the driver and he identified himself as Angus Clarkson. At a later date Mr. Clarkson and the Plaintiffs met at the grove of trees behind the house. A discussion took place. When asked about the conversation Ms. Chamberlain said she felt "terrified." Mr. Clarkson mentioned when the Plaintiffs did not believe him he got sarcastic and left. Mr. Chamberlain said Angus Clarkson was ordered to leave the property.

[28] It is unclear why Angus Clarkson went to the property at the end of April 2000 or what was said to cause Ms. Chamberlain to become terrified. Angus Clarkson testified that he went to meet the new owners, but the way he did this remained unclear and difficult to understand. He did confirm receiving the December instructions from Ms. Meierhans. He denied taking any trees from the property after that time. He said he had been in the business for 14 years and he stressed that he was honest.

[29] In 1998 he advised that he had made a contract with the Defendants to buy trees. He testified that after the month of December 1999 he did not put the truck on the road again until the end of April 2000. He did not consider Mr. Drysdale a friend, but did not mention why. In respect to a question about someone driving over the property in the spring of 2000, he replied that he had been in the business for 14 years and he knew from experience that no one had been there in the spring thus contradicting the evidence of the neighbors.

[30] Mr. Clarkson denied that trees had been dug up and removed after the time he had last took trees from the property in December 1999. He said the holes shown in the pictures and the video were old ones. He pointed out that older holes had vegetation growing on the inside walls; new holes did not because of new cuts into the ground. Once again I found his evidence to be unclear and difficult to understand. He denied that he threatened Ms. Chamberlain and said no one told him to leave the property. He admitted that he was sarcastic. This quality seemed typical from the manner he answered some questions put to him on cross-examination. Even so there is no doubt that Mr. Clarkson is a knowledgeable tree removal landscaper.

[31] The Plaintiffs had made enquires from Drysdale Tree Farms Limited and Four Seasons Tree Farms. They looked at the property and agreed with Mr. Clarkson about growth of vegetation on the sides of older holes. However, they both found fresh holes with no growth of vegetation on the sides.

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[32] A subsequent letter addressed to Ms. Chamberlain from Mr. Drysdale contained his opinion that 23 trees had recently been removed. The letter from Mr. Drysdale has been filed. It states as follows:

> Ms. Karen Chamberlain
>
> In response to your inquiry Ms. Jane Fraser and I inspected the property at 6536 on the 5th line of Essa on May 8th. It was obvious from the freshly disturbed soil the approximately 23 trees had been recently removed. Assuming that they were 12 – 15 feet tall as the remaining trees are, we would charge $650.00 to supply, plan and guarantee a specimen quality tree of the same size at that location. The cost to replace all of the trees in one operation would be less, - $500.00 per tree.
>
> Yours truly,
>
> Doug C. Drysdale

[33] Mr. David Burton, the President of Four Seasons Tree Farms, gave evidence. In response to questions about his observations he said:

> A. There were trees and Karen asked me about the holes that trees had obviously been taken out. So, I said, "Yes, trees have been taken out", because they had. You know that somebody had been in there digging prior to my arrival. There was no doubt about it.
>
> Q. Okay. Was – would you describe what you observed in terms of evidence of trees having been taken out?
>
> A. Somebody had been in with what I assumed was a tree spade truck because the holes were larger than usually, on say, a bobcat or a backhoe where you would have a tree spade mounted. You could dig those trees up and put them in a burlap and wire basket and load them on a truck.

[34] A letter from David Berton dated June 30, 2000 addressed to Ms. Chamberlain states:

> Mrs. Karen Chamberlain June 30, 2000
> 5'th Concession
> Egbert, Ontario
>
> Dear Karen, with regards to your new property you asked me to look at, It is my opinion that the Colorado Spruce trees at the back of the property do hold some

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value for resale purposes in the landscape trade. There have been a number of trees removed from the plantation with the use of a tree spade truck as the holes show evidence. Judging from the moss formations on the sides of some of the holes, some of the tree removals would have taken place in 1999 or prior. There are also some fresh holes, 17-25, which would indicate a spring of 2000 removal of trees did take place.

The value of the trees to have them replaced would be in the 600.00 to 800.00 range depending on available sources as the trees appear to be quite large in size.

Please let me know if you would like me to quote on replacing the trees, or if you would be interested in selling any of the remaining trees.

Best of luck with your new property,

David Burton
President

Please note, visit to property was May 5/00.

[35] In the cross-examination the suggestion of partiality Mr. Burton responded to a question about what took place at a later date. He said he had purchased 10 trees from the Plaintiffs by using a 27-ton spade truck. He paid for the 10 trees but only seven were taken out. He said he had a sixth sense. He felt that it was best not to have anything else to do with property. He was asked if there were any other reasons why he walked away from $750.00. After the court dealt with objections Mr. Burton said "Nobody told me anything…Karen had told me that she thought somebody had taken trees off of the property…"and he went on to answer…"I've seen lots of people take trees off properties that they shouldn't have." When there was no further objection he went on to say, "…I'm just talking about my past experience of buying trees from other people."

[36] There is one further important point in respect to the "TREE" issue. It involves the memory of Ms. Meierhans. She mentioned they received their last money from Angus Clarkson in December of 1999. Mrs. Meierhans thought it was for trees Angus Clarkson might have removed from their property before Christmas that year, but in reality, she was not sure. She used a note partly written in German to refresh her memory. She admitted that it would have been better if she had made a note of matters when they took place. She could not rely on her memory.

[37] The preponderance of evidence supports the finding that the tree grove on the property and mentioned in the real estate listing agreement induced the plaintiffs to enter into a contract with the defendants. The plaintiffs relied on the defendant's representation that trees would not be removed from the property.

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[38] The representation about the trees is a substantial clause in the contract. Trees were removed. The breach of the contract in respect to the tree representation gives rise to damages. The preponderance of evidence supports a finding of an improper removal of 17 spruce trees at an average cost of $600.00 per tree. The damages total $10,200.00.

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Refrigerator

[39] The preponderance of evidence does not support that a refrigerator is a chattel included in the phrase "chattels included: all built-in appliances, excluding oven." There is no material representation that relates directly to including the refrigerator in the sale. Independent evidence indicates the refrigerator was only recessed, it was not built-in.

Pool Equipment and Pool Liner

[40] The agreement of purchase and sale states that the vendors represent to the best of their knowledge and belief that the pool liner and equipment would be in good working condition at the time of closing. I find the preponderance of evidence supports a breach of promise in respect to the pool cover and the need to replace the water chlorinator. This breach gives rise to damages only for a pool cover in the amount of $271.45 and $281.75 for a chlorinator replacement. Cost invoices have been filed.

[41] I award total damages in the amount of $10,753.20 plus pre-judgment interest to the plaintiffs, together with costs. In the event the parties deem it necessary for the court to fix the amount of costs, I order that a trial date be obtained from the trial co-ordinator and briefs be filed two days in advance of the hearing.

_____

LOGAN, J.

Released: December 19, 2003

Court of King's Bench of Alberta

Citation: National Bank of Canada v Precision Livestock Diagnostics Ltd., 2025 ABKB 175

Date: 20250324
Docket: 2501 04252
Registry: Calgary

2025 ABKB 175 (CanLII)

Between:

National Bank of Canada

Plaintiff

- and -

Precision Livestock Diagnostics Ltd., Sunterra Food Corp., Soleterra D'Italia Ltd., Sunwold Farms Inc., Sunterra Farms Iowa Inc., Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., Sunterra Enterprises Inc. and Sunterra Beef Ltd.

Defendants

Endorsement
of the
Honourable Justice M.J. Lema

I. Introduction

[1] Should an interim receiver be appointed under s. 47 of the *Bankruptcy and Insolvency Act* where the predominant purpose seems to be information gathering about possible cheque kiting by some of the defendant corporations?

[2] If not, should a receiver be appointed under the *Judicature Act* or other Alberta statutes authorizing such an appointment?

[3] The answers are no and no, as explained below.

II. Appointment of interim receiver under s. 47 *BIA*

A. Legislative provision

[4] Here is s. 47 *BIA*:

> (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of
>
> (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
>
> (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
>
> (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable;
>
> (c) take conservatory measures; and
>
> (d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.
>
> (3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be **necessary for the protection of**
>
> **(a) the debtor's estate; or**
>
> **(b) the interests of the creditor who sent the notice under subsection 244(1).**
>
> (4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor. [emphasis added]

[5] It is common ground that NBC issued a notice of intention to enforce security under s. 244 *BIA* on March 14, 2025.

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[6] What prompted the issuance of that notice and NBC's reasons for seeking an interim receiver are discussed next

B. Background

[7] In mid-February 2025, NBC apparently identified irregular chequing activity among various defendants and took immediate steps to control further drawdowns from the defendants' various NBC accounts, by cheque or otherwise, and to recover an apparent overdraft of approximately $43 million stemming from that activity.

[8] That overdraft draft was cleared, in various ways, within 15 days of being identified.

[9] No further overdraft or other new debt to NBC, arising from the identified chequing activity or otherwise and owing directly by any of the defendants, has since been identified.

[10] NBC has called its loans, which currently stand at approximately $17 million.

[11] It issued a notice of intention to enforce its security, per s. 244 BIA, on March 14, 2025.

[12] Since approximately February 18, 2025, FTI, a licensed insolvency trustee, has, with the defendants' consent, been monitoring the group's financial transactions (or at least its Canadian operations) on NBC's behalf, albeit an informal (i.e. non-court-appointment) basis.

[13] NBC now seeks an interim receiver under s. 47 BIA for two central purposes:

1. preservation of and control over the "Account Property" i.e. "present and after-acquired bank accounts, money, funds, receivables, cheques, choses in action, and books and records" of the defendant; and
2. investigation of certain "Impugned Transactions" (defined in supporting affidavit), namely, the above-noted irregular chequing activity.

C. Analysis

[14] I start by reproducing NBC's detailed arguments on the preservation aspect, followed by my comments on each.

[15] Here are the first two: NBC's potential exposure and risk, and the effects on third parties.

1. "Potential exposure and risk"

[16] NBC argued:

> [NBC] has serious, well-founded concerns in relation to the Impugned Transactions and the Kiting Scheme. Among other things, **[NBC] faces potential exposure and risk as a result of the Kiting Scheme**, for which was there was no legitimate commercial purpose. While the Lender has mitigated against the over US$ 43 million in Overdraft Indebtedness, due to the implementation of the Risk Management Processes, **the possibility of further claims exists and the scope of the Kiting Scheme has not yet been determined**. Additionally, it is **unknown to what extent any other financial institutions (most notably, Compeer [Financial, ACA, an American bank]) have been affected**. It is possible, and in [NBC's] assessment likely, that the Compeer Accounts were in an overdraft position; but the Sunterra Group has refused to provide the information which would prove (or disprove) whether this is the case. [emphasis added]

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[17] NBC acknowledges that it has eliminated an approximately US$43 million overdraft apparently stemming from the Impugned Transactions.

[18] It has also instituted strict internal monitoring over and debit restrictions on all NBC accounts held by any of the defendants. In other words, it has closed the barn door against further drawdowns occurring without its approval.

[19] Finally, it has provided notice of various defaults under its lending agreements, demanded payment of its aggregate debt (as noted, approximately $17 million), and closed off any further financing of any of the defendants (i.e. other than advances contemplated under the proposed interim receivership).

[20] NBC did not explain or particularize its "potential exposure or risk" here.

[21] Even if it extended the scope of its inquiry earlier than the nine or so months already reviewed (back to May 1, 2024) and discovered (for instance) that more of the high-volume and high-value back-and-forth chequing activities had occurred in the previous (for example) three years, it did not explain how that would or might affect the group's current financial position with NBC.

[22] In other words, how any such uncovered activities would translate to any different overdraft or other debt position with NBC than it faced in mid-February of this year and which it has now cleared.

[23] As far as I can tell, whatever further irregular chequing activities occurred and whenever and in whatever amounts, the net result of them was reflected in the mid-February position in the relevant NBC accounts then. That is, it is not apparent what after-shock effects, if any, NBC is or would be facing even if it uncovered similar chequing activities in earlier periods, at least in terms of a changed, or even a risk of a changed, current financial position for the group with NBC.

[24] NBC's evidence and argument did not show otherwise.

2. Effects on third parties

[25] As for effects on third parties (e.g. Compeer), s. 47's second branch (i.e. after "[protecting] … the debtor's estate") focuses on the interests of the "**creditor**" applying for relief i.e. not any other actual or potential creditor or the creditors (actual or potential) generally.

[26] Accordingly, I do not find the possibly of unearthing information showing the impact of the chequing activities on Compeer or other creditors a meaningful reason for seeking an interim receiver.

3. Need to investigate chequing activities

[27] NBC then argued:

> In light of the sheer scale of the Impugned Transactions, and the period of time over which they were undertaken, it is necessary to ensure that a neutral third party with appropriate powers is in place to **investigate the Impugned Transactions and prevent further Impugned Transactions from occurring**. **[NBC] faces significant prejudice as a result of the Kiting Scheme**. While the management of the Sunterra Group has advised that the Impugned Transactions

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> were caused by Ray Price and that Mr. Price would be removed as a signatory for the Sunterra Group, (i) Mr. Price is the sole director of Sunterra Beef, Precision, and Soleterra, and a director of each Borrower; and (ii) the Sunterra Group has ceased cooperating with [NBC]. As a result, **absent the appointment of the Interim Receiver, [NBC] is unable to assess what further steps may be necessary to protect its interests.** [emphasis added]

[28] On investigating the Impugned Transactions, NBC did not explain why an interim receivership is needed for such an investigation (assuming one is needed) to occur.

[29] It alluded briefly to "litigation", presumably meaning possible future litigation between it and the defendants or some of them about the chequing activities or possibly litigation between it and other lenders in respect of those activities.

[30] But it did not explain why the document production, document review, and questioning dimensions of any such litigation would be inadequate to investigate those activities.

[31] It did not argue that the defendants or any of them will or even may destroy documentary, electronic, or other records.

[32] It did not offer a detailed comparative analysis of "investigation via IR" and "investigation via litigation."

[33] To the extent urgency is a consideration, it did not show what benefits a possibly faster investigation via IR would yield. As discussed above, NBC did not explain how a fuller understanding of the breadth and scope of the chequing activities would or could change the defendants' current financial position with NBC i.e. how learning more about those activities would or could inform anything that NBC might do now in reaction i.e. identify "what further steps" it might take or why they might be necessary.

[34] As noted above, NBC did not explain or particularize the asserted "significant prejudice" faced by it.

4. Benefits for other creditors

[35] NBC then argued:

> The appointment of the Interim Receiver is also for the **benefit of the Sunterra Group's creditors generally**, for substantially the same reasons. The scope of affected parties is unknown and the **proposed investigation will permit the Interim Receiver to identify other parties, including financial institutions who are affected by or hold claims arising from the Impugned Transactions and the Kiting Scheme**.

[36] As discussed above, the focus on creditor impact is necessarily limited to the interests of NBC itself.

[37] Other possibly affected creditors can take whatever steps they see as necessary to protect and advance their interests.

[38] I discuss this aspect further below.

5. Dissipation of assets

[39] Next NBC argued:

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> While risk to the assets of the debtor company is a relevant consideration [under s. 47], it is not necessary for the party seeking appointment of an interim receiver to produce evidence of actual or immediate danger of the dissipation of assets if the factors set out in the *BIA*, concerning protection of the estate or a creditor's interests, are met. The prejudice to the Obligors is limited as the Interim Receiver's appointment will only be over the Account Property, the Obligors will continue operating, and a funding request model will be put in place. [authorities omitted]

[40] This does not explain how appointment of an interim receiver is necessary to protect the debtors' estates.

[41] NBC did not show a material risk of prejudice to those estates.

[42] It did not provide evidence or argue that the debtors or any of them are dissipating property or that there is a material risk of that occurring.

[43] They did not provide evidence showing any material risk of continuation of similar chequing activities. Given NBC's steps since mid-February 2025, I cannot see how any such activities affecting NBC itself could occur.

[44] At the hearing on March 17, Canadian counsel for Compeer provided a copy of a document apparently showing that Compeer has begun or will soon be starting proceedings in South Dakota for certain relief against some of the defendants.

[45] I infer from the initiation of such proceedings that Compeer is aware of some or all of the chequing activities and that it is also taking steps to eliminate the risk of any further such chequing activities involving Compeer, which (from the record here) I infer is or was the defendants' principal (if not exclusive) US banker.

[46] NBC did not argue that the very existence of the chequing activities translates to a risk of the defendants or any of them taking prejudicial-to-NBC-or-others steps in respect of their assets.

[47] Instead, NBC's focus was on preventing the repetition of the chequing activities and investigating those which have already occurred.

[48] In the absence of evidence showing a material risk of such activities recurring or of the defendants taking other steps to dissipate their assets, and in the absence of evidence showing any other need for protection of the debtors' estates, this dimension of s. 47 (i.e. para 47(3)(a)) is not engaged here.

6. Risk of chequing activities continuing (and recap of earlier factors)

[49] NBC then argued:

> The current situation is untenable, and there is a **serious risk of deterioration of the Account Property – and [NBC's] collateral as a whole – in the short term**. While [NBC's] review of the Impugned Transactions is ongoing, there is strong evidence of a Kiting Scheme, which greatly exceeds the "more than a suspicion or speculation" threshold identified in the case law (as discussed below) concerning the **risk to assets of a debtor company**. The Borrowers have no further access to revolving credit, and it is unclear how the Sunterra Group intends to operate in the absence of further credit. [NBC] is prepared to advance funds, to the Interim

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> Receiver, in order to enable the Interim Receiver to carry out its mandate[,] which in turn, will permit funding requests to be made for required operational payments. Given that the Kiting Scheme was ongoing, for an indeterminate but potentially significant period of time, there is a **risk that there are significant but as yet unknown claims against the Obligors.** The appointment of the Interim Receiver, and corresponding investigation powers, are necessary to (i) ensure that **no further Impugned Transactions occur**; (ii) ensure the **protection and preservation of the Account Property**; (iii) enable a third party to **assess, review, and locate information concerning the Impugned Transactions** and identify any further or related transactions which may exist; and (iv) **assess any claims against the Obligors resulting from the Impugned Transactions or the Unauthorized Overdrafts,** including any claims by Compeer or others[.] [emphasis added]

[50] Again, NBC did not explain or particularize the asserted "serious risk of deterioration of the Account Property – and [its] collateral as a whole."

[51] As for a "risk that there are significant but as yet unknown claims against the Obligors", that does not translate to a risk to the debtors' estates or to NBC's position as the first-ranking creditor against most of the defendants. (Farm Credit Corporation is the first-ranking creditor on three of the defendants, with NBC in second position.)

[52] The priorities are what they are. Flushing out (possible) further claims against the defendants or any of them is not a convincing reason to install an interim receiver.

[53] Again, I do not see a material risk of further similar chequing activities here or any material risk to the Account Property, given the protective steps already taken by NBC.

7. Loss of confidence in management

[54] Here are NBC's further arguments:

> Whether the secured creditors of the debtor company have **lost confidence in the management** of the debtor company is also a relevant factor in considering whether the appointment is warranted:
>
> > I accept that there must be more than a suspicion or speculation concerning the assets of a company before an interim receiver is warranted. Where, as here, the major **secured creditors who have the most at risk** have with legitimate reason lost confidence, I do not think that there has to be an actual immediate risk to assets. [citing ***Maximum Financial Services v Corporate Cars Limited Partnership,*** 2006 CanLII 40988 (ONSC) at para 15]
>
> [NBC] has lost confidence in the management of the Sunterra Group, on numerous reasonable grounds, including as a result of: (i) the **Sunterra Group's inability or unwillingness to take urgent action to address the Impugned Transactions and share the necessary information, including the Compeer Accounts**; and, (ii) the Sunterra Group's decision to **cease cooperating with [NBC's] investigation of the Impugned Transactions** and to backtrack on promises made to [NBC] in February 2025.

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> It is not required that an applicant prove "actual misfeasance and wrongdoing such that assets are being misappropriated or dissipated", and even where there are possible explanations regarding alleged wrongdoing by a debtor company, the applicant will succeed if it can establish "on a balance of probabilities the **need for an immediate interim receivership to assure conservation of the Respondents' assets, and hence, protection of the interests of the Bank through its security**." [citing ***RBC v Canadian Print Music Distributors Inc,*** 2006 CanLII 21048 (ONSC) at paras 16-18]
>
> Facts demonstrating a *prima facie* case of borrower misconduct or defaults, including material misrepresentations to lenders and/or serious breaches of the loan agreements, have been sufficient to appoint an interim receiver [citing ***RBC v Applied Energy Systems Inc***, 2009 CanLII 69785 (ONSC) at para 24].
>
> In the context of the *BIA*, a requirement to establish a *prima facie* case has been interpreted as requiring that a claim be supported by evidence and not "mere allegations" or "obviously spurous", but the threshold is not particularly high. [NBC] has met and exceeded this threshold and there is **no credible, commercially reasonable justification for the occurrence of the Impugned Transactions or the Kiting Scheme**. [citing ***Smith v PricewaterhouseCoopers Inc,*** 2013 ABCA 288 at para 19] [emphasis added]

[55] Again, NBC did not demonstrate material risk to its interests here.

[56] It may well have lost confidence in Sunterra management, but it did not show material risk to its position if an interim receiver is not appointed e.g. how management's decisions will or could make the current circumstances worse for NBC.

[57] Even if NBC could learn more about the scope and breadth of the chequing activity, including how Compeer or possibly other financial institutions may have been involved and, if so, how those other parties are or may have been affected, that does not show why any such information is or might be necessary to protect or help protect NBC's current position.

[58] In ***RBC v Applied Energy*** (cited above), Cumming J. found (among other things) that "the security of RBC [had] been compromised" and that "there is a real danger assets will disappear."

[59] I have not found similar circumstances here.

8. No justification for chequing activities

[60] Even if no "credible, commercially reasonable justification" exists for the chequing activities, that on its own is not a material factor i.e. where NBC has recovered the overdraft in question, no material risk exists of further such activities, and no evidence shows that any as-yet-unexplored earlier activities have the potential to change NBC's current position with the defendants (in the sense of additional debt owing by any of them to NBC).

9. Limited powers of interim receiver

[61] Here I also emphasize the limited powers that can be given to an interim receiver, per ss. 47(2) *BIA*:

> The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

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(a) **take possession of all or part of the debtor's property** mentioned in the appointment;

(b) **exercise such control over that property, and over the debtor's business**, as the court considers advisable;

(c) **take conservatory measures**; and

(d) summarily **dispose of property that is perishable or likely to depreciate** rapidly in value.

[62] These are hold-the-line powers, which I have already found are not required here i.e. with no material risk shown of dissipation or other deterioration of the defendants' estates or NBC's position.

[63] Such powers do not extend to conducting investigations, at least not where it is unclear how the outcome of the investigations (i.e. learning everything about the irregular chequing activities) could affect the extent of the defendants' available assets or NBC's position on those assets or its position vis-à-vis the debtors or any of them.

10. Conclusion on s. 47 *BIA*

[64] For these reasons, I conclude that the evidence does not warrant the appointment of an interim receiver under s. 47 *BIA*.

III. No "preserve rights" receiver possible for four key defendants in any case

[65] In any case, as discussed below, no receiver, interim or otherwise, can be appointed for at least four of the defendants, which four happen to be the defendants most centrally (if not exclusively) involved in the irregular chequing activities, at least to the extent the proposed receivership is preservation-of-rights focused.

[66] The reason is a current stay or hold-action period in effect in respect of those defendants under the *Farm Debt Mediation Act*.

[67] I discuss this in detail below.

A. Legislative provisions

[68] The *FDMA* imposes an initial stay or hold period when a farmer (see definition below) is facing enforcement and other actions by one or more creditors.

[69] Here is the definition of "farmer", from s 2 *FDMA*:

> *farmer* means any person, cooperative, partnership or other association of persons that is engaged in farming for commercial purposes and that meets any prescribed criteria. (*agriculteur*)

[70] I believe it is common ground that Sunterra Farms Ltd., Sunwold Farms Ltd., Sunterra Farms Iowa Inc., and Sunwold Farms Inc. are farmers so defined.

[71] I believe it is also common ground that all four are insolvent within the meaning of (at minimum) one of the conditions identified in subsection 6(a), (b), and (c) *FDMA*.

[72] Here is the *FDMA* provision requiring interpretation here:

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> 21 (1) Every secured creditor who intends to
>
> > (a) **enforce any remedy against the property of a farmer**, or
> >
> > (b) commence any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of a farmer
>
> **shall give the farmer written notice of the creditor's intention to do so, and in the notice shall advise the farmer of the right to make an application under section 5.**
>
> **(2) The notice must be given to the farmer and to an administrator, in the form established by the Minister and in accordance with the regulations, at least 15 business days before the doing of any act described in paragraph (1)(a) or (b). [emphasis added]**

[73] NBC is a secured creditor within the meaning of ss. 21(1).

[74] NBC issued a ss 21(2) notice to the defendants or at least the four in question on March [14], 2025.

[75] Section 5 *FMDA* (referenced in ss. 21(1)) provides (in part):

> (1) Subject to section 6, a **farmer may apply to an administrator for either**
>
> > (a) **a stay of proceedings against the farmer by all the farmer's creditors**, a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's creditors for the purpose of assisting them to reach a mutually acceptable arrangement; or
> >
> > (b) a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's secured creditors for the purpose of assisting them to reach a mutually acceptable arrangement.

[76] The four defendants ("the Farmers") argue that the 15-day hold period imposed by s. 21 bars the appointment of an interim or other receiver now or at any point prior to the expiry of that period.

[77] NBC argues that the appointment of an interim receiver falls outside the scope of s. 21.

[78] I find for the Farmers on this point, for the following reasons.

[79] NBC relies on ***Jacob's Hold Inc. v Canadian Imperial Bank of Commerce***, 2000 CanLII 22730 (ONSC) (Jarvis J.). Here is the key segment of that decision:

> It seems sensible to deal first with the matters raised by Mr. Fallis. He says, essentially, that the order appointing the Interim Receiver is null and void and that all proceedings taken by PW pursuant to that authority are of no effect and that no immunity ought to be ordered in their favour in the circumstances. He argues that **ss. 21 and 22 of the *Farm Debt Mediation Act*, S.C. 1997, c. 21 operate as an automatic stay of** any action taken against a farmer and that an **application to appoint an Interim Receiver** pursuant to the *Bankruptcy and Insolvency Act*,

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> R.S.C. 1985, c. B-3 **constitutes a proceeding to which those sections apply. The appointment by the court of a receiver is for the purposes of preserving the estate of the bankrupt for the benefit of the creditors. It is not formally or otherwise a proceeding for the recovery of a debt, the realization of a security or the taking of any property of a farmer.** [emphasis added]

[80] Assuming for the moment appointing a *BIA* interim receiver falls into one of the latter three categories of action (i.e. the activities described in para 21(1)(b) *FDMA*), the question remains whether doing so constitutes a "enforc[ing] any remedy against the property of a farmer" under para. 21(1)(a).

[81] ***Jacob's Hold*** is silent on this aspect.

[82] It is clear that a preservation order, an attachment order, and other hold-the-line orders constitute a remedy against property i.e. without necessarily being linked to actual or possible future enforcement against the property. In ***Vachon v. Canada Employment and Immigration Commission***, 1985 CanLII 12 (SCC), [1985] 2 SCR 417, the Supreme Court of Canada found that "remedy", in the context of the *BIA*, should be interpreted broadly and as extending to preservative orders:

> Appellant in my view properly relied upon the English version of s. 49(1) of the *Bankruptcy Act*, where the word *recours* is rendered by the word "remedy", giving to it and to the words "*autres procédures*" ("other proceedings") a **very broad meaning which covers any kind of attempt at recovery, judicial or extrajudicial.** *Black's Law Dictionary* (5th ed. 1979), defines "remedy":
>
> > The means by which a right is enforced or **the violation of a right is prevented**, redressed, or compensated.
>
> and below:
>
> > Remedy means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.
>
> *Jowitt's Dictionary of English Law* (2nd ed. 1977), vol. 2, gives an almost identical definition:
>
> > the means by which the **violation of a right is prevented**, redressed, or compensated. …. [paras 21 and 22] [emphasis added]

[83] See also ***Dowd et al. v. Skip the Dishes Restaurant Services Inc.,*** 2020 MBQB 155 (CanLII) (Perlmutter ACJ):

> **While an attaching order is obviously a different form of *pre-judgment remedy* than an order for the preservation of property**, in light of the intrusive nature of both remedies including the potential hardship or harm to the party who is the subject of these pre-judgment orders, in my view, similar weighty considerations arise. It is my view that these considerations are sensibly reflected in the analysis of the Ontario Superior Court of Justice Divisional Court in ***BMW Canada Inc. v. Autoport Limited,*** 2019 ONSC 4299, which reformulated the following test for motions brought under the equivalent Ontario Rule 45.01 (*Rules of Civil Procedure*, RRO 1990, Reg 194, s 45.01) (which is worded identically to the Manitoba Rule) (para. 53):

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> **a. the property sought to be preserved is the property in question in a proceeding or relevant to an issue in the proceeding;**
>
> b. there is a serious issue to be tried with regard to the property;
>
> c. **the interim preservation or custody of the property is necessary to enable a party to advance or defend its claim**; and
>
> d. the balance of convenience favours granting the relief sought by the applicant or moving party. [para 13] [bold and italics emphases added]

[84] And ***Montreal Trust Company of Canada v. R M Holdings Ltd.,*** 2000 NFCA 27:

> On appeal, Montreal Trust did not submit that the applications judge was wrong in his construction or application of s. 66 or **Rule 29.10(g)**. Instead**, it argued that the applications judge failed to give the Act a broad and liberal interpretation *to effect its remedial purposes (which include the preservation of a debtor's exigible property before entry of final judgment* to ensure that any resulting judgment can be made effective)** and, more specifically, failed to consider or apply s. 33(4) of the Act. … [para 7] [bold and italics emphases added]

[85] And ***Coast Tractor & Equip. Ltd. v. Halliday***, 1987 CanLII 2760 (BC SC) (Gibbs J.):

> Earlier in these reasons **garnishee before judgment was referred to *as one of a genus of preservation of assets remedies* together with others including the power of injunction. In *Aetna Fin. Services Ltd. v. Feigelman,*** 1985 CanLII 55 (SCC)**, [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 971 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 4 C.P.R. (3d) 145, 15 D.L.R. (4th) 161, 32 Man. R. (2d) 241, 56 N.R. 241, during the course of determining whether a Mareva injunction should remain in place, Estey J., for the court, discussed the rationale for the power of the court to make orders for the preservation of assets.** … [para 12] [bold and italics emphases added]

[86] These authorities confirm that a preservation-of-assets-focused order is a form of remedy against property.

[87] I find that that characterization extends to a s. 47 *BIA* interim receivership i.e. as a mechanism aimed at preserving the status quo, as reflected (as discussed above) in the limited powers that can be given to such a receiver.

[88] This conclusion is supported by ***Canadian Imperial Bank of Commerce v Foxtrot Farms ULC***, 2024 BCSC 1019 (Masuhara J.):

> In respect to the argument of nullity advanced by Foxtrot, **CIBC submits that s. 21(1) and (2) of the *FDMA* are not applicable because the present application is not one seeking to enforce a remedy against the property of a farmer or the recovery of debt, realization of the security, or the taking of any property of a farmer. CIBC submits that it is only taking steps to**

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protect and preserve its security, and it is a future step in which it will seek a full receiver to which the notice period under s. 21(1) and (2) apply. Reliance is placed upon the Ontario case of *Jacob's Hold v. CIBC*, 2000 CanLII 22730 (ON SC), [2000] O.J. No. 5702; 52 O.R. (3d) 776.

Foxtrot relies upon the decision of Justice Joyce in *Community Futures Development Corp. v. Litzenberger*, 2006 BCSC 856, where Justice Joyce reviewed and summarized the purpose of the *FDMA* and the approach to be taken in applying the *Act*, the approach being that the *Act* is to be given "**such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" and that the "words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and purpose of the legislation."**

He noted the case of *Corp. Les Produits de la Jardiniere v. National Bank of Canada*, [1996] F.C.J. No. 460, which states at para. 14 in relation to the *FDMA*'s predecessor act that:

> the *Act* sets out a set of temporary measures intended to enable farmers to continue operating while benefiting from a grace period before entering into arrangements with their creditors with the assistance of a panel of experts acting as a conciliator.

Foxtrot also relies upon the decision of *Westminster Savings Credit Union v. Font*, 2006 BCSC 1308, a decision of Justice Cullen (as he then was) in which he considered s. 21(1)(a), and held that the **registration of a CPL "falls within the scope of s. 21 either as part of the enforcement of a remedy or the commencement of proceedings or action execution or other proceedings for the recovery of a debt or realization of security or taking of any property of a farmer". CIBC attempted to distinguish the *Westminster* case from the present by noting the differences between a CPL and a preservation order.**

I am not persuaded that the distinction assists here given the context of the **broad encompassing words "any remedy against property" and the liberal approach that is to be taken. *The language encompasses, in my view, a procedural remedy such as a preservation order. This would be much more consistent with the scheme and language of the FDMA.***

With respect to the case of *Jacob's Hold*, first, I am not bound by the Ontario decision of Jacob's Hold. Further, *the decision does not address the broad scope of s. 21(1), thus the commentary does not assist me in the interpretation of s. 21(1).* [paras 14-19] [bold and italics emphases added]

[89] And by ***North 40 Farms (Re)***, 1999 CanLII 14089 (MBQB) (Reg Sharp) at paras 13-18.

[90] Per ss 21(2) *FMDA*, no step that constitutes enforcing a remedy against a farmer's property can be taken until expiry of the 15-day waiting period i.e. ss. 21(2) provides an implicit stay of proceedings in advance of any further stay that may be triggered under s. 5 *FMDA*.

[91] Accordingly, even if a s. 47 *BIA* interim receivership were warranted, NBC moved prematurely here i.e. in applying in respect of the Farmers before expiry of the implicit ss. 21(2) stay.

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[92] The same applies to any form of receivership -- whether under the Judicature Act or other provincial statute authorizing the appointment of a receiver -- to the extent it is aimed at preserving the status quo i.e. providing a remedy in respect of the Farmers' property.

[93] I find that, concerning NBC's arguments in favour of a Judicature Act or other provincial-statute-based receiver that is preservation-focused, the same FMDA bar operates against them in the present circumstances i.e. concerning the Farmers.

[94] That leaves NBC's arguments in favour of an "investigative receivership."

IV. Investigative receivership

[95] To the extent NBC is seeking investigative powers for a preservation-focused receiver, the answer is that, with no preservation-focused receivership warranted or possible here, it is not necessary to consider the investigative dimension of such a receivership.

[96] If NBC is alternatively seeking a stand-alone investigative receivership, I have already explained why such is not available here as part of a s. 47 BIA interim receivership i.e. with its necessarily preservative focus and with no evidence showing how an investigation will or is likely to assist in preservation efforts.

[97] The spotlight shifts then to whether a stand-alone investigative receivership is possible and, if so, warranted here, under one or more of the Judicature Act or other provincial statutes.

[98] At paragraph 76 of its brief, NBC argued that the arguments raised in support of a s. 47 interim receiver addressing the risk of the lender's security deteriorating, the need to stabilize and preserve the debtor's business, and the loss of confidence in the debtors' management, apply equally in support of a "just or convenient" receiver under s. 13 of the Judicature Act.

[99] In answer I make the same arguments as above on those aspects.

[100] NBC provided a more detailed argument on a fourth aspect, namely, "positions and interests of other creditors." At para 78 it argued (in part):

> … The final factor, regarding the positions and interests of other creditors, also militates toward the appointment of [an] Interim Receiver in this case, as (i) it appears that there is **likely an overdraft position in the Compeer Accounts**, and **Compeer will likely benefit from the completion of an investigation of the Impugned Transactions**; (ii) the appointment of [an] Interim Receiver will **permit the Sunterra Group to continue operations** with minimal impact on third-party creditors and stakeholders; (iii) there may be **other financial institutions or parties impacted by the Impugned Transactions and who will benefit from identification of the claims against Sunterra Group** arising form the Kiting Scheme and the Impugned Transactions; and (iv) the funding of [an] Interim Receiver, by [NBC], by way of the [proposed] Interim Receiver's Borrowing Charge, will **ensure the preservation of the Sunterra Group's property and business** while investigations are ongoing.

[101] At the hearing on March 20, Compeer's Canadian counsel advised that Compeer supports NBC's application for an interim receiver and (presumably) for an investigative receiver.

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[102] However, Compeer did not provide any evidence at the hearing i.e. other than for the purpose of showing (as noted above) that it has commenced certain proceedings against some of the defendants in the US. Meaning no evidence from Compeer about its dealings with the defendants or any of them or anything else from which I might gauge how Compeer might benefit from the proposed receivership here.

[103] Neither did it bring its own application for a receiver or jointly apply with NBC.

[104] I do not find that providing a possible albeit unspecified benefit to a third party possibly involved (albeit with no details), is a sufficiently compelling reason for an investigative receiver or even a material consideration when gauging whether one should be appointed.

[105] Particularly with no evidence on whether whatever benefits might be achieved for Compeer are not achievable otherwise and, if achievable otherwise, evidence allowing an assessment of the comparative advantages and disadvantages of proceeding receiver-wise versus otherwise.

[106] Still less so concerning asserted (but unspecified) benefits for unidentified third parties ("other financial institutions or parties impacted").

[107] As for the proposed receivership being the sole means by which the defendants (or some of them) can continuing operating i.e. via the funding contemplated by the proposed receivership order, that ignores the possibility of the defendants attracting replacement financing during the current hold period (at least concerning the Farmers) and any extended stay period that might be triggered the FDMA or by other proceedings taken by the group (or some members) under the BIA or other restructuring statute.

[108] Concerning "preservation and accessibility of relevant records", NBC presented no evidence showing any risk of destruction of records.

[109] Concerning the asserted necessity of an investigative receivership to obtaining information from Compeer or other third-party financial institutions, NBC did not show that it can only obtain such information via receivership of the defendants. For instance, it provided no evidence of having requested information from Compeer or of any response from Compeer and, if negative, the reason(s) for it declining or being unable to provide the information.

[110] NBC also alluded to the possibility of obtaining the (or some of the) information "by court order" (see para 84(e)), but did not explain further.

[111] NBC stated (paragraph 79(c)): "Any investigatory, preservatory and administrative actions can be completed by the Interim Receiver more simply and cost effectively than any available means." But characterized the IR route as simpler and more cost-effective, it did not identify the comparables and how and why the IR route is better, other than a statement (at para 86) that "[NBC] is [not] seeking any sort of freezing order or similar relief (such as a Mareva injunction)" i.e. without any further discussion.

[112] In ***Akagi s Synergy Group (2000) Inc***, 2015 ONCA 368, the Ontario Court of Appeal explored the "investigative receiver" concept, surveying the Ontario law to that point. It identified the following common factors in the cases appointing such a receiver:

> Some consistent themes emerge from these authorities:

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- **The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery**: *Loblaw Brands*, at paras. 10, 14 and 16.
- The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric* (Div. Ct.), at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, *supra*, at para. 75.
- Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see, *e.g.*, *Loblaw Brands*, at para. 17; *Century Services*.
- Finally, in all cases the investigative receivership must be **carefully tailored to what is required to assist in the recovery of the claimant's judgment** while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends. [para 90] emphasis added]

[113] As already discussed, I do not find sufficient evidence of “a risk to [NBC’s] right to recover” its claims against the defendants or that it otherwise requires “assist[ance] in the recovery” of those claims.

[114] NBC did not offer any detailed submissions on seeking a receiver under any other provincial statute e.g. the *Personal Property Security Act* or the *Business Corporations Act*.

V. Conclusion

[115] NBC has not shown that an interim receiver under s. 47 BIA is warranted in the present circumstances or, at least concerning the Farmers, that appointing such a receiver is possible in the face of the current FMDA hold period.

[116] And same for a provincial-statute-anchored receivership aimed at preservation of rights.

[117] It has also not shown that an investigative receivership is possible under s. 47 BIA (at least where no evidence shows how the proposed investigation(s) would aid in preservation efforts) or is warranted under the Judicature Act or any other provincial statute in the current circumstances.

[118] Accordingly, I dismiss NBC’s application for the appointment of an interim receiver under s. 47 BIA or, alternatively, an equivalent receiver under any applicable provincial statute, or alternatively, an investigative receiver under the BIA or any applicable provincial statute.

[119] The defendants are entitled to costs on a scale (e.g. Schedule C or otherwise) and quantum to be determined.

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[120] The defendants' costs submissions, via maximum 3-page letter (excluding attachments), are due by close of business on Thursday, April 10, 2025, with NBC's due (same rules) by close of business on Thursday, April 17, 2025.

[121] I thank counsel on both sides for their helpful written and oral submissions.

Heard on the **20th** day of March, 2025.
Dated at the City of Calgary, Alberta this 24th day of March, 2025.

M.J. Lema
J.C.K.B.A.

Appearances:

Sean Collins, K.C., Pantelis Kyriakakis, Nathan Stewart and Samantha Arbor
McCarthy Tetrault LLP
for the Plaintiff National Bank of Canada

David W. Mann, K.C. and Scott Chimuk
Blue Rock Law LLP
for the Respondents (Sunterra Group)

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *XY, LLC v. Zhu,*
2013 BCCA 352

Date: 20130726
Dockets: CA039816; CA038917; CA038918; CA039822

Docket: CA039816

Between:

XY, LLC

Respondent
(Plaintiff)

And

Jesse Jia-Bei Zhu

Appellant
(Defendant)

And

JingJing Genetic Inc. (formerly IND Lifetech Inc.), Shu Xi Wang, Selen Zhou, Jin Tang

Respondents
(Defendants)

- and -

Docket: CA039817

Between:

XY, LLC (formerly XY, Inc.)

Respondent
(Plaintiff)

And

Selen Zhou

Appellant
(Defendant)

And

Jesse Jia-Bei Zhu, Jin Tang, and JingJing Genetic Inc. (formerly IND Lifetech Inc.)

Respondents
(Defendants)

2013 BCCA 352 (CanLII)

- and -

Docket: CA039818

Between:

XY, LLC

Respondent
(Plaintiff)

And

Jin Tang

Appellant
(Defendant)

- and -

Docket: CA039822

Between:

XY, LLC

Appellant
(Plaintiff)

And

International Newtech Development Incorporated, IND Lifetech Group Ltd., IND Lifetech (U.S.A.) Incorporated, IND Lifetech (USA) Inc., IND Lifetech (Qingdao) Co. Ltd., IND Lifetech (Zouping) Co. Ltd., IND Lifetech (Beijing) Co. Ltd., also known as Beijing IND Embryontech Co. Ltd., IND Lifetech Co. Ltd., IND Embryontech Inc., Shanghai JingJing Biotech Co. Ltd., formerly known as JingJing Genetic (Shanghai) Ltd., IND Lifetech, Inc., now known as JingJing Genetic Inc., Jesse Zhu, Selen Zhou and JinTang

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice D. Smith

On Appeal from the Supreme Court of British Columbia, March 2, 2012
(*XY, Inc. v. International Newtech Development Incorporated,* 2012 BCSC 319, Vancouver Registry, Docket Number S076862.)

2013 BCCA 352 (CanLII)

Counsel for the Appellant, Jesse Jai-Bei Zhu (CA039816) and for the Appellants International Newtech Development Incorporated, *et al.* (CA039822):	R.N. McFee, Q.C. M.D. Shirreff
Counsel for the Appellant, Selen Zhou (CA039817):	J.J. Hunter, Q.C. G. van Ert
Counsel for the Appellant, Jin Tang (CA039818):	S.K. Gudmundseth A.S. Dosangh
Counsel for the Appellant, XY, LLC in CA039822 and Respondent XY, LLC in CA039816, CA038917 and CA039818:	C.S. Wilson G. Bowman
Place and Dates of Hearing:	Vancouver, British Columbia May 15, 16, & 17, 2013
Place and Date of Judgment:	Vancouver, British Columbia July 26, 2013

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice D. Smith

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Summary:

Plaintiff XY entered into technology licensing agreement in favour of defendant "JingJing", a member of a group of corporations known as the "IND Group". The Agreement required that JingJing pay a royalty based on its revenues from its use of the technology, and contained various provisions to protect the confidentiality of the technology. The Court below found that JingJing breached the terms of the contract and committed the tort of deceit by falsifying its records and thus substantially underpaid the royalties it owed to XY. The controlling shareholder of JingJing, Mr. Zhu, and two employees of JingJing were also found to have committed the tort of deceit and were jointly and severally liable with JingJing for the payment of damages exceeding $8 million. These damages represented the difference between the royalties that would have been paid had JingJing properly recorded its revenues, and the amount it had actually paid. This represented the contract measure of damages, although in this case, the Court of Appeal said, damages for the tort of deceit would likely have been the same or nearly the same amount.

The trial judge declined to extend liability to other members of the IND Group of corporations, declining to pierce the corporate veil on the "group enterprise theory". He also dismissed the plaintiff's claim of unjust enrichment against the IND corporations. The Court granted a permanent injunction enjoining the future use of XY's technology by the defendants.

By the time of trial, JingJin had declared bankruptcy. The defendants other than JingJing appealed.

Appeal Allowed to limited extent of amending the terms of the permanent injunction and ordering a retrial of XY's claim of unjust enrichment against the IND defendants. The trial judge had not made findings regarding this claim and the plaintiffs' allegations were such as to require that such findings be made.

In all other respects, the appeals were dismissed. The trial judge had not erred in finding that the plaintiff had proven the tort of deceit, including the causation element that requires that the plaintiff have relied on the representor's statements to its detriment.

Even if causation for purposes of the tort of deceit had not been proven, the tort of civil conspiracy among JingJing and the three personal defendants had been proven. The trial judge had not erred in extending liability to the three personal defendants, who were not shielded by the corporate vehicle from liability for their active participation in deceiving XY.

The trial judge had not erred in declining to pierce the corporate veil of the IND corporations but as mentioned earlier, had erred in failing to make findings of fact with respect to the claim of unjust enrichment against them.

Reasons for Judgment of the Honourable Madam Justice Newbury:

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[1] This matter consists of three appeals and a cross appeal. They arise in the context of a technology licensing agreement between the plaintiff XY, LLC ("XY") as licensor and one of the defendants, JingJing Genetic Inc. ("JingJing"), as licensee. The technology makes it possible to separate X and Y chromosomes in (*inter alia*) bovine spermatozoa, thus permitting the production of calves of a desired sex. The trial judge, Mr. Justice Kelleher, found that JingJing had provided XY with false reports concerning revenues it received from its use of the technology, underpaid the royalties it owed to XY, concealed documents from XY, and violated in several ways the confidentiality provisions in the agreement. JingJing was found liable for breach of contract and the tort of deceit. The award of damages of some $8.6 million against JingJing is not challenged by the plaintiffs; but since the corporation is now bankrupt, the judgment is presumably a dry one.

[2] Three of the appeals are brought by individual defendants (the "Personal Defendants") who were employed by JingJing (and by other members of its corporate "group"). The trial judge found that these defendants had committed the torts of deceit and civil conspiracy and awarded the damages jointly and severally against them as well as against their employer. Ms. Jin Tang and Ms. Selen Zhou argue on appeal that they should not have been found liable for JingJing's fraudulent conduct and were simply "following orders". Mr. Jesse Zhu, who was the controlling shareholder of the "IND Group" of corporations and who was clearly the controlling mind of JingJing, cannot make that argument; but he contends the trial judge was wrong to find JingJing had committed the tort of deceit and hence to find that he was a joint tortfeasor with JingJing, or that he committed the tort of civil conspiracy. In his submission, there was no proof that XY had changed its position in reliance on JingJing's misstatements; thus the causation element of the torts was lacking. Finally, Mr. Zhu contends that the trial judge erred in his calculation of the damage

award, and challenges as overly broad the terms of a permanent injunction granted against JingJing, the Personal Defendants and "all those over whom they exercise control", in respect of the future use of XY's technology.

[3] The plaintiff cross appeals on the basis that other members of the IND Group should also have been found liable with JingJing for the damages suffered by XY. The plaintiff says that like the Personal Defendants, those corporations were joint tortfeasors with JingJing; and that in the alternative they constituted a "common interest entity", so that their individual corporate personalities should be notionally "collapsed" into one with JingJing.

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Factual Background

The Parties

[4] The trial of these actions occupied 29 days and the facts of the case were described by the trial judge in long and detailed reasons: see 2012 BCSC 319. I do not intend to try to rehearse them here except as is necessary to explain and determine the points raised on appeal. I begin by attaching as the first schedule to these reasons a copy of the IND corporate "chart" which represents the lines of ownership and control among JingJing and the other IND companies. With one or two exceptions, the chart was in effect at all material times until January 2008. In that month, all the shares of JingJing were transferred to two persons in China, one a friend of Mr. Zhu and the other his brother-in-law. As the trial judge observed, this transaction lacked commercial reality and Mr. Zhu admitted that it had been intended to avoid liability in this proceeding. (Paras. 15 and 118-21.)

[5] As the chart indicates, Mr. Zhu at all material times controlled International Newtech Development Inc., ("International Newtech") which in turn controlled JingJing and various other "IND" companies comprising the IND Group. It is worth noting that Excel Advance International Ltd. ("Excel") acquired IND Lifetech Group Ltd. ("IND Cayman") from International Newtech in July 2007. The shares of IND

Cayman were later sold to IND DairyTech Ltd., a publicly listed corporation, but Mr. Zhu continued to have effective control through other controlled corporations.

[6] The trial judge described the Personal Defendants and their positions in the IND Group as follows:

> The defendant Jesse Jia-Bei Zhu was born in China, and now lives in British Columbia. He is a Canadian citizen. He did his bachelors and masters degrees in China, and originally came to Canada as part of his Ph.D. studies.
>
> The defendant Richard Remillard is a veterinarian. Mr. Zhu hired him in 2001 as vice president of JingJing. He became president of JingJing in 2003.
>
> The plaintiff discontinued this action against Dr. Remillard as a result of a settlement agreement between them in April 2008.
>
> Under the terms of the agreement, Dr. Remillard agreed to deliver a "comprehensive, true affidavit in response to Interrogatories to be delivered by counsel for the Plaintiff to use in the Proceedings".
>
> The defendant Selen Zhou is the financial manager for IND Embryontech Inc. She did financial management for International Newtech and, until its bankruptcy, JingJing. She also did accounting work for IND (California) and IND (Pennsylvania). She, along with Jesse Zhu, Dr. Remillard and Tang Jin, were the management team of JingJing.
>
> The defendant Tang Jin was the lab manager for International Newtech. She was in charge of embryo production and, later, semen production. [Paras. 28-33.]

[7] The plaintiff XY was founded by the Colorado State University Foundation and Cytomation Inc. Until June 2007, Dr. Mervyn Jacobsen was its majority shareholder; since then, it has been controlled by Inguran, LLC, which carries on business as "Sexing Technologies".

The Technology

[8] The technology which was the subject of the Commercial License Agreement ("CLA") between XY and JingJing was described as follows by the trial judge:

> The plaintiff XY Inc. ("XY") owns technology (and the intellectual property rights associated with the technology) that permits the separation of X (female) and Y (male) chromosomes from bovine spermatozoa. This valuable technology is used as a means of producing calves of a desired sex.
>
> The chromosomes are separated using a cytometer, a device that counts cells. The cytometers that are adapted for this purpose are called SX

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> cytometers. These cytometers are manufactured by DakoCytomation Inc., which has a cross-licensing agreement with XY.
>
> …
>
> Thomas Gilligan is a long-time employee of XY and was XY's general manager at the time of the formation of the CLA with JingJing. He served as general manager of XY from 2002 to 2010. He is currently employed by ST [Sexing Technologies].
>
> Mr. Gilligan testified that flow cytometry began some 30 years ago. Scientists in the Silicon Valley studying DNA were doing flow cytometry studies on sperm and realized that X and Y chromosomes could be identified. The United States Department of Agriculture ("USDA") used this knowledge and developed a way of keeping the sperm alive through a sorting process. The USDA acquired a patent and made various improvements to the process.
>
> The first commercial use of this technology was by Mastercalf, a company in the United Kingdom. Mastercalf acquired a license from the USDA to use sorted sperm to create embryos through *in vitro* fertilization or "IVF". IVF is a process of having sperm fertilize oocytes obtained from cows in a fluid medium.
>
> According to Mr. Gilligan, the sorter used by Mastercalf was not fast enough to make the process commercially viable.
>
> The next developments were two. First, Colorado State University developed a way to work with more manageable numbers of sperm. Second, a company called Cytomation, Inc., later called DakoCytomation, developed a much faster sorter.
>
> In 1996, XY was formed by the Colorado State University Research Foundation and Cytomation, Inc. Its purpose was to bring this new technology to the marketplace. The first licensee of XY was a company called Cogent in the United Kingdom. Then, XY purchased Mastercalf so XY controlled both "exclusive licenses" that had been issued by the USDA. [At paras. 1-2 and 50-5.]

(Evidently, XY owns or has applied for patents around the world in respect of the technology.)

[9] In 1998, Mr. Zhu had established a research laboratory in Canada to carry out the in vitro fertilization ("IVF") of bovine embryos for the Chinese market using Canadian sires. (Para. 56.) In 2003, he, Dr. Remillard and Jin Tang met with XY's CEO, Dr. Jacobsen, to discuss the idea of exporting sexed IVF embryos. The embryos would be exported to China to supply farms that would buy directly from JingJing. After some delays, JingJing and XY agreed on terms that were set out in a

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letter dated December 26, 2003, and began working towards a more complete arrangement.

[10] Progress was delayed by the outbreak of mad cow disease in North America and by China's imposition of a ban on the importation of Canadian embryos. On February 6, 2004, however, XY and JingJing formally entered into the CLA. In general terms, XY agreed to permit JingJing to use its technology during the currency of the Agreement in return for a royalty based on the number of 'sexed' embryos JingJing sold in China, and granted JingJing options to manufacture "AI" (artificial insemination) "straws" containing cattle sperm for sale in China. In return for these licences, JingJing agreed to pay XY an initial fee plus a royalty on gross receipts received from the use or sale of licensed products. It is perhaps unnecessary to add that the CLA contained strict covenants on the part of JingJing designed to preserve the confidentiality of XY's technology.

[11] JingJing had to meet certain specified standards before the business terms of the CLA came fully into effect, but after some further amendments to the Agreement (see para. 74 of the reasons) and after purchasing two SX cytometers, JingJing achieved "commercialization" in October 2005.

[12] The relationship between the contracting parties was marred by dishonesty on the part of JingJing from the very beginning. The trial judge described at paras. 75-7 and 250, for example, an attempt by JingJing to amend the royalty provisions in the Agreement without XY's consent and in full knowledge that it had not agreed to the amendment. Dr. Jacobsen noticed the change and warned Dr. Remillard that he did not "do business that way". (Para. 76.)

[13] Evidently, JingJing was not deterred. It proceeded to violate various terms of the CLA, beginning with its entering into contract-sorting agreements with certain parties in August 2006, conduct that was prohibited by the CLA. (Para. 80.) XY expressed its objections, but JingJing proceeded to breach the Agreement in other ways – by selling sexed semen (not permitted by the terms of the CLA) and representing to XY that it was not doing so; by materially underreporting its embryo

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production (carried out partly through a veterinary clinic in Abbotsford, British Columbia and partly through other IND subsidiaries in Quebec and the United States) and selling in China; by taking steps to challenge XY's patents in China (prohibited under the CLA); and by attempting to sell SX cytometers to unauthorized parties in China. JingJing lied about or covered up these breaches through the production of false reports to XY which Ms. Zhou and Ms. Tang helped to prepare.

[14] Finally, on October 12, 2007, XY commenced its action in British Columbia against JingJing. It obtained an *ex parte* interim injunction restraining JingJing from transferring, selling, licensing, disclosing or in any way disposing of the cytometers or the confidential information that was the subject of the CLA. (See 2007 BCSC 1666.) Later, other claims and counterclaims were filed by and against other parties, and in August 2008, XY filed its consolidated statement of claim, alleging breach of contract, breach of confidence, deceit, conspiracy, inducing breach of contract, unlawful interference with economic relations, and unjust enrichment against the defendants herein.

[15] There were further dealings between the parties, but XY ultimately terminated the CLA in November 2008. (Para. 141.) In the lead-up to trial, all the counterclaims were either dismissed or withdrawn; and six weeks before the trial date, JingJing filed for bankruptcy.

Material Findings

[16] The trial judge made the following findings that are material to these appeals:

- Notwithstanding their arguments to the contrary, the defendants had been given notice of the "live issues at trial via the originating documents" and had not been "prejudiced [in the course of the litigation] in giving their side of the story." (Para. 174.)

- The evidence of each of Jesse Zhu, Jin Tang, and Selen Zhou was largely unsatisfactory and was contradicted by the plaintiff's evidence,

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including various emails to which the Personal Defendants were party. (Paras. 175-81.)

- JingJing was in an "obvious and substantial breach of contract". Its breaches took the following forms:
  - failure to keep accurate records in accordance with article 3.3 of the CLA;
  - failure to produce accurate records in accordance with article 3.4;
  - failure to report production to XY on a monthly basis in accordance with article 3.1.4;
  - failure to pay royalties monthly in accordance with articles 3.1.1 and 3.1.4;
  - failure to not sub-license the use of XY's technology in accordance with article 2.6;
  - failure to disclose and assign developments made with third parties using XY's technology in accordance with articles 6.2.2 and 6.2.3;
  - failure to maintain the confidentiality of XY's confidential information in accordance with article 3.10. (Paras. 187-8.)
- There had been a "widespread misuse of XY's technology and information amounting to a breach of confidence." These misuses included JingJing's failure to notify XY of research and development related to the technology as required by the CLA; challenges by JingJing to XY's patent applications in China; and the creation of sorting operations in China − all contrary to the CLA. The appropriate remedy for breach of confidence, the trial judge found, would be to grant a permanent injunction. (Para. 229).
- Jesse Zhu, Selen Zhou, and Jin Tang had not induced or procured the breach of contract by JingJing and were therefore not liable for the tort of inducing breach of contract. (This tort had been pleaded but was not addressed in the plaintiff's closing submissions.) In the trial judge's words, the Personal Defendants "did not induce JingJing to breach his

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contract with XY. Rather they were carrying out JingJing's breach of contract." (Para. 235; my emphasis.)

- The Personal Defendants and JingJing were "joint tortfeasors in deceit" (para. 262) and in the alternative, were liable for the tort of conspiracy by unlawful means. (Para. 277.)

- The evidence did not establish that the tort of deceit committed by the Personal Defendants was committed "in concert with the corporate members of the IND Group (beyond JingJing), or that it was committed on their behalf." (Para. 298.)

- The trial judge assessed XY's damages at paras. 278-96 of his reasons. Since JingJing had failed to produce records that would show how many embryos it had used in China, the trial judge had to do his best to assess this quantity and to assess their fair market value before and after January 2007, when the IND Group began using sexed semen from "proven sires". The trial judge calculated XY's damages as follows:

1	IVF embryos before January 2007: 500,000 embryos x 10% of $125 f.m.v.	6,250,000
2	IVF embryos after January 2007: 100,000 embryos x 10% of $150 f.m.v. (This does not include post December 2008 – this will be referred to the Registrar)	1,500,000
3	*In vivo* embryos: 1,147 embryos x 20% of $350 f.m.v.	80,290
4	Semen production: 195,148 AI straws x $6 royalty	1,170,888
5	LESS: Royalties already paid	(20,616)
6	LESS: Summary judgment paid	(472,671)
	TOTAL:	$8,507,891

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As I understand it, this award represents the Court's best assessment of the royalties that JingJing should have paid and would have paid it had it accurately reported its revenues as required by the CLA, less the royalties it had remitted – i.e., the amount necessary to place XY in the position it would have been if JingJing had performed its obligations under the CLA.

- The trial judge declined to disregard the separate legal identity of the various IND corporations, observing that Canadian courts take a "restrained" approach to piercing corporate veils. He saw "no legal basis for the Court to disregard the juristic personhood of each individual member of the IND Group". Further, he stated:

> The plaintiff's complaint is that JingJing sold or transferred its products to IND companies which did not pay it. When JingJing became bankrupt, XY had no recourse against it.
>
> I agree with the defendants, however, that the IND group of companies are not liable. The fact that Mr. Zhu treated them as a "common interest entity" does not entitle the court to disregard their separate legal personality as corporations. The circumstances of this case and of the corporate members of the IND Group do not rise to a level where the consequences of the individual defendants' torts or those of JingJing's breach of contract should flow throughout the IND Group to its individual members.
>
> The plaintiff's contract was with JingJing. None of the corporate defendants is party to the CLA. In the absence of a piercing of the corporate veil, or a finding of tortious activity on the part of one of the corporate defendants, there is no basis for liability. [At paras. 316-18; emphasis added.]

- With respect to unjust enrichment (which was argued in XY's submissions in reply at trial), the trial judge concluded that given his findings on the other torts, it was not necessary to carry out an analysis of this doctrine. (Para. 320.) However, he also stated:

> Insofar as the claim may apply to the other corporate IND defendants which have thus far not been found

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> liable, there is a paucity of evidence showing the manner in which other members of the IND Group have been enriched. The plaintiff's loss and the lack of juristic reason for any resulting enrichment have been established but, without more, the claim in unjust enrichment against the other corporate defendants in the IND Group must fail. [At para. 321; emphasis added.]

- XY was entitled to a permanent injunction in the terms proposed by the plaintiff. Attached to these reasons as Schedule II is a copy of the relevant paragraphs of his order imposing the injunction, and Appendix A referred to therein.
- The trial judge declined to award punitive damages (para. 348), but awarded special costs against JingJing and the Personal Defendants in light of their attempts to mislead the Court during the litigation process, their untruthfulness in giving evidence at trial, and their failure to disclose documents. (Para. 361.)

Damages

[17] As mentioned, the damages award was apparently an assessment of what amount would put XY in the position it would have been in if JingJing had properly performed its obligations with respect to the payment of royalties under the CLA. This of course is the measure of damages in contract. Mr. Wilson, counsel for the plaintiff, had advised the Court that his client was prepared to limit its damage claim to lost royalties, and thus presumably to forego compensation for other losses (including the diminution in the value of the technology) which would have been more difficult and costly to prove. The injunctive relief sought by XY was intended to protect against, or minimize, such losses in future.

[18] In these circumstances, it seems to me that if one were to calculate damages on a "reliance" basis, i.e., as the measure of what amount would be necessary to place XY in the position it would have been if no misrepresentation had occurred (see *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*

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[1993] 1 S.C.R. 12, at 37), the amount would likely be the same or close to the same. As will be seen below, Canadian courts in considering tort claims that arise in the contractual context seem to be willing to assume that if no misrepresentation had occurred, the defendant would have provided accurate statements and paid the plaintiff what it owed under the contract. (See especially *3Com Corp. et al. v. Zorin International Corp*. (2006) 211 O.A.C. 222 (C.A.) at para. 57; and *Wiebe v. Gunderson* 2004 BCCA 456 at paras. 29-40.)

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The Tort of Deceit

[19] The trial judge analyzed the evidence with respect to the elements of the tort of deceit beginning at para. 237 of his reasons. Relying on *Han v. Cho* 2009 BCSC 458 and *Le Soleil Hospitality Inc. v. Louie* 2010 BCSC 1183, he stated:

> The tort of deceit, also known as civil fraud, is concerned with the intentional inducement of another person to rely upon a representation that the representor knows to be untrue. The elements that make up this tort are:
>
> (1) a false representation of fact by the defendant;
>
> (2) made with knowledge of its falsity or recklessly, ie. not caring whether it is true or not;
>
> (3) made with the intention that the plaintiff would act on it;
>
> (4) with the intention that the plaintiff would act on it; and
>
> (5) the plaintiff suffered damages. [At para. 237; emphasis added.]

[20] The judge referred to certain textbook discussions of deceit which had been cited by this court in *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Company Ltd.* 2009 BCCA 307. He noted in particular a passage from Professor G.H.L. Fridman's text, *The Law of Torts in Canada* (2nd ed., 2002):

> Before a defendant can be liable for deceit it must be established, as a matter of fact, that the plaintiff relied on the defendant's misrepresentation. Such reliance was proved to have occurred in *Dixon v. Deacon Morgan McEwan Easson* [(1993) 102 D.L.R. (4th) 1 (B.C.C.A.)] where the plaintiff purchased the shares as a result of reading the press release containing the inaccurate financial statements about the company.
>
> Although in general it is for the plaintiff to prove the requisite reliance, it would seem that once the plaintiff establishes that the defendant made a

> misrepresentation calculated to induce the plaintiff to act to his detriment and loss consistent with the plaintiff's having acted on the misrepresentation, the onus then shifts to the defendant to prove that the plaintiff did not in fact rely on the misrepresentation in issue. [At 750-1.]

[21] The judge then considered each of the elements of the tort he had listed in his para. 237, finding that the defendants JingJing, Mr. Zhu, Ms. Zhou and Ms. Tang had knowingly made false representations to XY at least until 2008; and that they had intended for XY to rely on those representations. Then, with respect to the last two elements he stated:

> *The Plaintiff's Reliance*
>
> Finally, the plaintiff did act on it. Until the true facts were discovered, the plaintiff had no way of knowing it was receiving less than what it was owed, and that it was therefore entitled to recover damages.
>
> *Damages*
>
> There is no serious issue about the fifth element of the tort of deceit: the plaintiff undoubtedly suffered damages. [Paras. 260-61; emphasis added.]

Analysis

[22] Both Mr. Hunter on behalf of Ms. Zhou and Mr. McFee on behalf of Mr. Zhu took issue with the trial judge's statement of the elements of the tort of deceit, and with his conclusion that the tort was proven in this case. First, counsel submitted that the fourth and fifth elements stated by the trial judge at his para. 237 were incorrect or incomplete: the fourth element was obviously a repetition of the third, and the final element did not capture the requirement of causation – i.e., that the plaintiff must have suffered damages as a result of its reliance on the false statement.

[23] Many authors combine the fourth and fifth elements described by the trial judge into one, so that the following four elements as stated in *Derry v. Peek* (1889) 14 App. Cas. 337 (H.L.) are generally said to be the following:

1) a false representation or statement made by the defendant,

2) the statement was knowingly false,

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3) the statement was made with the intention to deceive the plaintiff, and

4) the statement materially induced the plaintiff to act, resulting in damage.

(See also Lewis N. Klar, *Tort Law* (2nd ed. 1996) at 490 and Fridman, *supra,* at 747-55.)

[24] In Spencer Bower, Turner and Handley, *Actionable Misrepresentation* (4th ed., 2000), the authors break down the four requirements into eight in the following passage:

> An action for damages for fraudulent misrepresentation at common law was an action for deceit. The Court of Chancery exercised a concurrent jurisdiction with the Courts of Law in cases of actual fraud, and could award equitable compensation on similar, but not identical, principles, and also specific relief. In either case a representee must allege and prove:
>
> 1) a representation;
> 2) that the defendant was the representor;
> 3) that the plaintiff was a representee;
> 4) inducement;
> 5) falsity;
> 6) alteration of position;
> 7) fraud;
> 8) damage.
>
> The first six matters are common to all claims for misrepresentation … The seventh and eighth, fraud and damage, are peculiar to actions in deceit.
>
> From the earliest times it has been recognized that the concurrence of fraud and damage is essential to a claim for damages for fraudulent misrepresentation. [At §181-2; footnotes omitted; emphasis added.]

The authors also state that the representee must establish that "he was induced not just to believe [the misrepresentation] but to *alter his position* in a manner affecting his interests" (at §138). They continue:

> 140 Entry into a contract with the representor or a third person is the most common alteration of position. But there are other transactions involving economic loss, present or contingent, which the representee may be induced to undertake which constitute an alteration in position. They include unilateral

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> acts such as payments, gifts, licences and consents, condonations of matrimonial offences, forbearances, and renunciations, and acts which render the representee civilly responsible to some third person, or in breach of the criminal law, which would not have done so if the statement had been true. [Emphasis added.]

[25] Similarly, the editors of *Halsbury's Laws of England* (4th ed.) state that the representee must "establish that he was induced by [the misrepresentation], not merely to alter his mind, but to alter his position, that is to say, to effect a change in his material or temporal interests or situation." (Vol. 31 at §778; my emphasis.) The editors continue:

> There are various ways in which a representee may act on the faith of a representation so as to alter his position. He may enter into a contract either with the risk of representor himself, or with a third person, or class of persons, or the alteration of position may take the form a unilateral transaction of a binding nature, in the sense that it is not revocable except with the consent of the other party to it, such as a gift, licence or consent, a forbearance or a renunciation, or it may consist in an act, of whatever nature, the effect of which is to render the representee civilly responsible to some third person, or even to render him amenable to criminal process, if such act would not have constituted any offence at all if the statement on the faith of which he committed it had been true. Further, a person may physically alter his position by the act of using property, whether land or a chattel, in reliance on a representation … and, generally, by the doing of or abstention from anything which has a bearing on his material interests, and which he is not legally compellable to do or to abstain from. [At Vol. 31, §779; emphasis added.]

[26] The Personal Defendants rely on these textbook formulations of the tort of deceit, arguing that XY did not change its position in reliance on the false statements made to it by JingJing or any other defendant. Instead, XY simply carried on with the performance of its obligations under the contract, as it would have if JingJing's statements had been true. Thus while the plaintiff suffered damages in contract, these defendants contend it did not prove damages flowing from an act of the plaintiff carried out in reliance on JingJing's false statements.

[27] Mr. Wilson on behalf of XY emphasized that the texts uniformly cite "forbearance" as a type of alteration of position. In support, the authors cite only *Firbank's Executors v. Humphreys* (1886) 18 Q.B.D. 54 (C.A.). In *Firbank's*, a

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railway company that was indebted to a contractor purported to give him certificates for debenture stock in return for the contractor's forbearing from pressing the railway for payment and finishing the railway line. Later, when the railway was wound up, it was discovered that it had already issued the whole of its debenture stock and that the certificates given to the contractor were worthless. The contractor sued the directors of the railway company personally for the value of the debentures as if they had been validly issued.

[28] Lindley, L.J. formulated the two questions before the Court in *Firbank's* as "(1) Whether the directors are to be treated as having impliedly warranted that they, as agents of the company, had authority to issue 18,400£ debenture stock? (2) What is the measure of damages for which they are liable if they are to be so treated?" He answered the first question in the contractor's favour, even though the directors had not known they had lacked the authority to issue the debentures. With respect to the second question, Lindley L.J. wrote:

> The directors cannot be treated as having warranted the solvency of the company, and if genuine debenture stock of the company had been worthless, the measure of damages would have been nil, but in this case the company's debenture stock is and always has been worth twenty shillings in the pound. Consequently, the value of 18,400£ genuine debenture stock is the measure of the contractor's loss. That is what he agreed to take in satisfaction of a larger demand, and that is what he has lost by reason of the misrepresentation made to him. [At 62-3.]

The Court did not elaborate on forbearance or change of position generally.

[29] There appear to be only a few modern Canadian cases that address situations in which the parties entered into a contract prior to the making of the false statements. One is *Catalyst Paper, supra*. Like this case, *Catalyst Paper* involved an ongoing contract that called for regular reports and invoices, although in this instance, the payments were to be made by the plaintiff "Catalyst" to the defendant "UPE". UPE had been engaged by Catalyst to facilitate the delivery and distribution of telephone directory paper to an Australian customer. Under the contract, UPE regularly invoiced Catalyst for certain costs, but the parties were not *ad idem* as to whether UPE was entitled by the terms of the contract to "mark up" certain

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distribution costs it incurred in Australia. Catalyst assumed that UPE was passing on only its actual costs and paid UPE's invoices from time to time. When it discovered the costs had been marked up, it sued in contract, breach of fiduciary duty, unjust enrichment, and fraudulent misrepresentation.

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[30] Catalyst's claim in contract failed because, in the trial judge's words, "there was no explicit agreement at the stage of the formation of the contract that the figures used would reflect actual costs." For the same reason, the claim in unjust enrichment also failed: it "could not be said there existed no juristic reason to compute the sales price from Catalyst to UPE by discounting the specified amounts agreed on by the parties from time to time during the course of the [agreement]." (Paras. 44-5.)

[31] Catalyst succeeded, however, in its claim for deceit, both at the trial level and on appeal. In the Court of Appeal, UPE submitted that the law of fraudulent misrepresentation required proof that Catalyst had been induced to enter its contract with UPE by the misrepresentation. On this point, UPE relied on G.H.L. Fridman, *Law of Contract in Canada* (4th ed. 1999) at 309-10, where the author listed four elements of deceit, the last of which was that the victim "must have been induced by the representation to enter into the contract." Bauman J.A. (as he then was) for this court noted however that the author himself took a wider view of the "reliance element" of the tort in *The Law of Torts in Canada, supra*. [At 750-1: see above at para. 20.]

[32] In *Catalyst Paper*, the trial judge found that the defendant had intended that the plaintiff "act on the representation by not focusing on, inquiring into, or assessing the appropriateness of the amount paid to Chase [a facilitator for UPE in Australia]." (My emphasis.) The Court of Appeal's treatment of reliance was more equivocal:

> It is implicit, if not express, that the trial judge found that the false representations began with the cost information forwarded by UPE from the beginning of its relationship with Catalyst in July 1999, September 1999, November 1999, February 2000, and regularly throughout the currency of the PSA. If an actual inducement to enter into the contract is required, the false representations in the Fall of 1999, and in February 2000, so induced

> Catalyst. And it is beyond doubt, as the trial judge found, that the false representations continued to induce Catalyst to alter its position to its detriment throughout the course of the arrangement with UPE. I note particularly the costing information sent to Catalyst at regular intervals during the PSA "for its approval"; an approval obtained, again, on the basis of the false representation that UPE passed along only actual costs and that those of Chase were subsumed in the 3% commission paid to UPE.
>
> In my view, the case against UPE for fraudulent misrepresentation was overwhelming. The judge committed no reversible error of law or fact in his disposition of the matter on this basis. [At paras. 62-3; emphasis added.]

[33] The Court in *Catalyst Paper* also referred to *Kelemen v. El-Homeira*, 1999 ABCA 315, (1999) 250 A.R. 67, in which a vendor of real estate had persuaded a prospective purchaser not to seek independent advice and instead directed him to one of his colleagues. As a result, the purchaser paid an inflated price for the property. The Court stated that "The action taken by [the plaintiff] that is the basis for the tort was that he did not seek the independent advice". (Para. 15; my emphasis.) However, the plaintiff also altered his position by entering into the purchase agreement on the basis of the vendor's trickery.

[34] The decision of the Ontario Court of Appeal in *3Com Corporation v. Zorin, supra,* is also somewhat analogous. The plaintiff, "3Com", an electronics manufacturer, entered into an ongoing contract for the sale of goods to a reseller, "Zorin". Zorin represented to the plaintiff that it was reselling the goods to foreign educational institutions, which allowed Zorin to purchase at a discounted rate by claiming rebates that were then paid out by 3Com. In fact, Zorin was selling to purchasers who did not qualify for the rebates. The plaintiff eventually learned of the misrepresentation and sued successfully in deceit. The trial judge found that 3Com had "relied on Zorin's false representations in approving the transactions for … discounted prices."

[35] The Court of Appeal upheld the trial court, rejecting Zorin's argument that in tort, only actual "losses" are to be compensated. In the analysis of Weiler J.A. for the Court:

> I agree with the trial judge's rejection of the appellants' arguments. The appellants' first argument on damages overlooks the fact that, in tort law, "the

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> plaintiff is to be put in the position it would have been in had the misrepresentation not been made": see *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 37. Although not written into the contracts, a vital condition to their formation was that the appellants deliver the goods to the persons to whom, and the places where, they said they were shipping the goods. The appellants were aware that the purchase price was based on the information they provided as to educational end-user and place. The fact that we are dealing here with a diminution in profit rather than an actual loss matters not. If the appellants had provided the respondents with the true customers and places of shipment, the respondents would have been entitled to a higher price for their goods or to refuse to sell their goods at the prices they did. The appellants deprived the respondents of this choice and made a greater profit because they did so. It was not necessary, in the circumstances of this case, to introduce evidence of a specific alternative third party buyer … [At para. 57; emphasis added.]

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[36] It is clear on the facts that 3Com shipped product to Zorin from time to time (see paras. 8 and 44) on the strength of Zorin's false statements and paid the rebates claimed by a fraudulent distributor, thus "altering" not only its "mind", but also its position. As seen above, however, the Court of Appeal did not rely on these acts to satisfy the elements of reliance and causation − although it is unclear whether these elements were squarely addressed in argument. Instead the Court seemed to agree with the trial judge that by 'receiving' lower payments for its goods than what it should have received under the contract, 3Com had relied on the false statements to its detriment. As well, the Court emphasized that the plaintiff would not have entered the contract unless Zorin had obliged itself to deliver the goods to the persons to whom it said it was delivering them. On one view, then, the fact the plaintiff had (prior to the misstatements) entered the contract with the defendant constituted an act in reliance on the (later) misstatements sufficient to found the tort of deceit. If this is correct, the tort of deceit seems indistinguishable from breach of contract in cases where the deceit is part of an ongoing contractual relationship.

[37] Returning to the case at bar, counsel for the Personal Defendants argued that the trial judge had "conflated" tort and contract by awarding damages without proof that the plaintiff had relied on the misrepresentations. XY submitted in response that the defendants' position was "too categorical." In XY's submission:

> It overlooks the fundamental tort law principle that the plaintiff is to be placed in the same position as it would have been in had the tort not been committed: see *Krangle (Guardian ad litem of) v. Briscoe*, [2002] 1 S.C.R. 205, 2002 SCC 9, at para. 22; and *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at p. 962, following *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.
>
> In cases involving misrepresentations (whether negligent or fraudulent), that first principle translates into an inquiry into the position that the plaintiff would have been in had the misrepresentations not been made: see *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at p. 37.
>
> That inquiry, in turn, often reduces to a determination about the steps taken by the plaintiff in reliance upon the misrepresentation that was made. For instance, where the plaintiff was induced to enter into a transaction on the basis of the misrepresentation, the loss suffered by the plaintiff is the loss resulting from the plaintiff's participation in the transaction – in other words, the reliance measure. *BG Checo* was itself such a case; see also *Wiebe v. Gunderson*, 2004 BCCA 456, 243 D.L.R. (4th) 1 (deceit inducing plaintiff to purchase ranch).
>
> However, where the misrepresentation operates during the performance of an *existing* contractual relationship, the reliance measure may be less apposite to the assessment of damages than when the misrepresentation induces the making of the contract in the first place. This court's decision in *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Co. …* illustrates the distinction. [Emphasis added.]

[38] In addition to *Catalyst Paper*, Mr. Wilson referred us *Karas v. Rowlett* [1944] S.C.R. 1, where the Court stated:

> The *injuria* here was intended to and did bring about a fraudulent termination of the lease and loss of the business. The damages from the deceit are, therefore, the same as the consequences of a breach of the obligations from which the rights and interests of the plaintiff arose; and they are to be determined on the rules applicable to contractual defaults.
>
> It is well settled that the person who has suffered from such a wrong is entitled, so far as money can do it, to be placed in as good a position as if the contract had been performed. [At 7; emphasis added.]

See also *V.K. Mason Construction v. Bank of Nova Scotia* [1985] 1 S.C.R. 271, and this court's decision in *Wiebe v. Gunderson*, *supra*. In the latter, we noted that in cases of fraud inducing a plaintiff to enter into a contract, the trend in Canada and elsewhere is to de-emphasize one particular "measure" of damages and to:

> … strive for an award that in broad and practical terms compensates the plaintiff for all aspects of his or her loss flowing from the fraud, without being

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> overly restricted by the nature of the cause of action. The overarching question is what amount of money represents the financial loss suffered by the plaintiff as a direct result of the altercation of his or her position under the inducement of the defendant's fraudulent representations. [At para. 40.]

(See also *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* [1993] 1 S.C.R. 12, at 37-42.)

[39] It is not the measure of damages with which we are concerned at this stage, however. Rather it is the question of whether the final element of the tort of deceit was proven against the Personal Defendants − assuming for the moment they were not shielded from liability by their employment relationship with JingJing. Here, it cannot be said that as in *Catalyst Paper*, the parties' agreement was entered into in reliance on JingJing's false representations (which obviously followed the CLA in time). Nor did XY, like the plaintiffs in *Catalyst Paper* and *3Com*, make payments on the strength of the false statements. It made no conscious decision, as the plaintiff did in *Firbank's*, to forebear from enforcing its rights or to delay taking legal action. In short, it conducted itself in the same way it would have if JingJing's reports had been true. Of course, had it realized the reports were false, the plaintiff might have sued immediately, and succeeded in obtaining its judgment before JingJing declared bankruptcy. But can it be said that XY's carrying on under the contract until it discovered the fraud constituted an act of reliance on its part?

[40] To answer this question in the affirmative would be a significant step in the law of deceit. I am reluctant to take such a step on the basis of authorities in which the point was not clearly raised, expressly considered or satisfactorily analyzed. At the same time, I recognize that the law of private obligations in Canada is moving away from a stringent view of causation in tort and from a "categorical" approach to civil causes of action generally: see *BG Checo International v. B.C. Hydro and Power Authority, supra*., at 348 and 41; *Rainbow Ind. Caterers Ltd. v. C.N.R. Co.* (1998) 67 D.L.R. (4th) 348 (B.C.C.A.), at paras. 184-5; *Morrison v. Pankratz* (1995) 122 D.L.R. (4th) 352 (B.C.C.A.) at para. 45. See also the discussion by M.J. Tilbury in Two Models of Concurrent Tort/Contract Liability & Their Application to

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Remoteness and the Measure of Damages in J. Berryman, ed., *Remedies: Issues & Perspectives* (1991) at 423 *et seq.*

[41] The Supreme Court of Canada may well wish to provide guidance in this area. On balance, however, I propose to adopt the less stringent view of reliance exemplified by this court's decision in *Catalyst Paper*, by which I am bound, and to accept that in the final analysis, the object is to compensate XY for the losses it suffered by reason of JingJing's fraudulent conduct. I will therefore proceed on the basis that XY's "acceptance" of the payments made by JingJing on the basis of the false reports constituted "reliance" for purposes of the tort of deceit. At the same time, I will consider the defendants' challenges to the trial judge's findings of liability independent of deceit so that if I am wrong regarding that tort, the parties will have a complete case for purposes of any further appeal.

Joint Torts

[42] Obviously, the trial judge's finding that the Personal Defendants were joint tortfeasors with JingJing would fall if deceit on JingJing's part were not proven. Conversely, I see no error in the conclusion that if deceit was proven, the Personal Defendants "each played a part and acted in concert to deceive XY …" (at para. 258, citing *The Koursk* [1924] P. 140 (C.A.)), and were therefore jointly liable in tort. (Again, this assumes for the moment that these defendants were not shielded from liability by reason of their employment status.) If this is correct it would be unnecessary to consider the tort of civil conspiracy, which would "add nothing" and could be struck out or "merged". (See *Bank of Montreal v. Tortora* 2010 BCCA 139; *Le Soleil Hospitality Inc. v. Louie* 2011 BCCA 305.) In any event, there is very little difference apparent between being a joint tortfeasor in the sense of participating in a "concerted action between [the tortfeasors] to a common end" (see Glanville Williams, *Joint Torts and Contributory Negligence* (1951) at 1), and being a civil co-conspirator.

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Civil Conspiracy

Elements of the Tort

[43] The elements of civil conspiracy are well settled in Canada, although cases in which liability is found are rare, and the cause of the action is regarded as somewhat "anomalous". (See the seminal decision of Lord Diplock in *Lonrho Ltd. v. Shell Petroleum Co. Ltd.* [1982] A.C. 173 (H.L.).) In the leading Canadian case, *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate* [1983] 1 S.C.R. 452, Estey J. for the Court stated that the tort arises in two possible situations, namely where:

> (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. [At 471-72.]

[44] The trial judge correctly identified the second branch ("unlawful act conspiracy") as relevant to this case (para. 267) and found that an agreement had existed between Dr. Remillard and the three Personal Defendants. (Para. 270.) In this regard, he identified "concerted action pursuant to the agreement", including "falsely reporting to XY and concealing material documents." (Para. 271.) Next, having found that the Personal Defendants had perpetrated the deceit found earlier in his reasons, the trial judge found that each of them knew or ought to have known that injury to the plaintiff was likely (citing *Golden Capital Securities Ltd. v. Holmes* 2004 BCCA 565 at para. 74). Finally, he stated:

> … I find that the plaintiff suffered a financial loss as a result of the unlawful conduct by the defendants. It was deprived of the royalties to which it was entitled.
>
> For these reasons I concluded that the plaintiff has proved conspiracy on the part of Jesse Zhu, Selen Zhou and Tang Jin. [At paras. 276-7.]

He did not suggest that the amount of these damages should be different from the amount for which JingJing itself was found liable.

[45] On behalf of Mr. Zhu, Mr. McPhee submitted in this court that in considering the question of causation flowing from the alleged conspiracy, the trial judge again "conflated" the loss suffered by XY as a result of JingJing's breach of contract, with that flowing from the conduct of the three Personal Defendants. As I understand it, this argument, like that made concerning deceit, turns on the question of causation.

[46] I certainly agree that the acts of the defendants must be causally related to loss or damage to the plaintiff for purposes of establishing a civil conspiracy. As stated in *Lombardo v. Caiazzo* (2006) 211 O.A.C. 270, "A conspiracy that does not result in damages is not actionable." (Para. 16.) The fact that the plaintiff must have suffered loss as a result of the conspiracy, however, does not mean it must have changed its position or relied to its detriment on misconduct of the defendant. In *Canada Cement LaFarge,* for example, the defendants were alleged to have conspired to drive the plaintiff aggregate manufacturer out of business through marketing arrangements aimed at dividing the concrete products market in British Columbia between two of the defendants. Although the plaintiff's claim ultimately failed, no issue arose concerning the sustainability in theory of the plaintiff's claim to loss of the "benefits of a free market" as a result of the alleged conspiracy.

[47] A more recent example is *Le Soleil Hospitality Inc. v. Louie* 2010 BCSC 1183, ***aff'd*** 2011 BCCA 305, where the defendants conspired to impugn a valid settlement agreement on the basis of rights allegedly arising under non-existent agreements. There was no reliance by the plaintiffs on the false agreements, but the conspiracy was found to be made out.

[48] If the tort of deceit were not made out in the case at bar, then, it would not follow that the tort of civil conspiracy on the part of the defendants other than JingJing would also be precluded. As stated above, the causation element of this branch of conspiracy requires only that the plaintiff have suffered "actual damage" as a result of unlawful conduct directed towards the plaintiff.

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Unlawful Act

[49] There is not a great deal of case law in Canada on the meaning of "unlawful means" or "unlawful act" in the context of civil conspiracy. In 1961, in *Gagnon v. Foundation Maritime Ltd.* [1961] S.C.R. 435, the Court referred in this context to "means … [that] were prohibited, and this of itself supplies the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy …". (At 446.) More recently, the Ontario Court of Appeal considered the issue in *Agribrands Purina Canada Inc. v. Kasamekas* 2011 ONCA 460 in connection with a claim of intentional inference with economic relations. The Court referred to *Bank of Montreal v. Tortora, supra*, in which it was said at para. 47 that for conspiracy to lie, the plaintiff must show unlawful conduct by each conspirator. After considering the specific context of intentional interference cases, the Court in *Agribrands* continued:

> [R]ather 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 of the conspiracy tort.
>
> 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*. 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 & Joost Blom, *Economic Interests in Canadian Tort Law* …, the authors say this at p. 167-168:
>
> > … Examples of conspiracies involving tortious conduct include inducing breach of contract, wrongful interference with contractual rights, nuisance, intimidation, 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.
> >
> > The second category of unlawful means is conduct comprising unlawful means not actionable in itself.
> > ...

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> 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. [At paras. 36-8; emphasis added.]

(See also *Rummery v. Matthews* 2000 MBQB 67, var'd on other grounds, 2001 MBCA 32; *Lerik v. Zaferis* [1930] 1 D.L.R. 634 (B.C.C.A.); and G.H.L. Fridman, *The Law of Torts, supra,* at 769-771.)

[50] In my view, the misconduct of the Personal Defendants in this case – essentially the preparation of false records and reports sent by JingJing to XY and the breach of confidence found by the trial judge − satisfies in law the "unlawful act" requirement for these purposes.

Factual Findings

[51] I turn next to the trial judge's findings concerning the conduct of Ms. Tang and Ms. Zhou, which counsel submit should not have attracted liability either in deceit or civil conspiracy. Ms. Tang was the lab manager in charge of embryo production and later semen production. She contends that she was a "mere employee" of JingJing and was following orders when she assisted Mr. Zhu in falsifying records in preparation for reporting sales to XY. She testified, for example, that "Jesse [Zhu] and Richard [Remillard]" are my direct supervisor[s]. I would do whatever they say." Similarly, Ms. Zhou, who was JingJing's bookkeeper, testified that as far as she was concerned, Mr. Zhu was "the boss". She recalled that when she had sent an e-mail to XY reporting numbers of embryo sales that she knew to be false, Mr. Zhu told her he was not sure whether "we will use them all or not". In response to Mr. Wilson's question as to whether he had told her the numbers were being falsified because JingJing "didn't want to pay the royalty on the embryos", she stated:

> He told me that -- he asked me not to worry because he said that he and Richard will address the issue later on, and also that he told me that, for the product that we exported to China, he's not sure -- he's not sure whether he'll use all of the product or not. But that [is] what he told me.

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[52] The trial judge was not persuaded by this and similar evidence from either Ms. Zhou or Ms. Tang. In connection with the tort of deceit, he found that all three Personal Defendants "knew the information they provided to XY was false and [that] the circumstances warrant an inference that they intended for XY to be deceived by it." (Para. 247.) In his analysis:

> The basis of this conclusion rests on the factual findings regarding the meeting the four managers allegedly held[,] the documentary evidence in responses to emails and witnesses' testimony in court. Little credence can be given to Zhu, Zhou and Jin's evidence. Dr. Remillard had no reason to be untruthful. It is fair to conclude that such a meeting was held and that the managers there devised the plan to deceive XY.
>
> Following on Perell's discussion [see Paul Perell, "The Fraud Elements of Deceit and Fraudulent Misrepresentation" (1996), 18 *Advocates' Q*. 23 at 28-30] of intention in civil fraud, the following circumstances indicate liability for JingJing, Jesse Zhu, Selen Zhou and Tang Jin:
>
> - The email sent by Remillard to Zhu on Feb 18, 2004, stating that they have to be careful in selling sexed semen in China for which they had no licensing permission and to be wary of XY's inferences from the fact that they have so many SX cytometers. Remillard's statement, "I bet they have good lawyers too!" underlines the deception ;
> - The meeting held by Tang Jin, Selen Zhou, Richard Remillard, and Jesse Zhu is evidence of [an] intention to produce deceiving numbers that only appear authentic; they agreed that the "[t]otal number of embryos would equal the number of doses we use per day." As Remillard testifies, the purpose of this endeavour was "to pay less royalty fee". Based on this meeting, it can be inferred that the defendants intended to lie and deceive XY by making representations that were contrary to the facts (or made in the absence of any facts).
>
> On June 21, 2006, Selen Zhou attempted to "renegotiate" the royalty terms by unilaterally altering the CLA. Dr. Jacobson rebukes her in an email for this and makes it clear that this is not the way he does business. He further requests that Zhou respond to Thom Gilligan's email "which seeks the correct details of your past sales – for reporting, royalty and compliance purposes."
>
> From this interaction it is clear that Zhou knew what royalties JingJing was responsible for to XY – why else would she attempt to actually alter the CLA? Altering the agreement is contrary to the defendants' assertion of a mistake of fact or honest belief and is circumstantial evidence that Selen Zhou actively perpetuated the deceit on XY by forwarding information she knew was false and was related directly to the payment provisions of the CLA.
>
> On June 20, 2007, Thom Gilligan sent an email to Remillard stating that he was skeptical of JingJing's reported numbers and challenging the reduced royalty rate on "B" type embryos. XY here is again informing JingJing that it is not complying with the expectations of the CLA. Remillard then immediately informs the other three managers that "the number given to XY must

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> match...". The email on its face shows Remillard reaching out to the group to try and find a solution to a problem that affects all of their deceitful intentions.
>
> Further, the fact that Tang Jin sent an email to Remillard, Zhou and Zhu two days later (June 22, 2007), laying out just how the numbers could be massaged to fit XY's expectations indicates her participation in the actual deception. The email belies any suggestion she was simply following orders and appears as a voluntary offering of information to perpetuate the deception.
>
> The evidence establishes that Zhou knew the royalty terms of the CLA and was dissatisfied with them. She then knowingly reported false numbers; Tang volunteered information to assist in perpetuating the deception. [At paras. 248-54; emphasis added.]

[53] Later, in connection with the tort of civil conspiracy specifically, he observed:

> On the evidence before me, I am satisfied that there [was] an agreement. Dr. Remillard testified that in a meeting involving Tang Jin, Selen Zhou, Jesse Zhu and himself, they agreed what to report to XY with the purpose being to pay them the royalties to which XY was entitled [*sic*; "less than" the royalties to which XY was entitled?]:
>
> > Q During your discussion with Jesse Zhu and Tang Jin and Selen Zhou about the numbers you were going to produce – to disclose to XY – to report to XY, why did you decide to report a different number of embryos to XY than what you were actually making?
> >
> > A We had to pay less royalty fee.
>
> Even in the absence of such a meeting, there was, on all the evidence, clearly an agreement among the four principals. [At paras. 269-70.]

[54] The trial judge also considered whether it was necessary for the plaintiff to prove that each conspirator must have committed an unlawful act for the tort to be made out, as suggested in *Bank of Montreal v. Tortora, supra*; but the Court here reasoned that:

> … Chaisson [J.A.'s] final statement [in *Tortora*] cannot be applied in the manner suggested by the defendants. That case pertained to the striking of pleadings where the plaintiff did not plead specific unlawful acts carried out by one of the defendants, who allegedly participated in the conspiracy.
>
> It was put this way in *Golden Capital Securities* at para. 74:
>
> > A person who conspires with others to commit unlawful acts may be liable for the consequences even though some of the acts are instigated by a single conspirator. But a person's liability for the acts of other conspirators requires proof that the

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> person knew or should have known that such acts were a probable consequence of carrying out the common objective: *R. v. Henderson*, [1948] S.C.R. 226 at 236, [1949] 2 D.L.R. 121, as cited in *Claiborne* at 79. [At paras. 273-74.]

Applying *Golden Capital Securities*, the judge concluded:

> I have found the defendants Jesse Zhu, Tang Jin and Selen Zhou liable for deceit. Additionally, in committing those unlawful acts, I am satisfied that these defendants knew or ought to have known that injury to the plaintiff was likely. These defendants were falsely reporting production and thereby underpaying the plaintiff.
>
> Finally, I find that the plaintiff suffered a financial loss as a result of the unlawful conduct by the defendants. It was deprived of the royalties to which it was entitled.
>
> For these reasons I concluded that the plaintiff has proved conspiracy on the part of Jesse Zhu, Selen Zhou and Tang Jin. [At paras. 275-77; emphasis added.]

[55] Mr. Wilson referred us to various other references in the Court's reasons to evidence that fully supports the conclusions that the Personal Defendants were part of the "management team" of JingJing who not only acted in concert to carry out unlawful acts that would injure the plaintiff, but who assisted in planning how best to go about it. In my view, the evidence makes it impossible to say the judge erred in reaching these conclusions.

Employment Status

[56] The next issue is whether the trial judge erred in law in finding that the Personal Defendants, who were presumably acting in the course of their employment, could be personally liable for the tort of civil conspiracy (or deceit, assuming the element of reliance was proven). Put another way, does the fact that they were employees of JingJing shield them from the consequences of what would otherwise be tortious conduct?

Case Law

[57] Surprisingly, the case law concerning the liability of employees who on the orders of or at the request of their employer commit torts or other wrongful acts that

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injure a third party, is not fully developed. One of the complicating factors is that many of the cases have arisen only in the context of applications to strike out pleadings and have not been decided on the merits. Another complication is due to the fact that the employers in most of the cases are corporations. A corporation can of course act only through its agents and employees and thus it can be said in a sense that any employee who commits a tort in the course of his or her duties is acting as his or her employer's agent. For economic reasons, the injured third party usually looks to the corporation rather than the employee for recovery.

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[58] The seminal English case is *Said v. Butt* [1920] 3 KB 497, where McCardie J. reasoned as follows in connection with an action against a "servant" for inducing breach of contract on the part of his "master":

> … 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 the contract he has made, and in my view an action against the agent under *the Lumley v. Gye* [[1853] EWHC QB J73] principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract …
>
> 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. [At 505-6; emphasis added.]

However, McCardie J. added:

> Nothing that I have said today 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. [At 506; emphasis added.]

[59] The scope of these remarks has given rise to much discussion and debate in the cases. I do not propose to trace that debate here; but counsel referred us to some recent Canadian authorities that illustrate how courts have treated the so-called '*Said v. Butt* exception' to the "general rule that persons are responsible for

their own conduct." (See *ADGA Systems International Ltd. v. Valcom Ltd*. (1999) 168 D.L.R. (4th) 351 (Ont. C.A.) at para. 15.)

[60] A 1995 case illustrates courts' reluctance to extend liability to employees of corporations for their employers' wrongs, although cases of fraud or dishonesty seem always to have constituted an exception to that approach. In *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd*. (1995) 129 D.L.R. (4th) 711 (Ont. C.A.), the motions judge had struck out pleadings in an action brought against the directors of a company ("Peoples") that had issued debentures by means of a prospectus. The plaintiffs, who had purchased the debentures, claimed they had relied on certain misrepresentations in the prospectus. Importantly, they did not allege that they had placed any reliance on the actions of the directors "as a board or as individual directors", and the pleadings were silent on "significant particulars concerning the actions of the respondents as directors *simpliciter*." (At 717.) The plaintiffs took the position, however, that all the directors were "collectively responsible as joint tortfeasors" with Peoples. Thus in the words of Finlayson J.A. for the Court of Appeal, the cause of action pleaded was "predicated on personal liability arising out of the actions of Peoples." (At 720; my emphasis.) He continued:

> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. ... In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.
>
> None of the conduct alleged against the respondent directors falls within the broad categories I have outlined above. Their exposure, if there is any, is narrowly focussed on their formal decision-making in the name of Peoples. A corporation may be liable for contracts that its directors or officers have caused it to sign, or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so- called "directing mind". Considering that a corporation is an inanimate piece of legal machinery incapable of

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> thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation. In this case, there are no such allegations. [At 720-1; emphasis added.]

[61] In the result, the Court struck out the action as against certain officers of Peoples, but allowed it to proceed as against two directors and senior executives who had been "involved in making certain representations personally which were relied upon by the appellants". (At 724-5.) I emphasize the Court's reference to cases of "fraud, deceit [or] dishonesty" as an exception to the general rule enunciated at the end of the passage.

[62] In 1999, in *ADGA Systems*, the Ontario Court of Appeal was again asked to consider the "troublesome issue" of when corporate directors and employees may be liable for acts done "in pursuance of a corporate purpose". The plaintiff "ADGA" complained that a competitor, the defendant "Valcom", had "raided" the plaintiff's employees and used their names in a tender document in direct competition with ADGA's tender offer. The defendant was the successful bidder. ADGA sued Valcom for interference with economic interests, and sued a director and two employees of Valcom for their part in that tort and for inducing breaches of fiduciary duty on the part of its (the plaintiff's) employees. The lower court relied on *ScotiaMcLeod* (cited as *Montreal Trust Co. of Canada v. ScotiaMcleod Inc.* (1995) 129 D.L.R. (4th) 711) to rule that since Valcom's director and employees had not been furthering their own interests but were acting to further their employer's interests, no cause of action was sustainable against them.

[63] On appeal, Carthy J.A. for the Court rejected the proposition that employees of corporations are always protected from liability for wrongs committed, or also committed, by their employers. He formulated the question as "whether, on the assumption that the defendant Valcom committed a tort against the appellant, the sole director and employees of Valcom can be accountable for the same tort as a

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consequence of their personal involvement directed to the perceived best interests of the corporation." (Para. 8; my emphasis.) He continued:

> My first observation is that I recognize the policy concern expressed by the Divisional Court, and other General Division judges, over the proliferation of claims against officers and directors of corporations in circumstances which give the appearance of the desire for discovery or leverage in the litigation process. This is a proper concern because business cannot function efficiently if corporate officers and directors are inhibited in carrying on a corporate business because of a fear of being inappropriately swept into lawsuits, or, worse, are driven away from involvement in any respect in corporate business by the potential exposure to ill-founded litigation. That being said, it is not appropriate to extend the reasoning of *ScotiaMcLeod* beyond its intended application by reading it as protecting all conduct by officers and employees in pursuit of corporate purposes. The common law should not develop on an *ad hoc* basis to put out fires. When a policy issue arises, here from modern business realities, the courts must proceed on a principled basis to establish a framework for further development which recognizes the new realities but preserves the fundamental purpose served by that area of law … [At para. 9; emphasis added.]

[64] With respect to *Salomon v. Salomon & Co. Ltd*. [1895-9] All E.R. 33 (H.L.), the Court observed that where a plaintiff seeks to establish an "independent" cause of action against the principals of a company, *Salomon* is not engaged and the corporate veil is not threatened. The distinction between an "independent" cause of action and "looking through the corporation" had been confirmed, Carthy J.A. stated, by *Said v. Butt*. In his analysis:

> First, this [*Said v. Butt*] is not an application of *Salomon v. Salomon*. That case is not mentioned anywhere in the reasons. Second, it provides an exception to the general rule that persons are responsible for their own conduct. That exception has since gained acceptance because it assures that persons who deal with a limited company and accept the imposition of limited liability will not have available to them both a claim for breach of contract against a company and a claim for tortious conduct against the director with damages assessed on a different basis. The exception also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assumed basis that the company's best interest is to pay the damages for failure to perform. By carving out the exception for these policy reasons, the court has emphasized and left intact the general liability of any individual for personal conduct. [At para. 15; emphasis added.]

[65] Carthy J.A. added at para. 18 that:

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> The consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a *bona fide* manner to the best interests of the company, always subject to the *Said v. Butt* exception. [Emphasis added.]

As examples, he referred to *Lewis v. Boutilier* (1919) 52 D.L.R. 383 at 389 (S.C.C.); *Berger v. Willowdale A.M.C., et al*. (1983) 41 O.R. (2d) 89 at 98 (C.A.), *lve to app ref'd* May 17, 1983; *Sullivan and Sullivan Farms Ltd. v. Desrosiers et al.* (1986) 76 N.B.R. (2d) 271 (C.A.), *lve to app ref'd* June 4, 1987. In the latter case, Hoyt J.A. had reasoned:

> The question here, as I have pointed out, is not whether Mr. Sullivan was acting on behalf of or even if he "was" the company, but whether a legal barrier, here a company, can be erected between a person found to be a wrongdoer and an injured party thereby relieving the wrongdoer of his liability. In my opinion, once it is determined that a person breaches a duty owed to neighbouring landowners not to interfere with their reasonable enjoyment of their property, liability may be imposed on him and he may not escape by saying that as well as being a wrongdoer he is also a company manager or employee. [At 278; emphasis added.]

And in an earlier case of alleged fraud, *Kepic v. Tecumseh Road Builders* (1987) 18 C.C.E.L. 218 (Ont. C.A.), Brooke J.A. had stated for the Court:

> It is well established that the directors of a corporation will not be liable for inducing that corporation to breach its contract when they are performing *bona fide* their functions as corporate officers. See *Said v. Butt* … This is not the case where a director acts in a fraudulent manner: Fraudulent efforts by a director of a corporation to increase the revenue of that body cannot be said to be *bona fide* in its best interest. See generally *Einhorn v. Westmount Investments Ltd*. (1969), 69 W.W.R. 31, 6 D.L.R. (3d) 71 (Sask. Q.B.), affirmed (1970), 73 W.W.R. 161, 11 D.L.R. (3d) 509 (Sask. C.A.); *McFadden v. 481782 Ontario Ltd*. (1984), 47 O.R. (3d) 134, 5 C.C.E.L. 83, 27 B.L.R. 173, (Ont. H.C.). [At 222; emphasis added.]

This passage was approved by the Court in *ADGA.*

[66] Carthy J.A. also considered the seminal Canadian case on vicarious liability, *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* [1992] 3 S.C.R. 299. The majority there rejected the argument that generally in Canada "an employee acting in the course of his or her employment and performing the 'very essence' of his or

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her employer's contractual obligations with a customer does not owe a duty of care, whether one labels it 'independent' or otherwise, to the employer's customer." (At 407-8.) (LaForest J. in dissent also spoke in terms of "the employee's primary duty" owed to third parties who might be injured in the course of the employee's duties: see 339.) The *ADGA* Court stated in summary that:

> These Canadian authorities at the appellate level confirm clearly that employees, officers and directors will be held personally liable for tortious conduct causing physical injury, property damage, or a nuisance even when their actions are pursuant to their duties to the corporation." [At para. 26.]

[67] After referring to *Normart Management Limited v. West Hill Redevelopment Company Ltd. et al*. (1998) 37 O.R. (3d) 97 (Ont. C.A.); *Alper Development, Inc. v. Harrowston Corporation, et al.* (1998) 38 O.R. (3d) 785 (C.A.) and other authorities, Carthy J.A. concluded in *ADGA that* there was no principled basis for protecting the director and employees of Valcom from liability for their alleged conduct and that the law in this area should be permitted to develop over time in a principled way. The action against the individual defendants was allowed to proceed.

[68] Both *ScotiaMcLeod* and *ADGA* were discussed by this court in *Hildebrand v. Fox*, 2008 BCCA 434, which again concerned an application to strike pleadings under R. 19(24) of the then *Rules of Court.* The plaintiff in that case, a teacher employed by the defendant school board, alleged gross negligence on the part of the superintendent of the board, Mr. Fox, in failing to meet the standard of care owed to her in investigating a complaint against her and reporting to the board. In support of his objection that no independent cause of action lay against him, the defendant relied on various cases, including *ScotiaMcLeod*, for the proposition that employees will not be liable for acts done in the course of their employment "unless the employee commits a tortious act which demonstrates an identity or interest separate and apart from their employer." (Para. 46.) For her part, the plaintiff relied on *London Drugs* as demonstrating that an employee can be liable in negligence "alongside his or her employer".

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[69] Tysoe J.A. in *Hildebrand* reviewed *Said v. Butt* and many of the cases mentioned above, ending with *London Drugs*. He observed that there is "no clear consensus" as to the law concerning the personal liability of employees, but continued:

> The law is relatively clear that, based on *Said v. Butt*, an employee of a company which has breached a contract is not personally liable for the tort of inducing breach of contract or for another claim that is a disguised attempt to make a non-party liable on a contract. That is not the situation in this case. Based on *London Drugs* and *ADGA Systems*, it is at least arguable that the principle in *Said v. Butt* does not extend to the tort of negligence even where the negligent act or omission occurred in the performance by the employee of a contract between the employee's corporate employer and the plaintiff. [At para. 70; emphasis added.]

The Court held that it was not plain and obvious the pleadings failed to disclose a cause of action against Mr. Fox "on the ground that it fails to demonstrate that he had an identity or interest separate and apart from [that of] the Board." (Para. 71.)

[70] Finally in this line of authorities, we were referred to *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.* 2010 BCCA 329. The Court in that instance addressed several questions, including whether the chambers judge below had erred in dismissing an application to join certain persons as defendants in a larger action involving a "leaky condo". Neilson J.A. referred *inter alia* to *London Drugs, Said v. Butt, ScotiaMcLeod*, *Hildebrand*, and a decision of the British Columbia Supreme Court, *Strata Plan LMS 2262 v. Stoneman Developments Ltd.,* 2004 BCSC 828, 39 C.L.R. (3d) 127. In *Stoneman*, Garson J. (as she then was) had suggested that a "dichotomy" existed in British Columbia between authorities which hold that "an employee is not personally liable unless his actions are themselves tortious and exhibit a separate identity or interest from that of the company", and others to the effect that "an independent tort is not required, and that an employee or director may be sued personally if his actions are tortious or exhibit a separate identity or interest from that of the company." (Para. 87; my emphasis.)

[71] Neilson J.A. in *Neilson* disagreed that such a dichotomy existed (see para. 69) and found it was not plain and obvious that claims in negligence against the

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individual respondents personally would be excluded under the "*Said v. Butt* exception to the general principle outlined in *London Drugs".* In her analysis:

> The fact that a director, officer or employee was acting within the course of employment and the corporation is vicariously liable for his negligence does not preclude a claim in negligence against the employee personally. However, in my view, the *London Drugs* principle requires that the claim against the individual must be based on the breach of a duty of care that would support an action against the individual personally. The material facts that support that personal claim in tort must be specifically pleaded to establish a possible cause of action under R. 15(5)(a)(iii). [At para. 66; emphasis added.]

[72] It does not appear that the foregoing authorities were cited to the trial judge in the case at bar. He referred only to a passage from Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (2009), where the authors stated:

> A fraudulent employee or agent is, of course, liable jointly with the employer or principal, irrespective of whether the fraud was done at the behest and for the benefit of the latter. [At 76.]

Curiously, the two cases cited by the authors (and mentioned by the trial judge at para. 256 of his reasons) are of little assistance on the question of employees' liability, given that they did not differentiate between defendant employees and defendant employers.

[73] Nevertheless, it appears to be the law in Canada that as long as tortious conduct on the part of an employee or agent of a corporation (or any other employer) is properly pleaded and proven as an "independent" tort by the employee or agent, the wrongdoer can be held personally liable notwithstanding that he or she may have been acting in the best interests of (and at the behest of) the employer or principal. I see no reason in principle or policy why such liability should be restricted to cases involving physical damage (as *Said v. Butt* may have suggested in 1920), or to claims in negligence (as referred to in *London Drugs, Hildebrand* and *Neilson.*) Certainly the Ontario Court of Appeal did not so restrict it in *ADGA.* (See also *Hogarth v. Rocky Mountain Slate Inc.* 2013 ABCA 57 at para. 103; *Schembri v. Way* 2012 ONCA 620 at para. 30; *Correia v. Canac Kitchens*, 2008 ONCA 506 at paras.

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86-8; and *Unisys Canada Inc. v. York Three Associates Inc.* (2001) 150 O.A.C. 49 (Ont. C.A.) at para. 11.)

[74] In any event it is clear that fraud or fraudulent conduct has historically fallen into an established category in which personal liability has been imposed on agents and employees. It is sufficient in the case at bar to rely on this exception, although the acts of the Personal Defendants were properly pleaded as amounting to civil conspiracy and in this sense constituted a tort that was independent of that alleged against JingJing.

[75] In the result, it cannot in my view be said that the claims of deceit or civil conspiracy were not available to XY against the Personal Defendants as a matter of law merely because they were employees of JingJing and acting in the course of their duties to further the objectives of JingJing.

"Following Orders" Defence?

[76] Counsel for Ms. Zhou and Ms. Tang did not frame their challenge to personal liability in terms of the *Said v. Butt* line of cases, however. Instead they argued that in carrying out the conduct complained of, they were "only following orders" and could not be expected to refuse to carry out the scheme apparently devised by their boss, Mr. Zhu. (As earlier mentioned, he was the directing mind of JingJing and the IND Group.) Counsel referred us to evidence that both Ms. Zhou and Ms. Tang were receiving modest salaries from JingJing − although Mr. Wilson also referred us to evidence that they worked for other IND companies and may have been remunerated more substantially in other ways.

[77] It is a striking fact that no case was cited to us in which the "following orders" argument was advanced, much less successfully, in a context analogous to this case. Mr. Gudmundseth referred us to a decision of the Federal Court of Australia in *Cooper v. Universal Music Australia Pty Ltd*. [2006] FCAFC 187, a copyright infringement case involving a website that contained hyperlinks to remote websites which users could use to have music transmitted directly to their computers. The

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website was hosted by "ComCen" and was owned and operated by the defendant Mr. Cooper. He was found to have "authorized" the infringement of copyright in sound recordings within the meaning of s. 101(1A) of the *Copyright Act 1968,* as was the defendant Mr. Takoushis, who supplied computing "support services".

[78] In the course of its lengthy reasons on appeal, the Court addressed the question of whether Mr. Takoushis had in law "authorized" the infringement:

> Mr Takoushis had studied information technology at TAFE before becoming an employee of Com-Cen. He gave evidence that his position within that company was essentially a computing support role. His Honour found that Mr Takoushis was Mr Cooper's primary contact with Comcen and that he provided assistance from time to time in relation to the establishment and operation of Mr Cooper's website.
>
> The evidence did not establish that Mr Takoushis had any personal power to prevent the doing of the acts of copyright infringement (s 101(1A)(a)). He was not Mr Cooper's internet service provider; he was merely an employee of the internet service provider – albeit an employee with skills in computer technology who undertook work in relation to Mr Cooper's website.
>
> Nor did the evidence establish that there was any relevant relationship between Mr Takoushis and the users of Mr Cooper's website or between Mr Takoushis and the operators of the remote websites from which sound recordings were communicated (s 101(1A)(b)). Nor did the evidence suggest that there was any reasonable step open to be taken by Mr Takoushis personally to prevent or avoid the doing of the acts of copyright infringement. While it would have been a reasonable step for Mr Takoushis' employer to have terminated its hosting of Mr Cooper's website, either absolutely or unless he removed the hyperlinks on it which facilitated copyright infringement, the evidence did not establish that Mr Takoushis had the necessary authority to do so himself (s 101(1A)(c)). I do not consider that it would have been a reasonable step for Mr Takoushis to approach his employer to compel them to do so.
>
> … Mr Takoushis was not a director of either Com-Cen or E-Talk. Nor was he shown to be an executive or shareholder of either of those companies. His evidence that his position within Com-Cen was essentially a computing support role was not challenged.
>
> In my view, the evidence before the primary judge was insufficient to establish that Mr Takoushis infringed the Record Companies' copyright by personally authorizing the relevant acts of copyright infringement.
>
> Further, for the reasons given above, the evidence before the primary judge was insufficient to demonstrate that Mr Takoushis held an executive or managerial role within either Com-Cen or E-Talk such that his involvement with their acts of copyright infringement rendered him personally liable for those acts of copyright infringement … [At paras. 69-74; emphasis added.]

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The Personal Defendants Zhou and Tang rely on this reasoning for the proposition that a person who holds a merely supportive role should not be held liable for participation in wrongs devised by and carried out by her employer.

[79] There is no doubt that the implications of holding an employee responsible for 'supporting' or 'assisting' her employer in what turns out to be fraudulent conduct, must be carefully considered. As Southin J. (as she then was) stated in *United Services Funds (Trustees of) v. Lazzell* (1988) 28 B.C.L.R. (2d) 26 (S.C.):

> One must, I think, be wary of postulating so wide a theory of assistance as to make liable, for instance, a secretary or bookkeeper who, discovering that her employer is engaged in chicanery, simply goes on doing the duties, not tortious in themselves, he or she did before. [At 89.]

I agree that the employee who simply carries on doing the job she has always done, notwithstanding that her typing or bookkeeping may assist in a fraud, should not without more be regarded as a fraudster (or conspirator) herself. (As noted by the Law Reform Commission of British Columbia in its *Report on Shared Liability* (1986) at 25-6, a person in this situation who "acts innocently or is unaware of the tortious act of another" would be entitled to indemnification from the employer.)

[80] Here, however, the trial judge found that Ms. Zhou and Ms. Tang went beyond mere bookkeeping or 'typing' lab reports at Mr. Zhu's instructions. Both defendants actively assisted in devising how best to deceive XY. Their acts were, then, "tortious in themselves" and were not part of their regular duties. As stated by Burns and Blom, *supra*, it appears the law has historically held fraudulent employees liable with their employers "irrespective of whether the fraud was done at the behest and for the benefit of the latter." As for *Cooper v. Universal Music*, I regard the reasoning relied on by the defendants as confined to the meaning of "authorized" in the Australian *Copyright Act 1968*.

[81] In the result, I would reject the "following orders" defence asserted on behalf of Ms. Tang and Ms. Zhou.

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The IND Corporate Defendants

[82] At para. 297 of his reasons, the trial judge turned to the question of whether the Personal Defendants were "together with the corporate IND defendants, jointly and severally liable" for the tort of deceit. (Obviously, this question does not arise unless JingJing was indeed liable in deceit.) The Court referred to *Osborne v. Pavlick* 2000 BCCA 120, where Southin J.A. adopted Scrutton L.J.'s description of "joint tortfeasors" in *The Koursk*, *supra*:

> The substantial question in the present case is: What is meant by "joint tortfeasors"? and one way of answering it is: "Is the cause of action against them the same?" Certain classes of persons seem clearly to be "joint tortfeasors": The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort. <u>These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another</u>. [At 155; emphasis added.]

The trial judge found that on the evidence, XY had not established that "the tort of deceit committed by the [Personal Defendants] was in concert with the corporate members of the IND Group (beyond JingJing), or that it was committed on their behalf." (Para. 298.)

[83] XY submits on its appeal that there is no basis in the evidence to differentiate the Personal Defendants' relationship with JingJing from their relationship with any other company in the IND Group. The plaintiff's factum elaborates:

> … Ms. Tang and Ms. Zhou both worked for the IND Group generally. That is the way their contracts were written; that is the way they worked; that is the way they were remunerated; and that is the way they thought of it themselves. <u>As agents or employees of all of the members of the IND Group, their joint conduct with Mr. Zhu attracts liability for the IND Group as a whole</u>. The trial judge's findings in respect of JingJing inexorably lead, on this record, to the same conclusion in respect of the remainder of the corporate group.
>
> The record well illustrates the way in which the conduct of the individual defendants engaged and involved the various companies in the IND Group. Under Ms. Tang's direction, IND Embryontech produced sexed IVF embryos in Quebec (TJ, paras. 23, 308), and IND (Pennsylvania) and IND (California) produced such embryos in their respective jurisdictions (TJ, paras. 24, 25,

> 308). In that same capacity, and working from those same labs, Ms. Tang generated the false data that Ms. Zhou eventually supplied to XY, with Mr. Zhu's approval (TJ, para. 89.)
>
> To the same effect, when JingJing purported to make an honest and comprehensive reporting in 2008, it did so using a false "embryo implant table", prepared by Ms. Tang using data generated by IND (Qingdao), describing the IND Group's embryo usage in China … That table was then relied on by Ms. Tang at trial ...
>
> JingJing itself never even possessed the documents or the data that [were] used to deceive XY in respect of IVF embryo production. That was established when, in the course of document production, JingJing was revealed not to have any such materials in its possession or control. The magnitude of the IND Group's common fraud was only revealed to XY when it obtained production from what were then called the "non-licensee defendants"− i.e., the IND Group companies other than JingJing … [Emphasis added.]

In summary, counsel submits that the Personal Defendants were not acting on behalf of JingJing alone when they perpetrated their fraud, but that Ms. Tang in particular:

> … used her employment relationships (*qua* lab manager) with all of those companies to falsify their records and contrive the numbers that were at the core of the false reporting that, in the language of Scrutton L.J. [in *The Koursk*] was the subject of her "common action" with JingJing and the other individuals … In this way, the [Personal Defendants] were the human nexus that bound the IND Group together, and enabled the companies' common fraud. [Emphasis added.]

[84] The argument, then, is that because Ms. Tang and Ms. Zhou worked for some, if not all, of the corporate defendants, they must be taken to have falsified the reports required to be made to XY under the CLA, in their capacity as employees of those other corporations. The fact remains, however, that it was in the course of their duties as employees of JingJing that Ms. Tang and Ms. Zhou conspired to injure XY by means of the falsified documents. Only JingJing was a party to the CLA, and only JingJing was required to report its revenues from the use of the technology. The fact Ms. Tang and Ms. Zhou may have used some IND facilities does not amount to proof that they were acting on behalf of or for the benefit of the other corporations. In my view, the trial judge correctly rejected this theory of 'infective liability' advanced by XY.

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[85] In the alternative, XY submits that the trial judge should have "collapsed" the separate legal personalities of the IND corporations into one (presumably JingJing) and should have treated its conduct as that of the IND Group as a whole. It is said the trial judge erred in applying "the wrong test" in rejecting this "group enterprise" submission.

[86] The law concerning both the lifting of a corporate veil in a simple 'Salomon' situation, and disregarding the separate personality of a group of related corporations is highly fact-dependent and does not admit of any clear test or rules. As Professor McGuinness observes in *Canadian Business Corporations Law* (2nd ed., 2005), it is difficult to make out any general principle followed by the courts in handling such cases. (At 49.) The trial judge referred to *Smith, Stone & Knight Ltd. v. Birmingham Corp.* [1939] 4 All E.R. 116 (C.A.), a case about the lifting of the corporate veil of a subsidiary to implicate its parent company. Atkinson J. there acknowledged that notwithstanding the separate legal personality of a corporation, there "may be such an arrangement between the shareholders and a company as will constitute the company the shareholders' agent for the purpose of carrying on the business and make the business the business of the shareholders." He continued:

> It seems therefore to be a question of fact in each case, and those cases indicate that the question is whether the subsidiary was carrying on the business as the company's business or as its own. I have looked at a number of cases – they are all revenue cases – to see what the courts regarded as of importance for determining that question … and I find six points which were deemed relevant for the determination of the question: Who was really carrying on the business? … The first point was: were the profits treated as the profits of the company? … [S]econdly, were the persons conducting the business appointed by the parent company? Thirdly, was the company the head and the brain of the trading venture? Fourthly, did the company govern the adventure, decide what should be done and what capital should be embarked on the venture? Fifthly, did the company make the profits by its skill and direction? Sixthly, was the company in effectual and constant control? … and it seems to me that every one of those questions must be answered in favour of the claimants. [At 121.]

[87] I do not read the trial judge in the case at bar as having applied these (or any other) "tests". To the contrary, he said he was unable to answer them with any

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certainty: para. 314. He also noted the discussion of *Smith, Stone* in *Alberta Gas Ethylene Co. v. Canada* (1988) 24 F.T.R. 309 (F.C.T.D.), at 313-14, where the Court took a "restrained" view of Atkinson J.'s comments. See also *Bow Valley Husky (Bermuda) Ltd. v. Saint John Ship Building Ltd.* (1994) 126 D.L.R. (4th) 1 (N.L.C.A.) at paras. 38-51, *var'd* [1997] 3 S.C.R. 1210; *Edgington v. Mulek Estate* 2008 BCCA 505, at paras. 19-26; and most recently, the decision of the U.K. Supreme Court in *Prest v. Petrodel Resources Ltd.* 2013 UKSC 34 at paras. 17-35 (*per* Lord Sumption JSC) and paras. 60-83 (*per* Lord Neuberger of Abbotsbury PSC). At para. 106 of *Prest* Lord Walker of Gestingthrope aptly summarized the state of the law:

> I am reluctant to add to the discussion but for my part I consider that "piercing the corporate veil" is not a doctrine at all, in the sense of a coherent principle or rule of law. It is simply a label – often, as Lord Sumption JSC observes, used indiscriminately – to describe the disparate occasions on which some rule of law produces apparent exceptions to the principle of the separate juristic personality of a body corporate reaffirmed by the House of Lords in *Salomon v. A Salomon & Co Ltd. ...* These may result from a statutory provision, or from joint liability in tort, or from the law of unjust enrichment, or from principles of equity and the law of trusts (but without any "false invocation of equity" in the phrase used by C Mitchell in the article mentioned by Lord Neuberger PSC, at para 77). They may result simply from the potency of an injunction or other court order in binding third parties who are aware of its terms. If there is a small residual category in which the metaphor operates independently no clear example has yet been identified. … [Emphasis added.]

[88] The leading decision of this court is *B.G. Preeco 1 (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989) 60 D.L.R. (4th) 30. There, Seaton J.A. rejected the conclusion that courts should lift the corporate veil wherever "fair play and good conscience" indicate − the so-called "Deep Rock doctrine". He observed that the corporate veil has been pierced in instances of "fraud or improper conduct" where the corporation "is used to effect a purpose or commit an act which the shareholder could not effect or commit", citing *Gilford Motor Co. v. Horne* [1933] Ch. 935 (C.A.). The veil had also been pierced in tax cases involving corporate groups "so as to ignore the separate legal existence of related companies", and the group enterprise theory had on occasion been extended to non-tax cases. However, Seaton J.A. observed, the House of Lords had limited those cases to their facts in *Woolfson v. Strathclyde Regional Council* [1978] S.C. (H.L.) 90 and in *Industrial Equity Ltd. v.*

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Blackburn (1977) 137 C.L.R. 567, the Australian High Court had disapproved of the idea of "treating related companies as one entity, absent some specific statutory requirement".

[89] Overall, the Court in *B.G. Preeco* was decidedly unenthusiastic about the idea of disregarding corporate personality. On the facts of *B.G. Preeco*, Seaton J.A. observed:

> … the plaintiff knew it was dealing with a company. The fraud found by the trial judge caused the plaintiff to believe that the company had assets that it, in fact, did not have. That has nothing to do with the corporate veil. The use of a company as a means of avoiding bearing business losses is neither unusual nor a basis for lifting the veil.
>
> In my view, the proper remedy is not to lift the corporate veil, but to award damages for fraud against the individuals and the company that committed the fraud. That is what the trial judge did. [At 40; emphasis added.]

[90] Counsel also referred us to the more recent case of *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996) 28 O.R. (3d) 423 (Gen. Div.). There Sharpe J. (as he then was) stated:

> As just indicated, the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently: *Aluminum Co. of Canada Ltd. v. Toronto (City)*, [1944] S.C.R. 267 at p. 271, [1944] 3 D.L.R. 609; *Bank of Montreal v. Canadian Westgrowth Ltd*. (1990), 72 Alta. R. (2d) 319 (Q.B.). …
>
> The second element relates to the nature of the conduct: is there "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights"? [At 433-4; emphasis added.]

[91] Fraud has of course been proven in this case and XY contends that there is evidence of conduct that satisfies the first element referred to in *Transamerica:* all the IND corporations are owned and/or controlled by Mr. Zhu, and he himself stated in discovery that until IND Dairy Tech Ltd. became publicly listed, "all the shareholding was in China and in Canada was controlled by me. [*Sic*.] It's an absolute common interest entity." (Para. 299.)

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[92] As the defendants contend, however, XY was not deceived by JingJing's separate legal personality *per se*. Presumably, XY dealt with JingJing in full knowledge that it was part of a larger group. XY did not insist upon receiving guarantees or other security from other members of the group as security for JingJing's performance of its obligations under the CLA. As in *BG Preeco*, JingJing's fraud had "nothing to do" with the corporate veil. Moreover, Mr. Zhu, the individual who controlled JingJing's shareholder, has of course been found personally liable for the same damages as JingJing itself. It is thus unclear to me how the application of the "group enterprise" theory would assist the plaintiff in practical terms. At the least, if all the assets of the other IND corporations were to become available to satisfy XY's judgment, existing creditors of those corporations would be affected and would have legitimate objections.

[93] XY also relies on another category of case described by the Court in *B.G. Preeco* − where the corporation is used to "effect a purpose or commit an act which the shareholder could not effect or commit." (At 38.) In XY's submission, JingJing was established for the very purpose of allowing the other members of the IND Group to obtain XY's technology without paying for it. The plaintiff points to an e-mail sent by Dr. Remillard to Mr. Zhu on April 30, 2003:

> If we setup a new company for that project, we will only pay royalty on the semen, because no embryos will be produced by that company. [Emphasis added.]

In addition, XY asserts that "notional sales" from JingJing to other members of the Group were 'papered' to bring about JingJing's insolvency, leaving those corporations with XY's technology:

> … to avoid the consequences of breaching the CLA, Mr. Zhu and the IND Group moved the property with which the CLA was concerned (i.e., sexed semen and IVF sexed embryos) into the hands of other IND Group companies, through notional sales papered after the fact without money changing hands. The effects of this were twofold. First, these notional transactions hollowed out JingJing financially. Ms. Zhou caused the "sale" of embryos to IND (Qingdao) through JingJing. This caused JingJing to accumulate debts owing to IND Embryontech (on paper, the original vendor). When IND (Qingdao) then failed to pay JingJing for the embryos, Mr. Zhu had thereby managed to contrive an artificial insolvency; JingJing could not pay

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> its debts to IND Embryontech as they become due, leading to its bankruptcy and eliminating XY's recourse against JingJing for breach of the CLA. … Second, the IND Groups shadowy internal dealings produced the "paucity of evidence" of enrichment that the trial judge found defeated XY's unjust enrichment claim against [it]. [Emphasis added.]

(Other acts of deceit, or at least involvement in some aspects of JingJing's deceit, on the part of other members of the IND Group are mentioned by the trial judge in passing at paras. 94, 95, 130, 131, 199 and 282 of his reasons.)

[94] The IND corporations submit in response that there is "no evidence" that the shareholder(s) of JingJing used the corporate vehicle to effect a purpose that it or they could not otherwise effect. Yet if the evidence supports the allegations quoted above concerning JingJing's insolvency, it might well be said the corporate vehicle had been used essentially to rob XY of its technology (not only of royalties) and to thwart its legal remedies.

[95] In these circumstances, it is unfortunate that the trial judge did not make findings of fact in response to XY's allegations on this point. It will be recalled that he stated at para. 317 only that the circumstances of this case and of the members of the IND Group did not "rise to a level where the consequences" of the torts of JingJing and the Personal Defendants or those of JingJing's breach of contract "should flow throughout the IND Group to its individual members." This was followed closely by the conclusion at para. 321 under the heading "Unjust Enrichment" that although detriment on XY's part and the absence of juristic reason had been proven, the third element – i.e., the enrichment of the IND defendants – had not.

[96] In my view, it was not by chance that the group enterprise doctrine and the claim in unjust enrichment were considered at the same point in the Court's analysis. Both would have been means by which the benefits (if any) of the fraud that were allegedly passed on to other members of the IND Group upon JingJing's bankruptcy could be pursued by the plaintiff. As suggested above, the "group enterprise" doctrine would be a highly uncertain and improbable route, and might yield nothing but expense and delay. The unjust enrichment claim, on the other hand, would have

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been a more direct means of addressing XY's complaints with respect to the use of JingJing to "front" a relationship with XY for the purpose of moving its technology to one or more of the other corporations, and with respect to the "hollowing out" of JingJing by means of paper debts to IND Embyrontech.

[97] In my respectful view it was incumbent on the trial judge to consider the evidence cited in this regard, to make findings of fact, and then to reach and explain his conclusions based thereon. While I am not persuaded he erred in declining to take the extreme step of notionally "collapsing" the separate identity of the IND defendants into one, I am driven to the conclusion that he did err as a matter of law in failing to analyze the evidence related to the claim for unjust enrichment and that that matter should be remitted to the court below for retrial as against the IND defendants. I would allow XY's appeal to the extent of revising para. 9 of the trial court's order as set out at the end of these reasons.

Injunctive Relief

[98] As mentioned earlier, the terms of the CLA required JingJing (then known as IND Lifetech, Inc.) to keep XY's technology confidential. The Agreement defined the term "Technology" as follows:

> "Technology" means any and all Proprietary Rights or confidential information, trade secrets, know-how, technical data, masks, code, programs, designs, processes, methods, operations, innovations, or inventions, whether or not patented, and any patents, patent applications, copy rights, or other intellectual property of any kind that Licensor, now or hereafter, owns, controls, licenses, or has an interest in.

and "Proprietary Rights" thus:

> "Proprietary Rights" with respect to the Technology means the collection of all Patent Rights, Trademark Rights, Trade Secret Rights, and Copyright Rights, or other rights which are or may be asserted as protectable under the laws of the United States or the laws of any foreign country.

[99] Section 3.10 of the CLA contained the central covenant regarding confidentiality and the exceptions thereto:

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> CONFIDENTIALITY: Each of the parties to this License Agreement shall maintain and hold confidential any and all information regarding the terms or condition of this License Agreement and any and all information regarding the Technology, the Proprietary Rights, or Improvements thereto of the other party during the Term of this License Agreement and thereafter, except to the extent that the information:
>
> i. is or becomes generally available to the public other than as a result of a disclosure by the recipient party;
>
> ii. becomes available to recipient party on a non-confidential basis and not in contravention of applicable law from a source other than the other party or one of its officers, directors, partners, employees, independent contractors, agents, or licensees ("Representatives") not bound by a confidential relationship with disclosing party or by a confidentiality or other similar agreement;
>
> iii. can be proven was known by recipient party on a non-confidential basis and not in contravention of applicable law or confidentiality or other similar agreement prior to disclosure to recipient party by disclosing party;
>
> iv. notwithstanding the foregoing, with respect to the Licensed Technical Information or any information marked or indicated by the disclosing party as confidential, recipient party shall maintain such information as confidential.
>
> Licensee agrees to limit access to information to employees or independent contractors who by express writing agree to confidentiality obligations including terms set out by Exhibit H (Assignment Agreement Terms) and Exhibit 1 (Nondisclosure Agreement Terms).

[100] The trial judge considered the granting of injunctive relief beginning at para. 323 of his reasons. He noted *Qureshi v. Gooch*, 2005 BCSC 1584, where the Court in turn cited the leading Canadian case, *Cadbury Schweppes Inc. v. FBI Foods Ltd*. [1999] 1 S.C.R. 142 for the proposition that in determining whether such relief is appropriate, the court considers the nature of the rights sought to be protected and the surrounding circumstances, and attempts to "balance the equities" between the parties. The Supreme Court confirmed that an action for breach of confidence is *sui generis*, a characterization said to "recognize the flexibility that has been shown by courts in the past to uphold confidentiality and in crafting remedies for its protection". (Para. 28.) Binnie J. cited with approval the observations of Deane J. in

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Moorgate Tobacco Co. v. Philip Morris Ltd. (1984) 156 C.L.R. 414 (H.C. Aust.) at 438:

> Like most heads of exclusive equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.

On the facts in *Cadbury Schweppes* itself, the Court concluded that the circumstances of the parties' dealings and the nature of the information ("nothing very special") militated against the granting of a permanent injunction, and that a monetary remedy was adequate.

[101] The trial judge in the case at bar also referred to Robert J. Sharpe, *Injunctions and Specific Performance* (looseleaf, 2010) for the proposition that an injunction will ordinarily be granted in the intellectual property context where (1) the plaintiff has a legal right in the property; (2) there is a real threat to or an actual invasion of the legal right; and (3) there is no defence of laches, delay, acquiescence or estoppel. (At para. 4.690, quoted at para. 327 of the trial judge's reasons; see also R. E. Dimock, *Intellectual Property Disputes: Resolutions and Remedies* (looseleaf, 2004) at 15.2, cited by the judge at para. 330.)

[102] The trial judge found that injunctive relief was appropriate because XY had not sought damages for the future effects of JingJing's breach of confidence. In his analysis:

> If it were denied, the defendants would be permitted to sort semen using their intimate knowledge of XY's equipment and protocols without paying royalties to XY and in competition with other licensees in China, Canada or elsewhere who do pay royalties. The injunction is an appropriate remedy, both mandatory and prohibitory.
>
> The plaintiff's mandatory injunction is sought to deliver or destroy under oath confidential information of XY which is in the hands of the defendants. The defendants have no right to possess such information and indeed do not assert they do. The injunction does no more than hold JingJing and its employees and related companies who had access to the bargain struck under the CLA. [At paras. 328-29.]

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[103] The judge rejected the defendants' argument that XY's technology was in the public domain − an argument based on an answer given by Mr. Evans in his (public) testimony at trial. This answer, the judge said, had been taken entirely out of context: Mr. Evans was not referring to the information about which he later testified, *in camera*, at trial. As well, the judge rejected Mr. Zhu's evidence that semen could be sorted by the defendants without XY's confidential information. Aside from the fact that Mr. Zhu was not found to be credible, this evidence was contrary to the "detailed and credible evidence" of Mr. Gilligan and Mr. Evans. (Para. 337.)

[104] In the result, the Court granted the injunction in the terms proposed by XY. This part of the Court's order is reproduced as Schedule II to these reasons.

[105] Mr. Zhu complains on his appeal about many detailed aspects of the injunction, but the main thrust of his argument is that the definition of "Confidential Information" contained in Appendix A encompasses information that has been made publicly available (by the publication of research or through patent applications). Thus it fails to distinguish between that information and information that is truly confidential. On this view, the trial judge was "required to examine the circumstances of XY's claim for confidentiality and [to] make an independent determination as to whether the information was truly confidential such that the Court's protection of XY's information was required indefinitely".

[106] The starting point for the relevant definition of "Confidential Information" in this case must be the terms of the CLA. As the trial judge noted at para. 204, the terms of any contract between the parties are relevant to the availability of a claim (and therefore, remedy) for breach of confidence. As seen above, s. 3.10 of the Agreement excepted information that is or becomes generally available to the public other than as a result of a disclosure by the recipient party, and information that was known by the recipient party "on a non-confidential basis and not in contravention of applicable law or confidentiality or other similar agreement prior to disclosure to

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[JingJing] by [XY]." Obviously, this would include published research and patent applications, and I did not understand XY to argue to the contrary.

[107] It is not appropriate, however, for a court to refer to all such patent applications and public research in the terms of an order. While recognizing that any injunction must be clear and enforceable, it seems to me that any question of over-breadth in this instance could have been avoided by the incorporation of the exceptions listed in s. 3.10 of the CLA quoted above. Aside from this exception, JingJing agreed to keep the technology confidential, and for its part, XY took every precaution to see that the licensee did so. As the trial judge observed, the confidentiality of the technology was also supported by the standard terms and conditions of DakoCytomation's contract with JingJing for the sale of SX cytometers. (Para. 208.)

[108] The trial judge analyzed the three different types of confidential information identified in this case, beginning at para. 209. He accepted Mr. Evan's evidence concerning the components of the SX cytometer that were confidential. Mr. Evans' *in camera* testimony confirmed that licensees are not even able to modify or add to most of the cytometer components. The Court accepted that the "protocols", or information regarding the use of the SX cytometer, given to Dr. Remillard had also been confidential. The Court continued:

> As Mr. Gilligan explained in his testimony, although much of the information contained in the report had been published, the summary prepared by XY was "the entirety of our field work up to [2003] ... [p]ublished and unpublished, which gives anybody who holds it a very good understanding of what we do or don't know so far, published or unpublished." In keeping with the principle from *Saltman Engineering* referred to in dissent by Sopinka J. in *Lac Minerals*, it is clear the people at XY had used their brains in creating XY's protocols based on published and unpublished research and experiments and had produced something that could only be produced by having gone through such a process. As such, it is clear that the information contained in the protocols was confidential and the plaintiff's evidence that the protocols were conveyed in confidence has not been undermined. [At para. 215; emphasis added.]

[109] Finally, with respect to XY's patent applications pending in China, the Court noted that applicants are normally reluctant to disclose their application information

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because it enables competitors to challenge the applications. (Para. 216.) Indeed, that is exactly what happened here: JingJing challenged XY's Chinese patent applications in breach of an express prohibition, stated to be effective during the term of the license. (Para. 224.)

[110] The terms of the injunction and specifically its definitions of "Proprietary Rights" and "Patent Rights" and "Trademark Rights" essentially track the corresponding definitions in the CLA. As already noted, they were subject to the exceptions stated in s. 3.10. The definition of "Patent Rights" becomes relevant only because "Confidential Information" is defined to include "Improvements to the Confidential Information made by the defendants"; the definition of "Improvements" contains the term "XY's Technology"; XY's Technology is defined to include "Proprietary Rights"; and that term in turn includes "Patent Rights". Following this chain, I agree with Mr. Wilson that patents and trademarks *per se* are not captured by the order; rather it is improvements "made by the defendants, including but not limited to all research and development regarding the use of sexed semen by any of the defendants internally or with the assistance of third parties such as, but not limited to, [the] Abbotsford Veterinary Clinic." In these circumstances, I do not agree with Mr. McFee's submission that the order operates to prevent the use of information that has been made public as a result of patent applications by persons other than the defendants. (Emphasis added.)

[111] Mr. Zhu also objects that the final clause (which I have labelled clause "(f)") of Appendix A to the order prevents him from using "the research and development of the defendants within the Field of Use and outside the Field of Use with respect to *in vivo* embryos and any other matters using sexed semen". The term "Field of Use" is defined broadly − too broadly, according to Mr. Zhu. In his submission, it precludes him from pursuing businesses that involve the production of embryos that are not dependent on XY's technology. The order prevents the defendants, for example, from purchasing sexed semen from another licensee of XY and then producing the resulting sexed embryos. Mr. Zhu testified that prior to the CLA, JingJing had

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engaged in such research and development without using XY's technology. (Para. 72.)

[112] XY responds that the trial judge expressly did not find this evidence persuasive. (Para. 337.) There was no evidence that Mr. Zhu had any "legitimate business" in the same field as XY that does not rely on XY's technology. Thus, it is said, "[t]here is nothing unjust about now constraining his behaviour to correspond with the bargain that first gave him access to the sexed semen technology, which he agreed was 'one of the world's most promising biotechnologies'".

[113] XY is understandably distrustful of Mr. Zhu and wants to cast its net widely so as to avoid having to re-litigate the confidentiality of its information at a later date should Mr. Zhu re-enter the business of producing embryos or otherwise using sexed semen. Nevertheless, XY's rights do not go so far as to entitle it to demand that Mr. Zhu never enter or re-enter that business. He and his companies, however, may not use or build on XY's technology to do so. It is not clear to me whether paragraph (f) was specifically referred to in argument before the trial judge, but in my respectful view, it is overly broad. I regard paragraphs (d) and (e) as sufficient to capture the defendants' future use of XY's technology, especially in light of the definition of "Improvements".

[114] I would therefore allow Mr. Zhu's appeal to the extent of deleting what I have denoted as paragraph (f) of Appendix A to the order, and incorporating the exceptions listed in s. 3.10 of the CLA, with appropriate changes in nomenclature. In all other respects, I would dismiss the appeal concerning the terms of the permanent injunction.

Calculation of Damages

The 50% Discount

[115] Finally, Mr. Zhu challenges certain aspects of the trial judge's calculation of damages (see para.16 above). First, it is said the judge erred in neglecting to give effect to a 50% discount, agreed to by XY in a letter agreement dated June 5, 2006,

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from the royalty payable by JingJing on the sale of sexed embryos. This discount was to continue for one year from the date of the letter agreement. Mr. Wilson responds that this matter was not raised below in connection with the quantum of damages and that had it been raised, XY would have adduced evidence that it was induced by JingJing's fraud to agree to the discount. XY refers in particular to evidence that JingJing had lied to it from the beginning regarding its embryo production, which it reported as 'nil' for the first few months and underreported thereafter. I agree with XY that this matter should have been raised below, and that it would be prejudicial now to permit JingJing to claim the discount.

Sale of AI Straws

[116] In calculating the damages, the trial judge stated at para. 294 of his reasons that there was "no dispute" that royalties of $6 per AI straw on 195,148 straws was payable. Counsel for Mr. Zhu says that the matter was and is very much in dispute.

[117] The figure of 195,148 AI comes from the addition of two columns in Ms. Tang's records which were tendered in evidence by XY, one of which showed "AI straw produced/service render" and the other of which showed "Produced/service render for other purpose (R & D)". Royalties were payable to XY only on AI straws that were "used". Counsel for Mr. Zhu did not refer us to any other records in support of his contention that Ms. Tang's figure was overstated. He pointed us only to a letter from JingJing's former counsel to Mr. Wilson in November 2008 in which $244,542 (USD) was offered by JingJing in respect of sexed semen calculated to September 30, 2008. It is not clear how the monetary figure was reached and Mr. McFee did not refer to any other reliable records to clarify the number of AI straws that were sold, as opposed to produced.

[118] In these circumstances, I would not fault the trial judge for adding together the two columns in Ms. Tang's records to reach the total number of AI straws on which to calculate damages.

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Expert Report

[119] Last, Mr. Zhu asserts that the trial judge erred in excluding from evidence an expert report proffered by the defendants concerning the fair market value of IVF embryos in China. This figure was relevant to the calculation of royalties payable before and after January 2007 on such embryos, discussed by the trial judge at paras. 278-96 of his reasons. The judge began his discussion by noting that because JingJing had not produced the records that could have shown the number of embryos used in China, it was necessary for the Court to infer the appropriate number on the evidence before it. At para. 285, the judge found that taking all the evidence he had into account, the figure of 500,000 embryos for the period before January 2007 and 150,000 in the period thereafter could be fairly inferred.

[120] As for the fair market value of the embryos, XY adduced expert evidence from Dr. Gordon MacDonald, who testified that unsexed IVF embryos (generally sold at half the price of sexed embryos) sold at between $60 and $75 USD. The judge found that this evidence 'made sense' and was consistent with other evidence regarding fair market value. (Para. 290.) Although the plaintiff's claim that the average value before January 2007 was $135 and $150 after January 2007, the Court settled on a value of $125 before January 2007 and $150 thereafter.

[121] On February 6, 2011, three months into the trial and the first day of the recommencement of the trial after a break, JingJing sought to tender an expert report from Dr. Richard Vanderwal, a doctor in veterinary medicine who practices in Abbotsford. His opinion was tendered in response to Dr. MacDonald's opinion. In explaining his lateness in tendering Dr. Vanderwal's evidence, counsel for JingJing advised the Court that his client had previously arranged for a report from an expert who lives in China, Zhu Yu Lin. The trial judge recounted in his ruling:

> Questions arose about the authenticity of the report. Mr. Zhu then advised the defendants that he refused to come to Vancouver to appear in court. There is a suggestion that the plaintiff may have had a role in Mr. Zhu's refusal. There is no cogent evidence that this is the case and I draw no such inference.

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> The evidence is that after October 20th, 2010, counsel for the defendant canvassed ten people as potential experts. Each refused based on unavailability, lack of relevant expertise or existing relationships with one of the parties to the litigation.
>
> The defendant tried to contact Dr. Vanderwal on November 14th. Ms. Prestegar has deposed that these efforts did not produce any results. Those efforts continued until prior to the holiday period in late December.
>
> On January 25th, counsel for the defendants discussed the matter with Mr. Vanderwal and confirmed that he would prepare a report. It was obtained by the defendant on Sunday, February 6th, 2011, and served on plaintiff's counsel the same afternoon or evening.

[122] The judge noted that under R. 11-7(6), the Court may allow an expert to provide a responsive expert's report "at trial" if non-compliance with the general time-limit of 42 days before trial is unlikely to cause prejudice or the interests of justice require it. The judge was not persuaded that either of these circumstances arose. In his analysis:

> Where circumstances beyond the defendants' control deprive them of an expert witness, the court will look favourably on accommodating this difficulty. The substantial prejudice to the plaintiff will not necessarily be a bar to the exercise of discretion. The interest of justice is often the overriding factor. But that is only where a party is [assiduous] in making efforts to locate a new witness. I am unable to say this is the case here. I infer that by early January, the defendant had decided not to pursue the search further. It was only three weeks later that these efforts were renewed and were successful.
>
> In the circumstances, I am not exercising my discretion and the report is excluded.

[123] Mr. McFee on behalf of JingJing submits that the Court here erred in failing to consider the "interests of justice" separately from prejudice under para. (b) or due diligence under para. (a) of R. 11-7(6). On this point, he relied on *C.A. et al. v. Critchley* [1996] B.C.J. No. 3055 (B.C.S.C.) at para. 12 and on *Perry v. Vargas* 2012 BCSC 1537. At para. 20 of *Perry v. Vargas*, it was said that by virtue of R. 11-7(6)(c), the Court retains a residual discretion to dispense with the other requirements of R. 11 in the interests of justice. In Mr. McFee's submission, the trial judge was required to consider the interests of justice separate from prejudice and due diligence, and in so doing to consider whether an adjournment of the trial or other steps could be granted to delay the cross-examination of Dr. Vanderwal. As a

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result of proceeding on the basis of the plaintiff's expert alone, counsel suggests that the judge ultimately used incorrect figures for the fair market values of embryos in China in his calculation of XY's damages.

[124] I am not persuaded that the trial judge so erred. He noted, correctly, that his discretion was "only to be exercised where there is prejudice or the interests of justice require it." As I read his reasons, he considered that prejudice and the defendants' diligence were relevant to the interests of justice. It is difficult to argue with this proposition. I respectfully adopt the observations of the Court in *Perry v. Vargas*:

> In my view the discretion provided for in R.11-7(6)(c) must be exercised sparingly, with appropriate caution, and in a disciplined way given the express requirements contained in Rules 11-6 and 11-7. That is, the "interests of justice" are not a reason to simply excuse or ignore the requirements of the other Rules. There must be some compelling analysis why the interests of justice require in a particular case the extraordinary step of abrogating the other requirements of the *Supreme Court Civil Rules*. None was provided. [At para. 22.]

[125] Given the deference due to a discretionary decision of this kind, I would not interfere with the trial judge's ruling in this case. I take additional comfort from the fact that the proposed expert was in fact the veterinarian in Abbotsford with whom JingJing had an important business relationship, and was thus an expert whose independence and impartiality in this case might well have been suspect.

[126] I would dismiss the appeal concerning the calculation of damages.

Special Costs

[127] As far as the judge's order for special costs is concerned, I see no basis to interfere with that order and indeed I find it was fully justified in light of the defendants' conduct of this litigation.

Disposition

[128] In summary, I would allow the appeals to the limited extent set out below:

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- I would allow XY's appeal to the extent that I would set aside para. 9 of the trial judge's Order and substitute therefor:

  9. The plaintiff's claims against International Newtech Development Incorporated, IND Lifetech Group Ltd., IND Lifetech (U.S.A.) Incorporated, IND Lifetech (USA) Inc., IND Lifetech (Qingdao) Co. Ltd., IND Lifetech (Zouping) Co. Ltd. and IND Embryontech Inc. for the torts of deceit, civil conspiracy and inducing breach of contract are dismissed; but the claims in respect of unjust enrichment against the said corporate defendants shall be remitted to the Supreme Court of British Columbia for retrial. The plaintiff's claims against Zhen Hong Liu are dismissed in their entirety.

  (XY has confirmed it seeks no order against "IND Lifetech Co. Ltd.," or Shanghai JingJing Biotech Co. Ltd.)

- I would allow the corporate defendants' appeal to the extent that I would add to Appendix A to the order, following subparagraph (vii) of paragraph (e) thereof, the following:

  Provided that Confidential Information shall not include information that

  i. is or becomes generally available to the public other than as a result of a disclosure by any of the defendants;

  ii. becomes available to any of the defendants on a non-confidential basis and not in contravention of applicable law from a source, other than the plaintiff herein or one of its officers, directors, partners, employees, independent contractors, agents, or licensees ("Representatives") not bound by a confidential relationship with the plaintiff or by a confidentiality or other similar agreement;

  iii. can be proven was known by any of the defendants on a non-confidential basis and not in contravention of applicable law or confidentiality or other similar agreement prior to disclosure to any defendant by the plaintiff.

And I would delete paragraph (f) of Schedule A to the Order.

If counsel are of the view that the foregoing terms of this order do not properly reflect this court's intentions as inferred from these reasons, or that they create a difficulty

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of which the Court may not be aware, they should advise the Registrar in writing within 20 days.

[129] We are indebted to all counsel for their able arguments.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Chiasson"

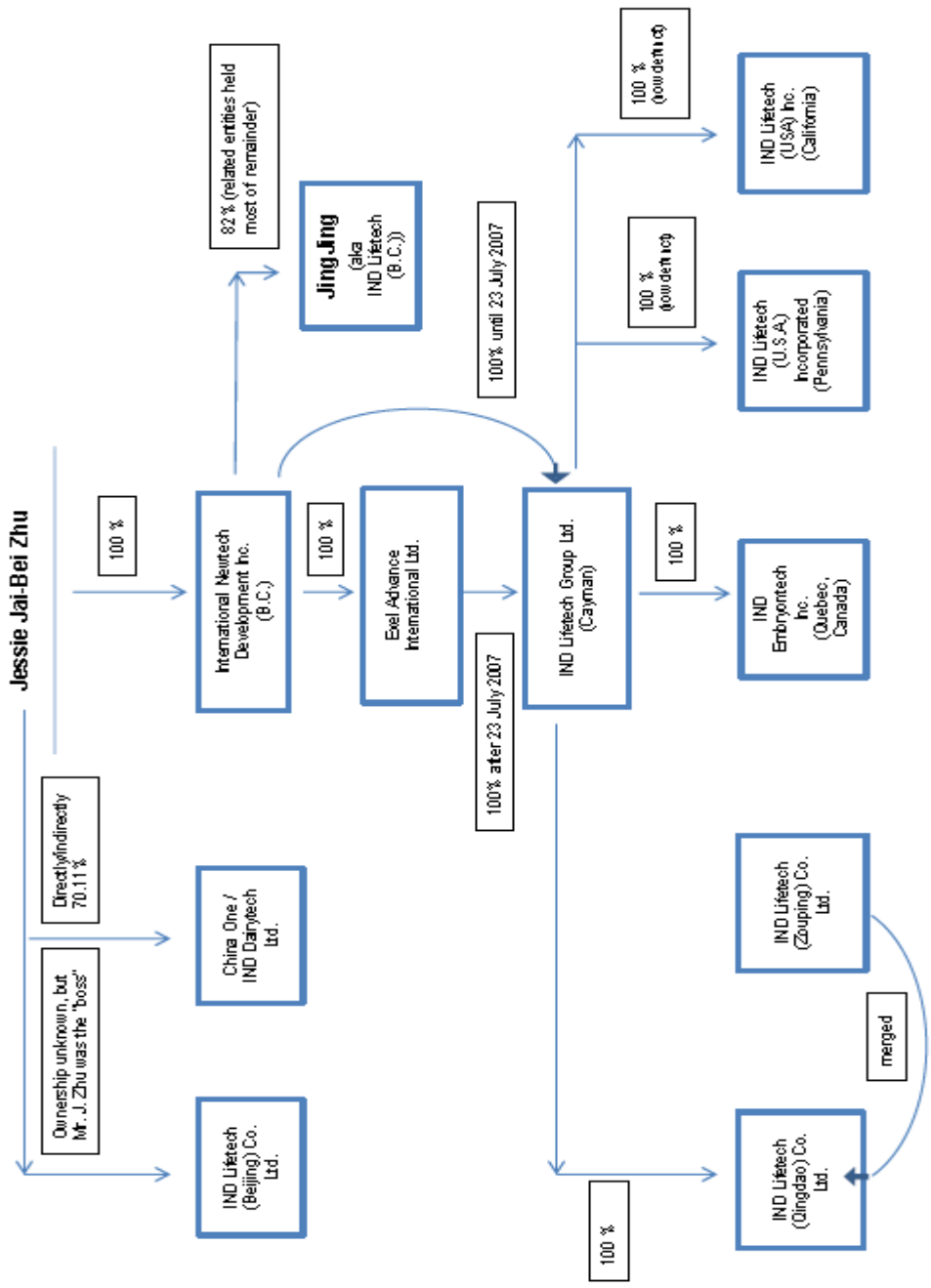
I Agree:

"The Honourable Madam Justice D. Smith"

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SCHEDULE 1

Corporate Chart



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SCHEDULE II

(Part of Order after Trial of the Supreme Court of British Columbia):

Mandatory and Prohibitory Injunction

12. The plaintiff is entitled to a prohibitory injunction to protect the plaintiff's Confidential Information including all Improvements;

13. The plaintiff is also entitled to a mandatory injunction to deliver up the Confidential Information and Improvements made possible by or because of access to the plaintiff's technology;

14. In this Order, the term "**Confidential Information**" has the meaning set out in Appendix "A" attached hereto;

15. The defendants JingJing, Jesse Jia-Bei Zhu, Selen Zhou, Tang Jin, and Shu Xi Wang and each of them (including by themselves, or by their directors, officers, agents, employees, servants, affiliates, joint venturers, successors, assigns, subsidiaries or related companies, and all those over whom they exercise control, directly or indirectly) are restrained from using the Confidential Information, for any purpose or to any extent, and are restrained from communicating, transferring, distributing, selling, publishing, leasing, licensing or in any other way or by any other means disclosing the Confidential Information to any person or for any purpose; and

16. Within 14 days from the date of this order, namely on or before March 16, 2012, the defendants JingJing, Jesse Jia-Bei Zhu, Selen Zhou, Tang Jin, and Shu Xi Wang and each of them, shall deliver up to the plaintiff or its designate any and all Confidential Information in their possession, power or control.

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Appendix "A"

to the Order After Trial of the

Supreme Court of British Columbia

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In this Order After Trial **"Confidential Information"** means:

(a) The following components of the Dako SX Mo-Flo Cytometer, including their configuration individually and in relation to each other and other components of the cytometer:

(i) the PMT (photomultiplier tube) controller;

(ii) the nozzle assembly;

(iii) the beam-shaping optics;

(iv) the detector system;

(v) laser beam steering towers, stages and optics;

(vi) the Summit Workstation hardware and Summit software with Cytrack;

(vii) the pulsed laser as configured for the SX cytometer;

(viii) the illumination chamber;

(ix) the front door rail;

(x) the strobe assembly; and

(xi) the pinhole strip;

(b) XY's protocols, as set out in document no. XY015125-175, entitled "XY, Inc. Protocols - Confidential - September 2005" and document no. XY016423-502, entitled "XY, Inc. Protocols - Confidential - March 2006";

(c) The technical data and processes contained in XY's report entitled "Confidential Information for the Purpose of Evaluating a MoFlo SX Sperm Sorting Facility in Canada", document no. XY001229-001237;

(d) All other information and techniques imparted from XY during training or otherwise to any of the defendants and their employees relating to the use and operation of SX cytometers;

(e) Improvements to the Confidential Information made by the defendants, including but not limited to all research and development regarding the use of sexed semen by any of the defendants internally or with the assistance of third parties such as,

but not limited to, Abbotsford Veterinary Clinic;

and where:

(i) Improvements means namely all know-how, processes, operations, methods, masks, codes, programs, designs, copyrights, patents, patent applications, or other intellectual property rights or other information created, obtained, or developed by either XY or any licensee of XY or JingJing whether through their own efforts or those of any independent contractor, employee, affiliate, or subsidiary, or directly or indirectly with any third party, based upon or derived from XY's Technology, in whole or in part;

(ii) XY's Technology means any and all Proprietary Rights or confidential information, trade secrets, know-how, technical data, masks, code, programs, designs, processes, methods, operations, innovations or inventions, whether or not patented, and any patents, patent applications, copyrights, or other intellectual property of any kind that XY, now or hereafter, owns, controls, licenses, or has an interest in;

(iii) Proprietary Rights with respect to XY's Technology means the collection of all Patent Rights, Trademark Rights, Trade Secret Rights, and Copyright Rights, or other rights which are or may be asserted as protectable under the laws of the United States or the laws of any foreign county;

(iv) Patent Rights with respect to XY's Technology means all rights which are or may be asserted as protectable by license or under the patent laws of the United States or the patent laws, or similar laws, of any foreign country or region, including, but not limited to, any patent applications or grants of patent along with any division, substitution, continuation, continuation-in-part, continued prosecution, or other patent application(s) thereof filed in the United States, under international treaty or agreement, or in any foreign country or region, and all patents, utility models, inventor's certificates, or other similar rights which may be granted thereon and any reissues or extensions thereof, and specifically includes, but is not limited to, those patent rights to United States Patent No. 5,135,759 pursuant to the license agreement with the United States Department of Agriculture, Agricultural Research Service ("USDA License") subject to the reservation of rights therein, including reservation by the Agricultural Research Service of an irrevocable, nonexclusive, nontransferable, royalty-free, license to practice the licensed patent throughout the world by or on behalf of the United States Government and on behalf of any foreign government pursuant to any existing or future treaty or agreement to which the United States is a signatory, and the right to engage in research, either alone or with third parties, with respect to the claimed inventions;

(v) Trademark Rights with respect to XY's Technology means all rights,

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whether registered or not, which are or may be asserted as protectable by license or under trademark, unfair competition, trade dress, anti-dilution, or similar laws of the United States, or any state, or any foreign country or region;

(vi) Trade Secret Rights with respect to XY's Technology means all trade secrets, confidential information, and know-how which are or may be asserted as protectable by license or under the trade secret, confidentiality, or unfair competition laws of any state, or under similar laws of any foreign country or region;

(vii) Copyright Rights with respect to XY's Technology means all rights, whether registered or not, which are or may be asserted as protectable under the copyright laws of the United States or the copyright laws of any foreign country.

(f) Specifically including but not limited to the research and development of the defendants within the Field of Use and outside the Field of Use with respect to *in vivo* embryos and any other matters using sexed semen:

(i) (Field of Use means the collection and preparation of cattle semen, the separation of spermatozoa in such cattle semen into sex-selected subpopulations of cattle spermatozoa based upon the presence of an X- chromosome or a Y-chromosome, use of such sex-selected subpopulations of cattle spermatozoa for in-vitro fertilization of cattle oocytes, the production of sex-selected cattle embryos utilizing in-vitro fertilization, cryogenic storage of such cattle semen, such sex-selected subpopulations of cattle spermatozoa, and such sex selected cattle embryos produced utilizing in-vitro fertilization)

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In the Court of Appeal of Alberta

Citation: L.K. Oil & Gas Ltd. v. Canalands Energy Corporation, 1989 ABCA 153

Date: 19890629
Docket: 19510
Registry: Calgary

Between:

L.K. Oil & Gas Ltd. and XL Food Systems Ltd.

Plaintiffs
(Respondents)

- and -

Canalands Energy Corporation

Defendant
(Appellant)

And Between:

Canalands Energy Corporation

Plaintiff by Counterclaim
(Appellant)

- and -

L.K. Oil & Gas Ltd.

Defendant by Counterclaim
(Respondent)

The Court:

The Honourable Mr. Justice Lieberman
The Honourable Mr. Justice Harradence
The Honourable Mr. Justice Côté

Reasons for Judgment of The Honourable Mr. Justice Harradence

Reasons for Judgment of The Honourable Mr. Justice Côté
Concurred in by The Honourable Mr. Justice Lieberman

1989 ABCA 153 (CanLII)

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE MASON OF THE COURT OF QUEEN'S BENCH OF ALBERTA DATED THE 14th DAY OF MAY, 1987

COUNSEL:

R.K. Laing, Esq., for the Appellant

D.B. Reesor, Esq., for the Respondents

1989 ABCA 153 (CanLII)

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE HARRADENCE

[1] The issue in this appeal is whether a representation made by the Respondent to the Appellant for the purposes of inducing the Appellant to participate in an oil and gas venture is an actionable misrepresentation for which rescission of the agreement or, alternatively, damages for negligent misrepresentation, is available.

[2] In early 1981 Thetis Energy Corporation (Thetis) put together an oil and gas exploration program called PT81. This consisted of 44 wells to be drilled in the Sooner Trend area of Northwest Oklahoma. Thetis published literature for prospective participants which included geological details, production data for previously drilled wells in the area and analyses of projected production and profitability. The program was promoted by Mr. John Rudolf who was known and trusted by Mr. Ellard, the president of the Respondent, L.K. Oil and Gas Ltd. (L.K.).

[3] L.K. acquired a 6.5% interest in the program and included this, along with other U.S. lands and Canadian lands, in an oil and gas exploration program which it was promoting. Participation in both the U.S. and Canadian portions was required in order to participate in the program. The Appellant, Canalands Energy Corporation (Canalands), entered into a joint venture agreement to participate in the L.K. program.

[4] L.K. produced its own economic analysis of the Sooner Trend play based on the figures supplied by Thetis. It supplied Canalands with both the Thetis economic evaluation and its own reworked economic evaluation. In addition, L.K. wrote a letter to Canalands dated July 14, 1981 laying out a proposal for Canalands to participate in the program. The letter contained the following statement to describe the Sooner Trend program:

> "A forty-four well program in which L.K. has a 6.5% interest, purchased in Thetis Energy's .70 NRI leases. Effective July 3, 1981, thirteen wells are on production, nine wells are being completed or production tested and four wells are drilling. There has not

been an abandonment to date and results appear to be better than historical averages used on entering the program. Cash flow of $600,000.00 annually is anticipated for L.K.'s interest. (emphasis added)"

[5] This is the letter which the Appellant claims constitutes an actionable misrepresentation, entitling it to relief.

[6] L.K. based the underlined portion of its July 14 letter on information it had received from Mr. Rudolf of Thetis and had no cause to doubt its truthfulness. It was admitted that these comments were intended to induce Canalands to enter the program.

[7] On receipt of the July 14 letter, Canalands asked L.K. for current production information and was told by L.K. that it did not have any but that Thetis could provide further information. Thetis refused Canalands' request for information on the basis that it was not a participant in the Thetis scheme. Thus Canalands had no access to production information.

[8] Canalands prepared its own analysis of the data provided by Thetis making adjustments to certain unknown variables which it considered to be more realistic. The economic evaluation showed that the overall program was moderately attractive. It should also be noted that Mr. McGregor, president of Canalands, and Mr. Ellard, president of L.K., were known to each other and were both professional engineers with considerable experience in the oil and gas industry.

[9] L.K. received current production information from the Sooner Trend program (Sable documents). The date of receipt is uncertain since, although the documents are date stamped, it is not known whose stamp is on the documents. The evidence of Mr. Ellard was that the documents were received by L.K. by the end of August although the Appellant says they were received by L.K. as early as July 8-16. These production figures required analysis to determine if the historical averages were being exceeded as the July letter indicated. L.K. had no one on staff capable of this analysis and the analysis was not done. Had the analysis been carried out, it would have revealed that expected production was not being attained.

[10] In September, L.K. made a rough calculation to determine the profitability of the Sooner Trend program and found that production was not meeting expectations.

[11] On September 4, Clarion, who was a 25% participant in the Sooner Trend program, decided not to participate in the program further because it was no longer economically practicable. In a September 22 meeting between representatives of L.K. and Canalands, L.K. informed Canalands of Clarion's withdrawal from the program and the reasons given by

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Clarion for its withdrawal. However, Mr. Ellard of L.K. told Mr. McGregor of Canalands that the real reason Clarion was withdrawing was because Clarion was in financial difficulty.

[12] On September 15, L.K. sent a copy of the joint venture agreement to Canalands. Acceptance was to be effected by signing the back page of the agreement and returning it to L.K. A CAPL operating agreement was also attached to the agreement.

[13] On October 5, 1981 a meeting of participants in the Sooner Trend program was held. It was agreed that the results were not as favourable as expected and that the program would be terminated at 33 wells.

[14] Thetis prepared a revised economic evaluation, dated August 31, which showed production was not reaching expectations. This was received by L.K. some time after October 9, 1981 and made known to Canalands in late November 1981.

[15] On October 23, Canalands returned the signed agreement and forwarded the cheque required on acceptance as per the terms of the agreement. The signed CAPL agreement was also returned at this time.

[16] By November, Canalands was aware that historical averages were not being met. In December 1981 and early 1982, Canalands who had initially wished to participate in only the Canadian portion, asked to withdraw from the U.S. portion of the program. Negotiations as to terms took place but no agreement was reached and negotiations failed.

[17] Canalands failed to make payments with respect to the U.S. portion of the program and accordingly in January 1983 L.K. issued a Statement of Claim to recover monies due. In September 1983, during examinations for discovery, Canalands learned that L.K. had received production information prior to entering into the agreement with Canalands. It made no further payments under the agreement, althouth it continued to make certain elections, was credited with production revenues, received government grants and executed assignment and novation agreements.

[18] In September 1985, Canalands informed L.K. that it intended to amend its pleadings to plead misrepresentation and claim rescission. The amendment was made in February 1986. The final version of the Statement of Defence alleged breach of contract due to the misrepresentations or failure to manage the program properly. The Counterclaim claimed damages for deceit or, alternatively, rescission of the contract due to fraud or

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innocent misrepresentation. At trial, the allegation of fraud was dropped and replaced by negligence.

[19] The Trial Judge held that the contract was made at the meeting between Canalands and L.K. on September 22. With regard to the Counterclaim, he found that there had been no misrepresentation, that the representations were not material and were not relied on by the Defendant in entering into the contract. On the question of breach of contract, he found no misrepresentation constituting a fundamental breach and no improper management of the program.

[20] The Appellant's grounds of appeal are:

> "1. Whether the learned trial Judge erred in finding that the statements made in the July 14, 1981 letter were not actionable misrepresentations which entitled the Appellant to rescission of the joint venture agreement and to have returned to it its investment plus interest, or in the alternative entitled it to damages.
>
> 2. Whether the learned trial Judge erred in finding that the joint venture agreement was made as a result of the September 22, 1981 meeting in Toronto rather than on October 23, 1981 as asserted by the Appellant."

1. Whether the Representations in the July 14, 1981 Letter Were Actionable Misrepresentation

(a) Rescission

[21] The Trial Judge found that the Respondents did not misrepresent the status of the Sooner Trend play in the representations made in the July 14 letter. The Appellant argues that this was an error since L.K. had a duty to inform Canalands when it became apparent that historical averages would not be exceeded and that anticipated cash flow would not be achieved. Whilst it is not necessary to decide this point, and I expressly refrain from doing so, I make the following comments with respect to the duty to inform in this situation.

[22] The existence of a duty to inform in some situations is shown by With v. O'Flanagan [1936] Ch. 575 (C.A.). There, a medical practice was being sold and the purchaser was told that takings were L2000 p.a. However, during the course of the negotiations, as a result of the vendor's illness, the practice was looked after by two **locum tenentes** and the takings were drastically reduced. The purchaser was aware of the fact that one of the **locum tenentes** had been employed but was told that he was handling the practice efficiently. The contract was rescinded because of the misrepresentation. Lord Wright, M.R. at p. 583 adopted the following from Traill v. Baring 4 De. G. J. & S. 319, 329:

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> "I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made bound unless such a communication has been made."

[23] The present case differs from With, **supra,** in that L.K. was unaware of the inaccuracy of its July 14 statement as it did not analyze the data received. L.K. relied on Mr. Rudolf of Thetis for their statements in the July 14 letter and had no reason to doubt his assertions with respect to profitability of the Sooner Trend. Did L.K. have a duty to analyze the data it had received? Although I would have otherwise found no duty to analyze the data it had received, on September 4 Clarion decided that the Sooner Trend program was not economically viable and withdrew from the program. Clarion's withdrawal, in my opinion, put L.K. on notice that circumstances may have changed and placed a duty on L.K. to analyze the data to confirm or disprove Mr. Rudolf's statements.

[24] Whether or not there was a duty to inform, and therefore a misrepresentation, not all misrepresentations give rise to relief. Two requirements of actionable misrepresentation are that the representation be material, and that it induced the contract by the representee's reliance on the representation. The Trial Judge held that the representation was not material, and that it did not induce Canalands to enter into the contract. The Appellant argues that this was an error.

[25] In order to be material, the statement must be of such a nature that it would be likely to induce a person to enter into a contract. Thus, statements relating to trivial or irrelevant matters cannot be material. However, even if the Appellant is correct that the statement was material, the Appellant must still show that the statement induced it to enter into the contract. It is to the question of reliance which I now turn.

[26] The necessity of proving reliance is noted in Cheshire, Fifoot & Furmston's **Law of Contract** (Butterworths, 11th Ed., 1986) at p. 262. The learned authors say:

> "A representation does not render a contract voidable unless it was intended to cause and has in fact caused the representee to make the contract. It must have produced a misunderstanding in his mind, and that misunderstanding must have been one of the

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reasons which induced him to make the contract. A false statement, whether innocent or fraudulent does not **per se** give rise to a cause of action."

This statement of law is confirmed by Holt Renfrew & Co. Ltd. v. Henry Singer Ltd. et al. [1982] 4 W.W.R. 481 (Alta. C.A.) where the question of fraudulent misrepresentation arose. At p. 500-501, Moir, J.A. said:

"As I understand the reasons of my brother McDermid, he finds actual fraud based upon the statement made in the first letter passing between Pekarsky and Dickson, wherein Pekarsky said the existing lease may not be a detriment to the sale. He goes on to find that, when this was no longer true, Pekarsky had a duty to Dickson to advise him of the change in circumstances.

I do not quarrel with the authorities quoted by McDermid J.A. in reaching his conclusion. They are undoubtedly a correct statement of the law as far as they go. However, it is perfectly clear that, before representation is actionable, it must be relied upon and have at least induced the contract in part. This is clear from the statement of Cote, Introduction to the Law of Contract, quoted in the reasons. In the first sentence quoted from that book at p. 91 we find the following:

'Even a statement which is truthful when made may become fraudulent if the facts change to the knowledge of the utterer, and then he allows the other party to go ahead **and rely on it.'** (The italics are mine.)

A similar statement of the law appears in Chitty on Contracts, 23rd ed., vol. 1 at p. 128. The learned author, however, goes on at p. 131 to say:

'It is essential if the representation is to have legal effect that it should have operated on the mind of the representee and the burden of proving this lies on the representee himself.'

Similar statements can be found in 17 C.J.S. 920 and in Kerr on Fraud and Mistake, 7th ed. (1952), pp. 52, 53. The learned authors appear to be unanimous that it is absolutely essential to prove that the statement was relied upon."

At p. 503 he summed up his position:

"To conclude, I am of opinion that, before representation, which was true when made but which became untrue later, can be relied upon, the representee must establish that he acted upon or relied upon that representation in entering into the contract."

[27] The Appellant argues that where a material representation is made with the intention to induce a person to enter into a contract and that person does enter into it, an inference should be drawn that he was induced to do so by the statement. In its written argument, the Appellant put the argument this way:

"… the inference that a material representation induces a representee to enter into a contract and the inference that a representation intended to induce the representee to enter into an agreement (which by the testimony of Mr. Ellard himself was clearly the

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> case here) does in fact induce him, would have led him [the Trial Judge] to the inescapable conclusion that the Appellant was in fact induced by the Respondent's representations to enter into the contract."
>
> [Emphasis added]

I cannot agree with this argument, as it is not supported by the authorities.

[28] In Redgrave v. Hurd (1881) 20 Ch. D. 1 (C.A.), Jessel, M.R. made the following statement at p. 21:

> "If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shewn either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation."

[29] In Smith v. Chadwick (1884) 9 App. Cases 187 (H.L.) this statement was considered by the House of Lords and found to be incorrect. At p. 196, Lord Blackburn said:

> "I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In **Redgrave v. Hurd,** the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act."

[30] In Smith v. Land and House Property Corporation (1884) 28 Ch. D. 7, Bowen, L.J. also voiced his disagreement with the statements made by Jessel, M.R. in Redgrave v. Hurd. Thus, the position following these cases was that an inference of fact that the representee was induced to enter into a contract, could be drawn where a material representation which was intended to so induce him was made.

[31] In Bevan v. Anderson and Peace River Sand and Gravel Co. Ltd. (1957) 12 D.L.R. (2d) 69, at p. 74, Riley, J. referred to the above inference as an inference of law but, with respect, I do not think that this is an accurate statement. It is noteworthy that Riley, J. made no mention of Smith v. Chadwick or Smith v. Land and House Property in his decision. In my view, the approach taken by Canadian courts is to consider all of the relevant facts of a case in order to decide whether a statement was relied upon. Where nothing else but the representation could have induced the contract, then a logical inference is that the

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representation did in fact induce the contract. Where other factors could be operative, the evidence must be considered to determine which factors were relied upon. Lord Blackburn noted in Smith v. Chadwick, the weight of the inference as evidence must "greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act".

[32] The question of reliance on fraudulent misrepresentation was considered in Holt Renfrew & Co. Ltd. v. Henry Singer et al. **(supra).** In that case, the lawyer for the purchaser of a building indicated that a lease to an existing tenant would not be a "deterrent" to the purchaser. The vendor agreed to sell the property, but the sale was subject only to the encumbrances which were registered. The lease had not been registered and the purchaser claimed to take title free and clear of the lease. The issue was whether the purchaser fraudulently misrepresented that it would take subject to the lease. McDermid, J.A. (in dissent) found that there was actionable misrepresentation since the only reason for the vendor to believe that the lease would be accepted was the statement that it was not a deterrent. However, Moir, J.A. (concurred in by Kerans, J.A. and Stevenson, J.A.) found that there had been no reliance. At p. 505, Moir, J.A. said:

> "Nowhere in the evidence am I able to find that Dickson said that he recalled the letter of 4th May and that he relied upon it when he was determining what to do with the offer. Surely that is the test. The court, in the absence of evidence, should not find that Dickson was misled."

No mention of an inference of either law or fact was made by any of the justices in that case.

[33] The Supreme Court of Canada in Parna v. G & S Properties Ltd. [1971] S.C.R. 306 also considered the issue of reliance in a case where fraudulent misrepresentation was alleged. There, a purchaser of an apartment building was given estimates of the receipts and disbursements for the property. They were inaccurate and the purchaser sought damages on the basis of these misrepresentations. He argued that based on the figures given to him he had calculated a net return of 9.64% and this had induced him to buy the property. The Court noted the purchaser was a shrewd and experienced apartment house operator who knew the figures given to him were estimates and who also knew that the figures were low. At p. 319, Spence, J. said:

> "I have come to the conclusion that the evidence given by the appellant Parna himself and by the solicitor who acted for him in the purchase proves that the appellant Parna was not misled in any way by the representations even if they had been false to the

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> knowledge of the respondents, but that a shrewd and intelligent apartment house operator figured that he could pay $251,000 for the property in question and obtain a satisfactory percentage of net profit."

As in Holt Renfrew, no mention of an inference of law or fact was made.

[34] The Supreme Court of Canada also considered the question of negligent misrepresentation in Cana Construction Co. Ltd. v. The Queen, **(supra),** and in V.K. Mason Construction v. Bank of Nova Scotia [1985] 1 S.C.R. 271. In both of these cases reliance was found but the Court did not refer to an inference of fact or law due to the materiality of the statement. In Cana Construction a tenderer, of necessity had to rely on figures given to it by the Crown in arriving at the tender price. No other possible source was available and the tender price could not be calculated without taking this figure into account. In V.K. Mason Construction a bank told a construction company that they would provide the owner with finance for construction. The Court accepted the trial judge's finding that there had been reliance. At trial (reported at 10 B.L.R. 77), O'Leary, J. based his finding of reliance on the fact that the contractor had refused to enter into a contract until it received confirmation that the owner would have sufficient funds to pay for the construction. On receipt of the bank's letter confirming this, the contractor entered into the contract. Thus, in these cases reliance was found where nothing else could have been relied on or where the circumstances showed it was relied upon.

[35] Several other cases can be cited where the issue of reliance upon a representation was decided without resort to any inference to be drawn from the materiality of the statement. See, for example Blair v. Merrill Lynch Canada Inc. and Brookes (1987) 80 A.R. 65 (Q.B.); Daeyoo Enterprise Co. Ltd. v. Long et al. (1986) 75 A.R. 47 (Q.B.); Eisenschiml v. Western Drilling Co. Ltd. [1943] 1 W.W.R. 605 (Alta. S.C. App. Div.); Kober v. McArthur (1984) 36 Alta. L.R. (2d) 152 (Q.B.).

[36] In summary, the case law does not support the Appellant's argument that if the Trial Judge had found the statements to be material, he would necessarily have found them to have been relied on. The question of reliance is a question of fact to be inferred from all of the circumstances of the case and all of the evidence adduced at trial.

[37] It should be emphasized that the finding of reliance is a finding of fact. In Smith v. Land and House Property Corporation **(supra),** Bowen, L.J. said at p. 15:

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> "Was there then a misrepresentation of a specific fact? This partly depends on the question, whether on the construction of the particulars, what they say as to **Fleck** is a representation of a specific fact, a question which the Court of Appeal has the same means of deciding as the Judge in the Court below. Whether the purchasers relied upon it is a question of fact which the Judge of the Court below had better means of deciding than we have, for he saw and heard the witnesses."

In the same case, Fry, L.J. said (p. 17):

> "…on the evidence as read before us I should have felt inclined to come to the conclusion that the contract was not induced by that representation; but as Mr. Justice **Denman,** who saw and heard Alderman **Knight,** was satisfied with his evidence, I cannot give my voice for reversing his decision."

[38] A more general discussion of an appellate court's jurisdiction to overturn findings of fact made at trial is found in Smith v. Chadwick **(supra).** Lord Blackburn said at p. 194:

> "The Court of Appeal ought to give great weight, but not undue weight, to the opinion of the judge who tried the cause, and saw the witnesses and their demeanour. That gives him considerable advantages over those who only draw their information from perusing the notes. But still, though the Court of Appeal ought not lightly to find against the opinion of the judge who tried the cause, I think that the Court of Appeal, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way."

[39] The Supreme Court of Canada in Lensen v. Lensen [1987] 2 S.C.R. 672, 23 C.P.C. (2d) 33 also considered an appellate court's jurisdiction to overturn findings of fact made at trial. At p. 43 (C.P.C.), Dickson, C.J.C. said:

> "A similar justification for limiting the scope of appellate review of findings of fact made in the first instance was offered by Lamer J. in **Beaudoin-Daigneault v. Richard,** [1984] 1 S.C.R. 2 at pp. 8-9, 37 R.F.L. (2d) 225, 51 N.R. 288 (S.C.C.):
>
> > 'So far as the rules for intervention by a first court of appeal in the findings of fact of a trial judge are concerned, in my opinion, whatever the uncertainty of the rule regarding some of our decisions in recent years … the rule is clear with regard to findings based on the credibility of witnesses: an appellate court should not intervene unless it is certain that its difference of opinion with the trial judge is the result of an error by the latter. As he had the benefit of seeing and hearing the witnesses, such certainty will only be possible if the appellate court can identify the reason for this difference of opinion, in order to be certain that it results from an error and not from his privileged position as a trier of fact. If the appellate court cannot thus identify the critical error it must refrain from interfering, unless of course the finding of fact cannot be attributed to this advantage enjoyed by the trial judge, because nothing could have justified the judge's conclusion whatever he saw or heard; this latter category will be identified by the unreasonableness of the trial judge's finding.…'

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> It is a well-established principle that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it can be established that the trial Judge made some 'palpable and overriding error which affected his assessment of the facts'."

[40] The Appellant argues that in the present case the Trial Judge was in no better position than this Court. Tanner v. Norys (1980) 21 A.R. 372 at p. 392 was cited in support. In that case, this Court adopted the words of the Supreme Court of Canada in Workmen's Compensation Board v. Greer (1974) 1 N.R. 99 at p. 108-109:

> "I appreciate that this conclusion differs from that reached by the trial judge and two of the three judges sitting in the Appeal Division, but no question arises as to the veracity of the witnesses and the judgment of the majority of the Appeal Division is based on inferences drawn from conflicting medical opinion so that this is a case which appears to me to be governed by the language used by Lord Halsbury in Montgomery & Co. Ltd. v. Wallace-James, [1904] A.C. 73, at page 75, which was affirmed by the Privy Council in Dominion Trust Co. v. New York Life Insurance Co., [1919] A.C. 254, at page 257. Lord Halsbury said in part:
>
> > ' … where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of the Appellate Court.' "

[41] However, in the case on appeal, the Trial Judge heard the evidence with regard to the circumstances in which this agreement was made and heard witnesses for the Appellant testify that it relied on the representations in the July 14 letter. The learned Trial Judge unequivocally stated that the representations were not relied upon by the Appellant. Thus, questions of credibility are involved in this case and I do not find that the Trial Judge was mistaken such that I should overturn his findings.

[42] On the facts of this case, there are other factors which could have induced Canalands to enter into the contract. In a report from Mr. McGregor in which he recommended Canalands participate in the program, he said:

> "I look on the L.K. farmout proposal as an ideal investment opportunity for Canalands. It would entail participation with a reputable firm with quality people who, I believe, have the expertise and experience required to enhance prospects for success in their oil and gas ventures. (L.K. has today taken on staff Mr. Heinz DeVries, another geologist from Norcen, whose specialty is Southern Alberta geology.)
>
> The farmout program involves a diversified blend of geographic areas (Alberta, Oklahoma, Montana, and East Coast offshore), exploratory and semi-proven properties and, projects that will yield early investment returns, along with longer term frontier ventures."

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[43] Canalands analyzed the historical data given to it by L.K. and Thetis and found that the program was economically attractive. Indeed, in this analysis, Mr. Neary, in selecting figures from the Thetis data, used some figures taken from historical data over the last nine years rather than the newer data. In evidence, he explained this as follows:

> "I guess what it boiled down to, we had more confidence on their historical data from 180 wells over nine years than we did on 40 wells over two and a half years."

[44] In this type of program, which was in the early stages of drilling at the time that the representations were made, it is reasonable to conclude that Canalands relied on its own analysis of the historical averages data and on the reputation of L.K. and not on L.K.'s representations. The Trial Judge who saw and heard the witnesses found no reliance and, whilst I might have come to a different conclusion, his finding is supported by evidence and I cannot overturn his finding.

[45] As I have found no reliance, then Canalands cannot succeed in its claim for rescission for misrepresentation.

Damages

[46] The law with respect to liability for damages for negligent misrepresentation was stated by Lord Denning, M.R. in Esso Petroleum Co. Ltd. v. Mardon [1976] 1 Q.B. 801 (C.A.) as follows (p. 820):

> "It seems to me that **Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.** [1964] A.C. 465, properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another -be it advice, information or opinion - with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages."
>
> [Emphasis added]

[47] Since inducement is a necessary element in negligent misrepresentation, the Appellant's claim for damages must also fail.

2. The Date of the Agreement

[48] The date the agreement between the parties was entered into is a question of fact. The Trial Judge concluded that the contract was made on September 22, 1981 and there was

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evidence to support that conclusion. Whilst again I might not have come to the same conclusion, I cannot interfere with his finding.

Conclusion

[49] Any misrepresentation which might have occurred in the July 14 letter is not actionable since the representations did not induce Canalands to enter into the contract. The representations do not therefore give rise to rescission or damages. The first ground of appeal therefore fails.

[50] The finding of the Trial Judge that the agreement was concluded on September 22, 1981 was supported by the evidence and therefore the second ground of appeal also fails.

[51] The appeal is dismissed with costs.

DATED at Calgary, Alberta
this 29th day of June
1989.

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE COTÉ

[52] I do not agree that any duty to analyze the data arose here, but fortunately that point does not affect the result. I have no inclination to doubt the trial judge's finding of the contract date. In all other respects, I concur in the judgment of Mr. Justice Harradence.

DATED at CALGARY, Alberta
this 29th day of June,
A.D. 1989

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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

[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

[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

[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.

[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

[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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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

JL3280

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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

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.

Canada Cement LaFarge Ltd./Ciments Canada LaFarge Ltée, LaFarge Canada Ltd., LaFarge Concrete Ltd./LaFarge Béton Ltée, and Deeks-LaFarge Ltd. (the "LaFarge Group") *Appellants*;

and

Ocean Construction Supplies Limited, Construction Aggregates Ltd., and Metro Concrete Ltd. (the "Ocean Group") *Appellants*;

and

British Columbia Lightweight Aggregate Ltd. *Respondent*;

and

Rockcrete Ready-Mix Ltd., Deeks Sand & Gravel Co. Ltd., Deeks-McBride Holdings Ltd., Deeks Concrete Brick Ltd., Deeks Block Ltd., Lorraine Ready-Mix Ltd., T.G. McBride & Co. Ltd., Island Ready-Mix, Ltd., Holmes & Wilson Limited, Holmes & Wilson Trucking Company Limited, Fraser Valley Concrete Products Ltd., Butler-LaFarge Ltd., Friday Harbor Sand & Gravel Co., Evans Coleman & Gilley Brothers Limited, Ocean Cement Limited, Ocean Cement & Supplies Ltd., Ocean Construction Supplies Northern Limited, Ocean Construction Supplies (Victoria) Limited, Ocean Cement Trading Limited, Pacific Brick & Block Limited, British Columbia Cement Company Limited, Genstar Limited/Genstar Limitée, Metro Concrete Western Ltd., Inland Cement Industries Limited, Con-Force Products Ltd. *Defendants*;

and

British Columbia Lightweight Aggregate Ltd. *Appellant on Cross appeal*;

and

Canada Cement LaFarge Ltd./Ciments Canada LaFarge Ltée, and others *Respondents on Cross appeal.*

File Nos.: 16608 and 16704.

Canada Cement LaFarge Ltd./ Ciments Canada LaFarge Ltée, LaFarge Canada Ltd., LaFarge Concrete Ltd./LaFarge Béton Ltée, et Deeks-LaFarge Ltd. (le «groupe LaFarge») *Appelantes*;

et

Ocean Construction Supplies Limited, Construction Aggregates Ltd., et Metro Concrete Ltd. (le «groupe Ocean») *Appelantes*;

et

British Columbia Lightweight Aggregate Ltd. *Intimée*;

et

Rockcrete Ready-Mix Ltd., Deeks Sand & Gravel Co. Ltd., Deeks-McBride Holdings Ltd., Deeks Concrete Brick Ltd., Deeks Block Ltd., Lorraine Ready-Mix Ltd., T.G. McBride & Co. Ltd., Island Ready-Mix, Ltd., Holmes & Wilson Limited, Holmes & Wilson Trucking Company Limited, Fraser Valley Concrete Products Ltd., Butler-LaFarge Ltd., Friday Harbor Sand & Gravel Co., Evans Coleman & Gilley Brothers Limited, Ocean Cement Limited, Ocean Cement & Supplies Ltd., Ocean Construction Supplies Northern Limited, Ocean Construction Supplies (Victoria) Limited, Ocean Cement Trading Limited, Pacific Brick & Block Limited, British Columbia Cement Company Limited, Genstar Limited/ Genstar Limitée, Metro Concrete Western Ltd., Inland Cement Industries Limited, Con-Force Products Ltd. *Défenderesses*;

et

British Columbia Lightweight Aggregate Ltd. *Appelante en appel incident*;

et

Canada Cement LaFarge Ltd./Ciments Canada LaFarge Ltée, et autres *Intimées en appel incident.*

N[os] du greffe: 16608 et 16704.

1983 CanLII 23 (SCC)

BOA COMPEER000917

1982: November 29 and 30; 1983: April 26.

Present: Laskin C. J. and Ritchie, Estey, McIntyre and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Combines — Conspiracy to injure by unlawful means — Whether or not deliberate intention to injure necessary — Whether or not breach of Combines Investigation Act an "unlawful means" required to establish this tort — Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.

Respondent, a supplier of lightweight aggregate, ceased business and was awarded damages for the tort of conspiracy to injure after its client, a manufacturer, began using another aggregate to produce its lightweight concrete. The action by appellants, who had earlier pleaded guilty to a charge of conspiring to prevent or unduly lessen competition in the production of cement contrary to s. 32(1) (*c*) of the *Combines Investigation Act*, made it impossible for respondent to improve its market position. It was found at trial and on appeal that, while appellants did intend to eliminate competition, they did not deliberately conspire to drive respondent out of business. Both courts also concluded that the tort of conspiracy to injure did not include an intent to injure the plaintiff, as a prerequisite, where the defendants had acted unlawfully to effect the ends of their conspiracy. The appellants appealed that finding and further argued that the "wrongful means" required for the tort of conspiracy could not consist of (1) a breach of s. 32(1) (*c*) of the *Combines Investigation Act*, (2) fictitious tenders to third parties or fraud or deceit with respect to such third parties, or (3) injury to the purported right not to be deprived of the benefits flowing from a free and competitive market.

Held: The appeals should be allowed and the cross-appeal dismissed.

The tort of conspiracy exists: (1) if the predominant purpose of defendant's conduct is to cause plaintiff injury, whether or not defendants' means were lawful; or (2) where defendants' conduct is unlawful and directed towards the plaintiff (alone or with others) and in circumstances that the defendants should know that injury to the plaintiff is likely to, and does, result—

1982: 29 et 30 novembre; 1983: 26 avril.

Présents: Le juge en chef Laskin et les juges Ritchie, Estey, McIntyre et Wilson.

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

Responsabilité délictuelle — Coalitions — Complot en vue de nuire par des moyens illégaux — Est-il nécessaire qu'il y ait une intention délibérée de nuire? — Une violation de la Loi relative aux enquêtes sur les coalitions constitue-t-elle un «moyen illégal»? — Loi relative aux enquêtes sur les coalitions, S.R.C. 1970, chap. C-23, art. 32.

L'intimée, une fournisseuse de granulat léger, a cessé ses activités et s'est vu attribuer des dommages-intérêts pour le délit civil de complot en vue de nuire après que sa cliente, une fabricante, eut commencé à utiliser un autre granulat dans la production de son béton léger. Par leurs actes, les appelantes, qui avaient antérieurement avoué leur culpabilité relative à une accusation d'avoir comploté pour empêcher ou diminuer indûment la concurrence dans la production de béton, contrairement à l'al. 32(1)*c*) de la *Loi relative aux enquêtes sur les coalitions*, ont mis l'intimée dans l'impossibilité d'améliorer sa situation sur le marché. On a conclu tant en première instance qu'en appel que les appelantes avaient bien l'intention de supprimer la concurrence, mais qu'elles n'ont pas comploté délibérément en vue de ruiner l'intimée. Les deux tribunaux ont conclu en outre que, lorsque les défendeurs ont agi illégalement en exécution de leur complot, le délit civil de complot en vue de nuire n'est pas soumis à la condition préalable d'une intention de nuire au demandeur. Les appelantes contestent cette conclusion, faisant valoir que les «moyens illégaux» qui doivent avoir été employés pour qu'il y ait délit civil de complot ne peuvent consister ni en une infraction à l'al. 32(1)*c*) de la *Loi relative aux enquêtes sur les coalitions*, ni en des soumissions fictives à des tiers, ni en une fraude ou tromperie pratiquée à l'endroit de celles-ci, ni en une atteinte au droit, si droit il y a, de ne pas être privé des avantages découlant d'un marché libre et compétitif.

Arrêt: Les pourvois sont accueillis et le pourvoi incident est rejeté.

Il y a délit civil de complot: (1) si la conduite des défendeurs vise principalement à causer un préjudice au demandeur, peu importe la légalité des moyens employés; ou (2) lorsqu'il s'agit d'une conduite illégale de la part des défendeurs qui est dirigée contre le seul demandeur ou contre lui et d'autres personnes dans des circonstances où les défendeurs auraient dû savoir que le

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notwithstanding the fact that the predominant purpose of defendants' conduct be not necessary to cause injury to the plaintiff.

Respondent was not entitled to claim for damages under this tort because the necessary intention to injure did not exist here. Appellants discontinued their use of respondent's product for solid business reasons and not because of any plan calculated to damage it: the unlawful market-sharing agreements were neither directed against nor intended to injure respondent. Further, because respondent tried to share in the benefits accruing to appellants from those agreements it could not validly argue that it had been unlawfully deprived of its right to the benefits of a free market.

préjudice subi par le demandeur serait une conséquence probable, même s'il n'est pas nécessaire que l'objet prédominant de la conduite des défendeurs soit de léser le demandeur.

L'intimée n'a pas droit à des dommages-intérêts pour le délit civil de complot parce qu'il n'y a en l'espèce aucune intention de nuire. Si les appelantes ont cessé d'utiliser le produit de l'intimée, cela s'explique par des solides raisons d'affaires et n'est nullement attribuable à un dessein de lui nuire; les accords illégaux relatifs au partage du marché ne visaient pas l'intimée et n'avaient pas pour objet de lui porter préjudice. De plus, il n'y a aucun lien de causalité entre les activités illégales des appelantes et l'effondrement de l'intimée. D'ailleurs, même s'il y en avait, la demanderesse-intimée n'aurait pas droit à des dommages-intérêts parce qu'elle a manifestement cherché à profiter des avantages dont bénéficiaient les appelantes par suite des conventions illégales relatives au partage du marché.

Lonrho Ltd. v. Shell Petroleum Co. Ltd., [1982] A.C. 173, [1981] 2 All E.R. 456, applied; *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265; *Gagnon v. Foundation Maritime Limited*, [1961] S.C.R. 435; *Southam Co. Ltd. v. Gouthro*, [1948] 3 D.L.R. 178, considered; *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435; *Sorrell v. Smith*, [1925] A.C. 700; *National Coal Board v. England*, [1954] A.C. 403; *Tallow v. Tailfeathers* (1973), 44 D.L.R. (3d) 55; *Tomlinson v. Harrison*, [1972] 1 O.R. 670, (1971), 24 D.L.R. (3d) 26; *Rondos v. Wawrin* (1968), 68 D.L.R. (2d) 658, referred to.

Jurisprudence: arrêt appliqué: *Lonrho Ltd. v. Shell Petroleum Co. Ltd.*, [1982] A.C. 173, [1981] 2 All E.R. 456; arrêts examinés: *International Brotherhood of Teamsters v. Therien*, [1960] R.C.S. 265; *Gagnon v. Foundation Maritime Limited*, [1961] R.C.S. 435; *Southam Co. Ltd. v. Gouthro*, [1948] 3 D.L.R. 178; arrêts mentionnés: *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435; *Sorrell v. Smith*, [1925] A.C. 700; *National Coal Board v. England*, [1954] A.C. 403; *Tallow v. Tailfeathers* (1973), 44 D.L.R. (3d) 55; *Tomlinson v. Harrison*, [1972] 1 O.R. 670, (1971), 24 D.L.R. (3d) 26; *Rondos v. Wawrin* (1968), 68 D.L.R. (2d) 658.

APPEALS and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1981), 123 D.L.R. (3d) 66, 26 B.C.L.R. 292, [1981] 4 W.W.R. 385, dismissing an appeal from a judgment of Callaghan J. Appeals allowed and cross-appeal dismissed.

POURVOIS et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (1981), 123 D.L.R. (3d) 66, 26 B.C.L.R. 292, [1981] 4 W.W.R. 385, qui a rejeté un appel d'un jugement du juge Callaghan. Pourvois accueillis et pourvoi incident rejeté.

R. J. Gibbs, Q.C., and *D. F. Robinson*, for the appellants the "LaFarge Group."

R. J. Gibbs, c.r., et *D. F. Robinson*, pour les appelantes composant le «groupe LaFarge».

J. Edgar Sexton, Q.C., Brian G. Morgan, and *G. A. Urquhart*, for the appellants the "Ocean Group."

J. Edgar Sexton, c.r., Brian G. Morgan, et *G. A. Urquhart*, pour les appelantes composant le «groupe Ocean».

Rees Brock, Q.C., and *Vince Orchard*, for the respondent.

Rees Brock, c.r., et *Vince Orchard*, pour l'intimée.

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The judgment of the Court was delivered by

ESTEY J.—The plaintiff-respondent holds a judgment against the appellants in the amount of $750,000 for damages for conspiracy to injure the respondent in its business. In essence, the courts below found that while the appellants did not deliberately conspire to drive the respondent out of business, the appellants did intend to eliminate all competitors which, in the view of the Court below, included the respondent. In the view of the learned trial judge and the Court of Appeal, the tort of conspiracy to injure did not include as a prerequisite an intent to injure the plaintiff where the defendants, as an object of the conspiracy, acted unlawfully, in this instance criminally.

The appellants advance their submissions on four principal bases:

(a) The intention necessary to found liability in the appellants for the tort of conspiracy to injure by unlawful means, is a specific intent to injure the respondent;

(b) The element of 'unlawful means' cannot be provided by a breach of the conspiracy section of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 32, by the fraudulent or fictitious bids made by the appellants in the sale of concrete in British Columbia, or by any injury by the appellants of an alleged legal right of the respondent to the benefits of a competitive concrete market in British Columbia;

(c) The principles of remoteness or causation exclude all elements or factors unconnected to the respondent and any loss suffered by it;

(d) In any case, the respondent, by voluntarily participating in the arrangements of which complaint is now made, is barred from any recovery from the appellants on the principles of *ex turpi causa* or *in pari delicto*.

Version française du jugement de la Cour rendu par

LE JUGE ESTEY—Une décision en faveur de la demanderesse-intimée a condamné les appelantes au paiement d'un montant de 750 000 $ en dommages-intérêts pour complot en vue de nuire à l'intimée dans son entreprise. Les cours d'instance inférieure ont conclu en substance que les appelantes n'ont pas comploté délibérément en vue de ruiner l'intimée, mais qu'elles avaient bien l'intention d'éliminer tous leurs concurrents au nombre desquels, selon la Cour d'appel, figurait l'intimée. Le savant juge de première instance et la Cour d'appel ont estimé que le délit civil de complot en vue de nuire n'est pas soumis à la condition préalable d'une intention de nuire au demandeur lorsque les défendeurs agissent illégalement, en l'espèce criminellement, en exécution du complot.

Les appelantes invoquent quatre moyens principaux:

a) pour que les appelantes soient tenues responsables du délit civil de complot en vue de nuire par des moyens illégaux, il faut qu'il y ait eu l'intention précise de nuire à l'intimée;

b) ne constituent pas des «moyens illégaux» une infraction à l'art. 32 de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, chap. C-23, qui porte sur les complots, ni les soumissions frauduleuses ou fictives qu'ont faites les appelantes relativement à la vente de béton en Colombie-Britannique ni une atteinte quelconque portée par les appelantes au droit, dont l'intimée prétend jouir, de bénéficier d'une libre concurrence sur le marché du béton en Colombie-Britannique;

c) les principes de l'éloignement ou de la causalité en soi excluent tout élément ou facteur qui ne se rapporte pas à l'intimée et à tout préjudice qu'elle a pu subir;

d) en toute hypothèse, suivant les principes *ex turpi causa* ou *in pari delicto*, sa participation volontaire aux arrangements dont elle se plaint maintenant empêche l'intimée de se faire indemniser par les appelantes.

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The appellants' first submission seeks to combine in the definition of the tort of conspiracy both elements:

(a) the intent to injure the plaintiff; and,

(b) the agreement to employ unlawful means.

There is no basis in authority in the common law for such a combined standard. As we shall see, the recent contest in the courts has been whether there is a second tort of conspiracy 'to perform an unlawful act', in addition to the long-existing tort of conspiracy to injure. Therefore I will approach the analysis of the facts and the applicable law on the basis that the appellants are seeking to demonstrate:

(a) the tort of conspiracy requires 'the predominant objective of injury to the plaintiff'; and, alternatively,

(b) if there be a tort of conspiracy to perform an unlawful act, the actions of the appellants, admittedly contrary to the *Combines Investigation Act*, are not sufficient to support the respondent's action because the unlawful acts occasioned no injury to the respondent and hence, damages being the gist of the tort in any event, no action lies in the respondent.

It is unnecessary to review the extensive record before dealing with these four principal submissions, but it will be convenient to outline briefly the history of the events leading to these proceedings. The appellants are engaged in the business of manufacturing and supplying cement, ready-mix concrete, concrete pipe, concrete block and other such concrete products in the province of British Columbia. The respondent was at all material times engaged in the business of producing a lightweight aggregate called "Saturnalite" for use in the production of concrete and concrete products. In the production of their concrete the appellants made use of ordinary aggregate, that is sand and gravel, as well as lightweight aggregate for the production of lightweight concrete. The appellant

Les appelantes essaient dans leur premier moyen d'inclure dans la définition du délit civil de complot deux éléments:

a) l'intention de porter préjudice au demandeur; et,

b) l'existence d'un accord en vue d'employer des moyens illégaux.

La *common law* n'appuie aucunement cette norme à deux volets. Comme nous allons le voir, les tribunaux ont eu dernièrement à se pencher sur la question de savoir s'il y a, en plus du délit civil de complot en vue de nuire qui existe depuis longtemps déjà, un second délit civil de complot «en vue d'accomplir un acte illégal». Je me propose donc d'aborder l'analyse des faits et du droit applicable en tenant pour acquis que les appelantes cherchent à prouver:

a) que pour qu'il y ait délit civil de complot «l'objet prédominant» doit être «de porter préjudice au demandeur»; et, subsidiairement,

b) que, s'il existe un délit civil de complot en vue d'accomplir un acte illégal, les actes des appelantes, indiscutablement contraires à la *Loi relative aux enquêtes sur les coalitions*, ne suffisent pas pour fonder l'action de l'intimée parce que les actes illégaux ne lui ont occasionné aucun préjudice et comme le préjudice est de toute façon au coeur du délit civil, son action est irrecevable.

Il n'est pas nécessaire de passer en revue le dossier volumineux avant de procéder à l'examen des quatre moyens principaux soulevés par les appelantes, mais il convient de présenter un bref historique des événements qui ont donné naissance à cette procédure. L'entreprise des appelantes consiste en la fabrication et la fourniture de ciment, de béton prêt à l'emploi, des conduites en béton, de blocs de béton et de produits de béton similaires dans la province de la Colombie-Britannique. À toutes les époques en cause, l'intimée fabriquait un granulat léger appelé «Saturnalite» destiné à être employé dans la production de béton et de produits de béton. Les appelantes faisaient du béton avec du granulat ordinaire, c'est-à-dire avec du sable et du gravier, mais elles utilisaient également du

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supplied, or acquired through other sources, the ordinary aggregate but were not engaged in the production of lightweight aggregate. In 1974 the appellants pleaded guilty to charges under s. 32 of the *Combines Investigation Act*, *supra*, and substantial fines were levied. In the course of those proceedings it was revealed that in 1962-63 the appellants entered into marketing arrangements, the effect of which was to divide the concrete and concrete product market in British Columbia between the appellant Ocean Construction Supplies Limited and the appellant Canada Cement LaFarge Ltd. in the ratio of 55 per cent to 45 per cent.

granulat léger dans la fabrication de béton léger. Les appelantes fournissaient elles-mêmes le granulat ordinaire ou l'acquéraient d'autres sources, mais ne produisaient pas de granulat léger. En 1974 les appelantes ont avoué leur culpabilité relativement à des accusations portées en vertu de l'art. 32 de la *Loi relative aux enquêtes sur les coalitions*, précitée, et elles ont été condamnées à de lourdes amendes. Il est ressorti au cours de ces procédures qu'en 1962 et 1963, les appelantes avaient conclu des accords de commercialisation dont l'effet était de partager le marché du béton et des produits de béton en Colombie-Britannique entre l'appelante Ocean Construction Supplies Limited et l'appelante Ciments Canada LaFarge Ltée dans une proportion de 55 p. 100 contre 45 p. 100.

By reason of losses in its operations and because the respondent and its owners recognized the small market for lightweight aggregate in British Columbia, and perhaps for other reasons, the respondent sought to establish or secure markets for their lightweight aggregate, Saturnalite, and entered into agreements with the appellants in 1963 whereby the appellants undertook to purchase from the respondent, for a period of two years, volumes of lightweight aggregate specified in the agreement. Under the agreements the appellants undertook to acquire this type of aggregate from the respondent only, and not to enter the lightweight aggregate supply business themselves. The agreements specified the price of the Saturnalite to be supplied.

En raison de ses pertes d'exploitation et parce que ses propriétaires reconnaissaient la faible demande de granulat léger en Colombie-Britannique, et peut-être pour d'autres raisons, l'intimée a cherché à créer ou à s'assurer des débouchés pour son granulat léger, Saturnalite, et, à cet effet, a passé avec les appelantes en 1963 des contrats par lesquels ces dernières s'engageaient à acheter à l'intimée, pendant une durée de deux ans, les quantités de granulat léger précisées. Elles promettaient en outre d'acquérir ce type de granulat seulement de l'intimée et de ne pas se lancer elles-mêmes dans l'entreprise de fourniture de granulat léger. Les contrats fixaient le prix du Saturnalite qui devait être livré.

As a *quid pro quo* for the entry into this agreement by the appellants, the parent company of the respondent, Graymont Limited, executed an undertaking reciting that the undertaking was entered into "in consideration of Deeks-McBride Ltd. . . . entering into an agreement dated as of the 1st day of May 1963 . . . . " Deeks-McBride Ltd. was a member of the LaFarge group of companies. The respondent's then parent company covenanted and agreed that it:

> shall not . . . directly or indirectly, be engaged in, employed in, operate, carry on, manage or invest in the cement or concrete business or in the business of manufacturing concrete products within the province of Brit-

En échange de la signature de ces contrats par les appelantes, la société mère de l'intimée, Graymont Limited, a signé un engagement qui, suivant ses propres termes, a été fait [TRADUCTION] «en contrepartie de la signature par Deeks-McBride Ltd... d'un contrat daté du 1er mai 1963 . . .». Deeks-McBride Ltd. fait partie du groupe LaFarge. La société mère de l'intimée s'est engagée:

> [TRADUCTION] à ne pas . . . directement ou indirectement, pendant la durée de ladite convention et pendant la période visée par toute reconduction, exploiter, exercer ou administrer un commerce de ciment ou de béton

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ish Columbia at any time during the currency of the said agreement and any renewal or renewals thereof . . .

At the request of the respondent the parties entered into second agreements (one agreement with each of the appellants, the Ocean Group and the LaFarge Group) on the expiry of the first. These second agreements, which were executed in June of 1965, were for a term of five years and by their terms required:

(1) the appellants to purchase all their requirements of lightweight aggregate from the respondent;

(2) the appellants to refrain from entering into the manufacture of such aggregate;

(3) the price payable by the appellants to be that specified in the agreements;

(4) the appellants to purchase a prescribed minimum quantity of the lightweight aggregate;

(5) the appellants to market blocks produced from lightweight aggregate, as well as lightweight ready-mix concrete, all at a price specified in the agreements.

In return the respondent undertook in the agreements not to enter into "fields in the cement and concrete industry in which . . . [the appellants are] presently engaged . . . ." The effect of these agreements was simply to make the respondent the sole supplier to the appellants of lightweight aggregate for use in the production of cement and cement products in British Columbia and to regulate the minimum volume and price of such lightweight aggregate to be so employed by the appellants, and further to regulate certain prices of the resultant lightweight concrete products.

The trial judge found that the respondent "was not aware it was selling in a completely structured market. It [the respondent] had wrongly assumed there would be competitive bidding for its product . . . " ((1979), 103 D.L.R. (3d) 587, at p. 608); and the Court of Appeal, on the same point, stated: "The plaintiff [respondent] entered into those agreements in the belief that there was free competition in the market." ((1981), 123 D.L.R.

ou de fabrication de produits de béton dans la province de la Colombie-Britannique, et à ne pas investir, directement ou indirectement, dans ce type de commerce en Colombie-Britannique . . .

À la demande de l'intimée, lorsque les premières conventions sont venues à expiration, les parties en ont conclu d'autres (il y avait une convention avec le groupe Ocean et une avec le groupe LaFarge). Ces nouvelles conventions, signées en juin 1965, avaient une durée de cinq ans et exigeaient:

(1) que les appelantes achètent à l'intimée tout le granulat léger dont elles avaient besoin;

(2) que les appelantes ne se lancent pas dans la fabrication de granulat léger;

(3) que le prix à payer par les appelantes soit celui fixé par les contrats;

(4) que les appelantes achètent une quantité minimale déterminée de granulat léger;

(5) que les appelantes vendent des blocs fabriqués à partir de granulat léger ainsi que du béton léger prêt à l'emploi, et ce au prix fixé dans les conventions.

En contrepartie, l'intimée s'est engagée à ne pas pénétrer les [TRADUCTION] «secteurs de l'industrie du ciment et du béton où . . . [les appelantes] exercent présentement leurs activités . . .». Ces conventions avaient simplement pour effet de faire de l'intimée l'unique fournisseur en granulat léger des appelantes pour la production de béton et de produits de béton en Colombie-Britannique, de régler les quantités et le prix minimaux du granulat léger ainsi utilisé et aussi de régler le prix de certains produits de béton léger.

Le juge de première instance a conclu que l'intimée [TRADUCTION] «ignorait qu'elle vendait sur un marché complètement structuré. Elle [l'intimée] avait supposé à tort qu'il y aurait de la concurrence pour son produit . . .» ((1979), 103 D.L.R. (3d) 587, à la p. 608); la Cour d'appel a dit sur ce même point: [TRADUCTION] «la demanderesse [l'intimée] a conclu ces conventions croyant qu'il y avait libre concurrence sur le marché.»

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(3d) 66, at p. 80). However, the documentary evidence is to the contrary.

In a letter written by the president of the respondent to the president of the appellant LaFarge on April 1, 1965, the respondent acknowledged that the concrete "... industry is virtually controlled by two companies, and because of their capital resources, they can continue this dominance through the acquisition of almost all worthwhile outlets ...." The respondent's president then concluded that "any independent raw material supplier is in an untenable position, regardless of the merits of his product". That the respondent was aware of the legal consequences of the control of this industry is made apparent in the next paragraph:

> If the large companies refuse to make room in their outlets for new products, they are inviting a third force into the market in order to accommodate the independents. It is also our opinion that the spirit of the Combines Act is contravened by the sealing off of the market by the purchase of more and more outlets, by interference with transportation arrangements, by inter-company sales of materials and other co-operative action.

In this letter the respondent asserted that:

> Our only defence under these circumstances would be to expand the diversification programme which we initiated three years ago in order that we be able to take a direct hand in the market and have co-operative outlets for our material.

Indeed, the author states that in reliance upon the first agreement:

> We were led to believe at that time [the time of the first agreement] that the first contract would lead to a second one and, for this reason, we did not pursue our vertical integration programme. Therefore, we were very disappointed when we recently found out that Ocean Cement Ltd. was seriously considering entering the shale business. As can now be seen, reasonable predictions would indicate that the volume of shale required for this market will allow our company to make a profit provided we have all the expanded shale business in this area. Any loss of volume to anyone else, such as that

((1981), 123 D.L.R. (3d) 66, à la p. 80). Toutefois, ce n'est pas ce qui se dégage des documents versés au dossier.

Dans une lettre datée du 1er avril 1965, écrite au président de l'appelante LaFarge, le président de l'intimée reconnaîssait que [TRADUCTION] « ... l'industrie [du béton] est virtuellement dominée par deux sociétés qui, grâce à leurs ressources en capital, peuvent s'assurer de la continuation de cette domination par l'acquisition de la quasi-totalité des points de vente qui en valent la peine ... » Puis le président de l'intimée a conclu que [TRADUCTION] «tout fournisseur indépendant de matières premières se trouve dans une situation intenable, quelle que soit la qualité de son produit». Que l'intimée n'ignorât pas les conséquences juridiques de cette état de choses devient apparent à la lecture du paragraphe suivant:

> [TRADUCTION] Si les grandes sociétés interdisent aux nouveaux produits l'accès à leurs points de vente, elles invitent des tiers à pénétrer sur le marché afin de répondre aux besoins des indépendants. Nous sommes également d'avis que le fait de fermer hermétiquement le marché par l'achat d'un nombre toujours croissant de points de vente, par l'ingérence dans les dispositions prises pour le transport, par la vente de matériaux entre sociétés et par d'autres mesures de coopération, constitue une infraction à l'esprit de la *Loi relative aux enquêtes sur les coalitions*.

L'intimée affirmait dans cette lettre:

> [TRADUCTION] Notre unique ressource dans ces circonstances est d'étendre le programme de diversification entrepris il y a trois ans, ce qui nous permettra de participer directement au marché et d'avoir des points de vente coopératifs pour nos matériaux.

En fait, l'auteur de la lettre déclarait:

> [TRADUCTION] On nous avait donné à entendre à ce moment-là [au moment de la signature de la première convention] que le premier contrat serait suivi d'un second et, pour cette raison, nous n'avons pas poursuivi notre programme de concentration verticale. Par conséquent, nous avons été vivement déçus d'apprendre dernièrement qu'Ocean Cement Ltd. envisage sérieusement de se lancer dans le schiste. Or, comme on le sait maintenant, il paraît, selon des prévisions raisonnables, que la quantité de schiste requise pour ce marché permettra à notre société de réaliser un profit, à condition

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proposed by Ocean a short time ago would, of course, throw us into a loss position once more.

Having recited all of this the respondent's senior officer stated:

Regardless of the foregoing, I believe it would be more profitable for our company to extend the present arrangements whereby we supply your company with all your expanded shale requirements on a fixed contract basis. I therefore propose a five year firm contract on the basis laid out in the attached Schedule 'A'.

The letter concluded:

I am sure that if your company will accept the principle of our supplying you with all your shale requirements (both for aggregate and Pozzolan) then we will soon be able to conclude an equitable arrangement.

As already observed, the courts below concluded, in the words of the Court of Appeal, "the plaintiff [respondent] was a competitor of the defendants [appellants]" (at p. 81). However, the letter of the respondent from which the quotations above have been taken is at pains to point out:

Both expanded shale and Pozzolan [light weight aggregate] should not be looked upon as competitors to heavy aggregate and cement.

The evidence is clear that the choice between the use of lightweight or heavy aggregate is made not by the concrete supplier, such as the appellants, but rather by the customer or buyer of the concrete. Usually this means the architect or engineer employed by the owner undertaking the construction project. Some argument was made by counsel for the respondent that the appellants had priced the concrete produced by use of Saturnalite so high as to discourage its use. Suffice it to say that there was no such finding, and the terms of the contract specify the price of certain end products in any case. With reference to this the learned trial judge stated, at p. 614:

qu'elle puisse être l'unique fournisseur de schiste expansé dans cette région. Si quelqu'un d'autre devait prendre une part du marché, comme Ocean s'est proposée de le faire il n'y a pas longtemps, il est évident que cela nous mettrait de nouveau en déficit.

Ayant dit tout cela, le président de l'intimée ajoutait:

[TRADUCTION] Malgré cela, je crois qu'il nous sera plus profitable de maintenir la situation actuelle en vertu de laquelle nous vous fournissons, suivant les modalités prévues au contrat, tout le schiste expansé dont vous avez besoin. Je propose donc un contrat ferme d'une durée de cinq ans dont les modalités seront conformes à l'annexe «A» ci-jointe.

La lettre se terminait ainsi:

[TRADUCTION] Je suis certain que si vous acceptez le principe selon lequel nous allons vous fournir tout le schiste dont vous aurez besoin (aussi bien pour la production de granulat que pour la production de pouzzolane), nous allons pouvoir bientôt en arriver à un accord équitable.

Comme je l'ai déjà fait remarquer, l'une et l'autre cours d'instance inférieure ont conclu, pour reprendre les termes employés par la Cour d'appel, que [TRADUCTION] «la demanderesse [intimée] faisait concurrence aux défenderesses [appelantes]» (à la p. 81). Toutefois, l'auteur de la lettre de l'intimée, d'où proviennent les extraits précités, s'est appliqué à signaler:

[TRADUCTION] Il ne faut considérer ni le schiste expansé ni le pouzzolane [granulat léger] comme des sources de concurrence avec le granulat lourd et le ciment.

Il se dégage nettement de la preuve que ce n'est pas le fournisseur de béton (les appelantes) qui choisit entre l'emploi de granulat léger ou celui de granulat lourd, mais plutôt le client ou l'acheteur du béton. Cela veut dire normalement l'architecte ou l'ingénieur engagé par le propriétaire qui entreprend la construction. L'avocat de l'intimée a fait valoir, sans insister, que les appelantes avaient fixé un prix prohibitif pour le béton fabriqué à partir de Saturnalite. Signalons simplement qu'il n'y a pas eu de conclusion dans ce sens et, de toute façon, le contrat établit le prix de certains produits finis. Le juge de première instance a dit à ce propos, à la p. 614:

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Because the concrete manufacturer only supplied the concrete after it had been specified by the architect or the engineer did not necessarily mean the manufacturer had lost effective control over the type of concrete to be specified. Surely cost benefit studies, or cost analysis studies, would have had to be conducted by the architect or engineer at the design stage and prices would have had to be obtained from the manufacturers.

Light-weight always did cost more because of the manufacturing process but if the savings effected by the use thereof were greater than the additional cost incurred for light-weight, then presumably light-weight would be used in a free competitive market.

The Court of Appeal stated with reference to this topic, at p. 78:

> The evidence disclosed that the decision as to whether an owner or contractor would use light-weight concrete, in preference to heavy-weight concrete, was made at the design stage of a project, by an architect or engineer. The decision turned primarily on cost and was the result of a cost benefit analysis made by the architect or engineer.
>
> When an invitation to tender was issued by a contractor the decision had already been made as to what portion of the project would involve light-weight concrete and what portion of the project would use heavy-weight concrete. The defendants would respond to the invitation to tender by quoting prices for the volumes of light-weight and heavy-weight required for the project.

Because lightweight aggregate had a specific use in the concrete industry, and because of the respondent's vested interest in the promotion of that use, the respondent's salesmen were active in the concrete-user market promoting the use of lightweight concrete. The judgment on appeal below, at p. 79, stated with reference to this:

> The plaintiff had salesmen who were active in the market, promoting the use of light-weight concrete, and they, knowing the published price of the defendants' heavy-weight concrete, would not only be able to quote a price for light-weight concrete, but from 1965 through 1970, during the period of the agreements between the plaintiff [the respondent] and the defendants, could guarantee the price of light-weight concrete to architects and engineers.

Of critical importance is the statement of the Court of Appeal: "The evidence disclosed that architects and engineers in preparing a cost benefit

[TRADUCTION] Le fait que le fabricant de béton en fournit seulement après que l'architecte ou l'ingénieur en a précisé le type, ne veut pas nécessairement dire que le fabricant a perdu tout pouvoir réel sur le type de béton à choisir. Il aurait certainement fallu que l'architecte ou l'ingénieur effectue à l'étape du dessin des études coûts-avantages ou des analyses des coûts et qu'ils se renseignent auprès des fabricants concernant les prix.

Le béton léger coûte toujours plus cher en raison du mode de fabrication, mais si les économies réalisées par son emploi justifient son coût plus élevé, alors c'est vraisemblablement le béton léger qui sera utilisé dans un marché où il y a libre concurrence.

La Cour d'appel a dit sur cette question, à la p. 78:

> [TRADUCTION] La preuve révèle que c'est l'architecte ou l'ingénieur qui décide, au stade du dessin, si un propriétaire ou un entrepreneur utilisera du béton léger de préférence au béton lourd. L'architecte ou l'ingénieur procède à une analyse coûts-avantages et la décision est prise principalement en fonction du coût.
>
> Lorsqu'un entrepreneur fait un appel d'offres, la décision quant aux quantités de béton léger et de béton lourd à utiliser a déjà été prise. À la suite d'un appel d'offres les défenderesses proposaient des prix pour les quantités de béton léger et de béton lourd requises.

Puisque le granulat léger sert à une fin précise dans l'industrie du béton et puisqu'il était de l'intérêt de l'intimée de promouvoir son utilisation à cette fin, les vendeurs de l'intimée s'appliquaient à encourager les consommateurs à employer le béton léger. L'arrêt de la Cour d'appel dit à ce sujet, à la p. 79:

> [TRADUCTION] La demanderesse avait des vendeurs qui s'occupaient activement, sur le marché, de la promotion de l'emploi du béton léger et qui, connaissant le prix publié du béton lourd des défenderesses, étaient en mesure non seulement d'établir un prix pour le béton léger, mais, de 1965 à 1970 lorsque les conventions entre la demanderesse [l'intimée] et les défenderesses s'appliquaient, de garantir aux architectes et aux ingénieurs le prix du béton léger.

La déclaration suivante de la Cour d'appel revêt une importance capitale: [TRADUCTION] «La preuve révèle que lorsque les architectes et les

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analysis would obtain the price for lightweight concrete from the plaintiff [respondent]". The evidence also discloses, and it was so found by the learned trial judge, that during the five-year term of the 1965 agreements the price spread between light and ordinary aggregate rose from five cents to six cents per block by the agreement of the respondent and appellants. At trial it was also found (at p. 605) that "there was little evidence adduced that the defendants [appellants] denigrated or bad-mouthed the plaintiff's [respondent's] product". Furthermore, prior to the expiry of the 1965 agreements, the respondent increased the price of lightweight aggregate supplied to the appellants by one dollar per cubic yard contrary to the terms of the agreements. In the result, the respondent did not realize the volume of sales to the appellants during the second agreement. Instead of delivering to the appellants 411,832 cu. yds., there was a shortfall of 91,718 cu. yds. There is no clear explanation of this disparity between contract guarantees and performance. However, the trial judge noted at p. 599 that:

> During the spring of 1969 as a result of heavy demand for Saturnalite and production problems the plaintiff was unable to supply the amounts required by its customers and consequently found it necessary to institute a quota system.

The agreements expired in 1970 and apparently the respondent elected not to seek a renewal. Presumably the respondent by that time had determined either that it was sufficiently established in business that it could "go it alone", or that the agreement had been found to be improvident in that it failed to produce the volume necessary for the respondent to operate its business at a profit. Whatever may be the reason, the respondent did not seek and there was no renewal of the 1965 agreement.

Shortly thereafter, the appellant Ocean, in the course of reviewing its block business in 1970-71, determined that in the production of lightweight aggregate concrete products, Ocean would thereafter use as a lightweight aggregate pumice from the Seattle area instead of Saturnalite. The appellant

ingénieurs préparaient une analyse coûts-avantages, ils se renseignaient auprès de la demanderesse [intimée] sur le prix du béton léger». Il se dégage également de la preuve, et c'est ce qu'a conclu le savant juge de première instance, qu'au cours de la durée de cinq ans des conventions intervenues en 1965, l'écart entre le prix du granulat léger et du granulat ordinaire est passé, sur accord de l'intimée et des appelantes, de cinq cents, où il était, à six cents le bloc. Le premier juge a conclu (à la p. 605) en outre que [TRADUCTION] «la preuve produite n'indique guère que les défenderesses [appelantes] ont dénigré ou rabaissé le produit de la demanderesse [intimée]». De plus, avant l'expiration des conventions de 1965, l'intimée les a violées en augmentant d'un dollar la verge cube le prix du granulat léger fourni aux appelantes. En conséquence, le volume de ses ventes aux appelantes a baissé pendant la durée du second contrat. En effet, elle a livré aux appelantes 91 718 verges cubes de moins que les 411 832 verges cubes prévues. La raison de ce décalage n'est pas claire. Toutefois, le juge de première instance a fait remarquer à la p. 599 que:

> [TRADUCTION] Au printemps de 1969, par suite d'une forte demande de Saturnalite et en raison de certains problèmes de production, la demanderesse s'est trouvée dans l'impossibilité de fournir à ses clients les quantités dont ils avaient besoin et a dû, par conséquent, instaurer un système de contingentement.

Les conventions ont expiré en 1970 et l'intimée a apparemment choisi de ne pas les renouveler. Selon toute vraisemblance, elle avait alors décidé soit qu'elle était assez solidement établie pour pouvoir faire cavalier seul, soit que les conventions ne donnaient pas les résultats souhaités en ce sens qu'elles ne lui avaient pas permis de réaliser le chiffre d'affaires nécessaire pour assurer la rentabilité de son entreprise. Quelle que puisse être la raison, l'intimée n'a pas cherché à reconduire les conventions de 1965 et celles-ci n'ont donc pas été renouvelées.

Peu après, l'appelante Ocean, au cours d'un examen de ses ventes de blocs de béton pour l'année 1970-1971, a décidé qu'elle emploierait désormais comme granulat léger dans la production de produits de béton léger de la pierre ponce provenant de la région de Seattle au lieu de Satur-

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LaFarge followed the same course about a year later. Some Saturnalite continued to be used by the appellants thereafter, but only for a limited range of concrete products. In the result, the respondent's sales by 1973 had dropped to about 60 per cent of its annual volume at the end of the contract period. The respondent's plant ceased operations in late 1974.

Both the trial judge and the Court of Appeal, at pp. 616 and 87, found that the appellants "did not make deliberate and specific plans to drive the plaintiff [respondent] out of business." Both courts did find, however, that the respondent was a competitor of the appellants, and that since the appellants did intend, in the words of the Court of Appeal, "to eliminate all competitors and succeeded in so doing", at p. 89), the appellants therefore "eliminated" the respondent. The Court of Appeal in this line of reasoning expressly stated at p. 81: "The plaintiff [respondent] was a competitor of the defendants [appellants]." It is difficult to determine the evidentiary basis for this conclusion. The trial judge seems to have reached the same result by a somewhat different line of reasoning. His Lordship stated, at p. 621:

> It was manifestly apparent that one of the objects and purposes of the marketing arrangement was to prevent competition from any source including that from the plaintiff.

This statement immediately follows a reference to the negotiations leading to the execution of the 1963 contract, already quoted in part:

> At the time the 1963 contracts were entered into with the plaintiff the *quid pro quo* was that Graymont Limited and its principal shareholders would not compete with the defendants by agreeing not to . . . [engage in the business of manufacturing concrete products].

It may be that the trial judge, in finding that the object of the appellants was "to prevent competition from any source including that from the plaintiff [respondent]", was relying upon the immediately preceding quotation from the 1963 covenant executed by the respondent. By that covenant the

nalite. L'appelante LaFarge a pris la même décision environ un an plus tard. Les appelantes ont continué à utiliser une certaine quantité de Saturnalite, mais seulement pour un nombre restreint de produits de béton. Finalement, les ventes de l'intimée en 1973 ont baissé à environ 60 p. 100 du chiffre annuel à l'expiration des contrats. L'usine de l'intimée a fermé ses portes vers la fin de 1974.

Aussi bien le juge de première instance que la Cour d'appel ont conclu que les appelantes [TRADUCTION] «n'ont élaboré aucun plan traduisant une intention délibérée et précise de ruiner la demanderesse [intimée]» (aux pp. 616 et 87). Les deux cours ont toutefois conclu que l'intimée était en concurrence avec les appelantes et que, puisque celles-ci ont bel et bien visé, selon les termes employés par la Cour d'appel, [TRADUCTION] «à éliminer tous les concurrents et sont parvenues à le faire» (à la p. 89), il s'ensuit qu'elles ont «éliminé» l'intimée. Dans ce même ordre d'idées, la Cour d'appel dit expressément à la p. 81: [TRADUCTION] «La demanderesse [intimée] faisait concurrence aux défenderesses [appelantes]». On voit mal sur quelle preuve cette conclusion peut se fonder. Le juge de première instance semble être parvenu au même résultat par un raisonnement un peu différent. Il dit, à la p. 621:

> [TRADUCTION] Il est bien évident que l'accord de commercialisation avait notamment pour objet et pour but d'éliminer toute concurrence, y compris celle de la demanderesse.

Cet extrait suit immédiatement une déclaration, que j'ai déjà citée en partie, concernant les négociations qui ont abouti à la signature du contrat en 1963:

> [TRADUCTION] Lorsque les contrats avec la demanderesse ont été signés en 1963, Graymont Limited et ses actionnaires principaux ont dû en contrepartie renoncer à faire concurrence aux défenderesses en s'engageant à ne pas . . . [se lancer dans la fabrication de produits de béton].

Il est possible qu'en concluant que les appelantes avaient pour objet «d'éliminer toute concurrence, y compris celle de la demanderesse [intimée]», le juge de première instance se soit fondé sur l'extrait qu'il venait de citer du contrat de 1963 signé par l'intimée. L'intimée s'est engagée par là à ne pas

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respondent undertook not to become a competitor of the appellants, which has quite a different commercial connotation from an agreement between actual competitors. We are not here concerned with the significance of that definition under the *Combines Investigation Act*, and I only make reference to the distinction in order to determine and examine the actual finding made by the learned trial judge and the Court of Appeal on this issue.

There are two senses in which the learned trial judge seems to have employed the term "competitor" with reference to the potential competition which could arise between the parties. If the respondent, as a raw material producer, extended his industrial operation vertically, the end product would be concrete products which would compete in the market with those of the appellants. The second sense in which it might be argued that the parties are competitors arises from the fact that the respondent produces one type of aggregate used in the production of concrete and the appellants produced another type of aggregate used in the production of concrete products. In support of its conclusion that the respondent is a competitor of the appellants, the Court of Appeal cited the trial judge's summary of the evidence of an expert witness:

> Both Ocean and LaFarge had an incentive not to use lightweight aggregates to maximum benefit to their customers for by so doing they would use less cement and aggregate which they produced and sold themselves [at p. 613];

and concluded at p. 81:

> The plaintiff was a competitor of the defendants. When light-weight concrete was specified by an architect or engineer this reduced the demand for cement, aggregates and reinforcing steel which they produced or sold themselves.

There is, however, no finding that the end products in question (light and ordinary concrete) are competitive in the sense that one can be used interchangeably with the other. The products made from lightweight aggregate are, according to the evidence, used where specified by the technicians in control of the building operation in question. There is no evidence and no finding that the

entrer en concurrence avec les appelantes, ce qui, en matière commerciale, est bien différent d'un accord entre de véritables concurrents. La façon dont la *Loi relative aux enquêtes sur les coalitions* définit ce terme ne nous intéresse pas ici, et je mentionne cette distinction à la seule fin de déterminer et d'examiner la véritable conclusion du savant juge de première instance et de la Cour d'appel sur cette question.

En ce qui a trait à la concurrence qui aurait pu naître entre les parties, le premier juge semble donner deux sens au terme «concurrent». Si l'intimée, en sa qualité de productrice de matières premières, procédait à la concentration verticale de ses activités industrielles, les produits de béton qui en résulteraient seraient mis sur le marché en concurrence avec ceux des appelantes. On pourrait également prétendre que les parties étaient des concurrentes en ce sens que l'intimée produisait un type de granulat utilisé dans la production de béton alors que les appelantes en produisaient un autre type employé pour la fabrication de produits de béton. La Cour d'appel a cité, à l'appui de sa conclusion que l'intimée était une concurrente des appelantes, le résumé qu'a fait le premier juge de la déposition d'un témoin expert:

> [TRADUCTION] Aussi bien Ocean que LaFarge avaient tout intérêt à ne pas faire profiter leurs clients au maximum des granulats légers, car elles réduisaient ainsi l'utilisation du ciment et du granulat qu'elles produisaient et vendaient elles-mêmes, [à la p. 613];

La Cour d'appel a conclu, à la p. 81:

> [TRADUCTION] La demanderesse faisait concurrence aux défenderesses. Lorsqu'un architecte ou un ingénieur exigeait spécialement du béton léger, cela diminuait la demande de ciment, de granulats et d'acier d'armature que les défenderesses produisaient ou vendaient elles-mêmes.

Cela ne revient cependant pas à conclure qu'il y a concurrence entre les produits finis en question (le béton léger et le béton ordinaire) en ce sens qu'ils sont interchangeables. Suivant la preuve, les produits faits de granulat léger sont employés chaque fois que les techniciens chargés des travaux de construction les exigent. Il n'y a ni preuve, ni conclusion que ces produits sont interchangeables,

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products may be used interchangeably, one for the other, and, as recognized by the Court of Appeal, it was the plaintiff who provided the architects and engineers with the price of lightweight concrete and who did the product promotion. It is difficult to see, therefore, in what sense there is actual competition between the respondent and the appellants.

I now turn to the first of the four submissions advanced by the appellants, *supra*, relating to the intent requirement of the tort of conspiracy to injure. While there may have been some doubt as to the required intent in the common law tort of conspiracy, there never appears to have been any doubt that one element of the tort of conspiracy to injure is an intent to cause damage to the respondent. The learned author of *Salmond on Torts*, 17th ed., (1977), put it this way at p. 377:

> Since the *Crofter* case [[1942] A.C. 435] the common law is clear. A combination wilfully to do an act causing damage to a man in his trade or other interests is unlawful and if damage in fact is caused is actionable as a conspiracy.

Damage is, of course, the gist of most tortious actions, and outside of the field of negligence, the intention to inflict damage must be present. *Vide Law of Torts*, Fleming, 5th ed., pp. 24 and 33.

A recent and most helpful discussion of this tort in circumstances not far removed from those arising in this appeal, is found in *Lonrho Ltd. v. Shell Petroleum Co. Ltd.*, [1982] A.C. 173, [1981] 2 All E.R. 456, a decision of the House of Lords handed down on June 4, 1981. Lord Diplock, with whom the other members of the House of Lords concurred, divides the tort into two components. With respect to the first element or rule he said at pp. 188 and 463 respectively:

> Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted the agreement, which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of

l'un pouvant être substitué à l'autre et, comme l'a reconnu la Cour d'appel, c'est la demanderesse qui a informé les architectes et les ingénieurs du prix du béton léger et qui a fait la publicité du produit. Donc, on voit mal dans quel sens il peut y avoir une véritable concurrence entre l'intimée et les appelantes.

Abordons maintenant le premier des quatre arguments (précités) invoqués par les appelantes. Cet argument se rapporte à l'élément moral d'intention du délit civil de complot en vue de nuire. S'il a pu subsister un doute quant à l'intention requise pour le délit civil de complot qui existe en *common law*, il paraît qu'on n'a jamais douté qu'un des éléments constitutifs de ce délit civil est une intention de porter préjudice à la victime. Voici ce qu'en dit le savant auteur de *Salmond on Torts*, 17e éd, (1977), à la p. 377:

> [TRADUCTION] Depuis l'arrêt *Crofter* [[1942 A.C. 435] la situation en *common law* est claire. Une coalition en vue de l'accomplissement volontaire d'un acte qui lèse une personne dans sa profession ou dans ses autres intérêts est illégale et, s'il y a effectivement préjudice, elle donne ouverture à une poursuite pour complot.

L'existence d'un préjudice est, bien entendu, essentielle à la plupart des recours délictuels et, abstraction faite du domaine de la négligence, il doit y avoir intention de causer ce préjudice. Voir *Law of Torts*, Fleming, 5e éd., aux pp. 24 et 33.

L'arrêt récent *Lonrho Ltd. v. Shell Petroleum Co. Ltd.*, [1982] A.C. 173, [1981] 2 All E.R. 456, que la Chambre des lords a rendu le 4 juin 1981, contient une analyse des plus instructives de ce délit civil dans des circonstances pas très éloignées de celles de la présente espèce. Lord Diplock, à l'avis duquel les autres membres de la Chambre des lords se sont rangés, a établi qu'il s'agit d'un délit civil à deux volets. En ce qui a trait au premier, il dit aux pp. 188 et 463 respectivement:

> [TRADUCTION] Vu comme un délit civil, cependant, le complot est une cause d'action très exceptionnelle. Elle est fondée sur un préjudice causé au demandeur; tant que la convention, qui à elle seule constitue le crime de complot, n'est pas exécutée, il n'en résulte aucun préjudice; seuls peuvent avoir cet effet les actes accomplis en exécution de la convention. Donc le délit civil, à la

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agreement but of concerted action taken pursuant to agreement.

With reference to the second element of conspiracy, His Lordship continued at pp. 189 and 464:

The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in *Quinn v. Leathem* [1901] A.C. 495, and accepted as good law in the *Crofter* case [1942] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

It was argued in the House of Lords that the tort should be extended to embrace the situation where the conspiratorial conduct resulted in a contravention of penal law, but did not include an intention by the conspiring defendants to injure the plaintiff. This argument was rejected by Lord Diplock in the following words, at pp. 189 and 464:

My Lords, my choice is unhesitatingly the same as that of Parker J. and all three members of the Court of Appeal. I am against extending the scope of civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff.

There is here no finding by the learned trial judge of any intention by the appellants to injure the respondent in its business. The market-sharing agreements, to which reference will be made below, were not alleged nor found to have been entered into with the plaintiff in mind at all. The 1963 and 1965 agreements between the parties to this appeal were of course not directed against the respondent, and it is axiomatic that the agreements did not have as their object injury to the respondent. The substantial discontinuance of the use of Saturnalite by the appellants after the agreements expired was not found to have been an

différence du crime, consiste non pas en la convention, mais en l'action concertée entreprise pour l'exécuter.

Sa Seigneurie ajoute aux pp. 189 et 464, concernant le second élément du complot:

[TRADUCTION] Selon moi, cette Chambre doit reconnaître le délit civil de complot en vue de nuire aux intérêts commerciaux du demandeur lorsque tel est l'objet prédominant de la convention entre les défendeurs et des actes accomplis en exécution de cette convention qui ont causé un préjudice au demandeur, car il s'agit d'un délit civil trop bien établi pour être écarté, quelque exceptionnel qu'il puisse paraître aujourd'hui. Cette Chambre l'a appliqué il y a 80 ans dans l'arrêt *Quinn v. Leathem* [1901] A.C. 495, et a confirmé sa validité en droit dans l'arrêt *Crofter* [1942] A.C. 435, où l'on a signalé clairement que l'accord en exécution duquel les actes dommageables ont été accomplis doit avoir pour objet prédominant de causer un préjudice au demandeur et non pas simplement de servir les intérêts personnels des défendeurs.

On a fait valoir devant la Chambre des lords qu'il y a lieu d'étendre ce délit civil de manière à comprendre la situation où les actes accomplis en exécution du complot contreviennent au droit pénal sans qu'il y ait intention de la part des comploteurs défendeurs de porter préjudice au demandeur. Lord Diplock a rejeté cet argument en disant aux pp. 189 et 464:

[TRADUCTION] Vos Seigneuries, je me range sans hésitation à l'avis du juge Parker et des trois membres de la Cour d'appel. Je m'oppose à ce que le délit civil de complot soit étendu au-delà des actes accomplis en exécution d'une convention conclue par au moins deux personnes, non pas pour protéger leurs propres intérêts, mais dans la seule intention de nuire à ceux du demandeur.

Le savant juge de première instance n'a pas conclu en l'espèce à l'existence d'une intention de la part des appelantes de nuire à l'entreprise de l'intimée. On n'a pas allégué et il n'a pas été conclu que les conventions relatives au partage du marché, sur lesquelles je reviendrai plus loin, visaient la demanderesse. Les conventions de 1963 et de 1965 entre les parties en l'espèce ne visaient évidemment pas l'intimée et il va de soi qu'elles n'avaient pas pour objet de lui porter préjudice. Le premier juge a conclu que, si, après l'expiration des conventions, les appelantes ont dans une grande mesure cessé de se servir du Saturnalite, ce n'était pas dans le

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act done as part of a plan calculated to damage the respondent. Pumice required no processing and hence was a less expensive ingredient in concrete, and there is no evidence of any supply difficulties of the kind mentioned by the Court of Appeal in connection with Saturnalite. Indeed, the respondent, in attempting to seal off the threat from pumice, requested the Department of Industry, Trade and Commerce of the Government of Canada to take appropriate action through customs duties to keep the product from invading the British Columbia concrete industry. This will be the subject of further comment with reference to the third submission made by the appellants. There is, in short, no evidence and no finding of the necessary intention to injure which would entitle the respondent to the recovery of damages for the tort of conspiracy to injure.

The appellants took the position before this Court that success in any one of their four submissions would be sufficient to require that this appeal be allowed. This is true, however, only if the scope of the tort of conspiracy is confined to situations in which the defendants specifically intended to injure the plaintiff. In any event, the parties having directed their arguments to all four issues, it is appropriate that this Court respond. I therefore turn to the second issue.

The law concerning the tort of conspiracy is far from clear with respect to conduct of the defendants which is itself unlawful. The tort of conspiracy to injure is complete, as we have seen from *Lonrho*, *supra*, and the included reference to *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435, where the predominant purpose of the conspiracy is to injure the plaintiff and damage in fact results. Thus the concerted action to give effect to the intent completes the tort, and if an unlawful object is necessary (assuming damages have been suffered by the plaintiff), it is but the object to injure the plaintiff. As Lord Cave said in *Sorrell v. Smith*, [1925] A.C. 700, at p. 712:

> A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.

dessein de nuire à l'intimée. La pierre ponce, qui n'exige aucun traitement, est un composant moins coûteux du béton, et rien n'indique qu'elle présente des difficultés d'approvisionnement du genre mentionné par la Cour d'appel relativement au Saturnalite. En fait, l'intimée, dans une tentative de parer à la menace que représentait la pierre ponce, a demandé au ministère fédéral de l'Industrie et du Commerce de prendre les mesures douanières appropriées pour empêcher ce produit d'envahir l'industrie du béton de la Colombie-Britannique, sujet dont j'aurai l'occasion de reparler au cours de mon examen du troisième argument des appelantes. Bref, la preuve n'établit pas l'existence de l'intention de nuire requise pour que l'intimée ait droit à des dommages-intérêts pour le délit civil de complot en vue de nuire, et on n'a pas non plus conclu à l'existence de cette intention.

Les appelantes font valoir en cette Cour qu'il suffit qu'un seul de leurs quatre arguments soit retenu pour que ce pourvoi soit accueilli. Cela n'est vrai, cependant, que si la portée du délit civil de complot se limite aux situations où les défendeurs ont visé expressément à porter préjudice au demandeur. Quoi qu'il en soit, étant donné que les parties ont présenté des arguments sur chacune des quatre questions en litige, il convient que la Cour y réponde. Je passe donc à la deuxième question.

L'état du droit en ce qui concerne le délit civil de complot est loin d'être clair dans les cas où la conduite des défendeurs est en soi illégale. Comme il se dégage de l'arrêt *Lonrho*, précité, et de l'arrêt *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435, qui y est mentionné, il y a délit civil de complot dès lors que l'objet prédominant du complot est de porter préjudice au demandeur et qu'il y a effectivement préjudice. Ainsi, l'action concertée en vue de donner suite à l'intention complète le délit civil et, si un objet illégal est nécessaire (à supposer que le demandeur ait subi un préjudice), cet objet consiste simplement à vouloir nuire au demandeur. Comme le dit lord Cave dans l'arrêt *Sorrell v. Smith*, [1925] A.C. 700, à la p. 712:

> [TRADUCTION] Une coalition d'au moins deux personnes en vue de nuire volontairement à une personne dans sa profession est illégale et, si un préjudice lui est causé, elle donne ouverture à une poursuite.

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The conspiracy to commit an unlawful act in the criminal law is, in this respect, differently structured. The question which must now be considered is whether the scope of the tort of conspiracy in this country extends beyond situations in which the defendants' predominant purpose is to cause injury to the plaintiff, and includes cases in which this intention to injure is absent but the conduct of the defendants is by itself unlawful, and in fact causes damage to the plaintiff. The causative problems common to the second and third submissions of the appellants will be discussed mainly in connection with the latter. Statements made in a number of English cases decided prior to *Lonrho*, *supra*, appeared to endorse this latter aspect of the tort and led the learned author of *Salmond on Torts*, *supra*, at p. 379 to conclude:

> A second form of actionable conspiracy exists when two or more combine to injure a third person by unlawful means—*e.g.* the commission of a crime or tort, or the infringement of a guaranteed constitutional right . . . . In such a case it is irrelevant that the object of the conspirators in using those means may be legitimate. Combinations of this kind must be contrasted with what might be called "*Quinn* v. *Leathem* conspiracies," where the means are legitimate but the object is not. . . . Hence a conspiracy may be actionable if either the end or the means, or both, are unlawful.

Lord Diplock declined to accept this analysis, however, observing in his judgment in *Lonrho*, *supra*, at pp. 189 and 464, that:

> . . . in none of the judgments in decided cases in civil actions for damages for conspiracy does it appear that the mind of the author of the judgment was directed to a case where the damage-causing acts although neither done for the purpose of injuring the plaintiff nor actionable at his suit if they had been done by one person alone, were nevertheless a contravention of some penal law.

As a result, Lord Diplock concluded that the House of Lords had an "unfettered choice" in defining the scope of the tort of conspiracy, and elected to limit the civil action to acts done in combination for the predominant purpose of injuring the interests of the plaintiff.

Le complot en vue de commettre un acte illégal qui existe en droit criminel est différent à cet égard. La question qui se pose maintenant est de savoir si, au Canada, le délit civil de complot s'étend au-delà des situations où le but prédominant des défendeurs est de nuire au demandeur et s'il englobe les cas où cette intention de nuire est absente, quoique la conduite du défendeur soit en elle-même illégale et porte en fait préjudice au demandeur. Les problèmes de causalité communs aux deuxième et troisième prétentions des appelantes seront examinés surtout relativement à la troisième. Plusieurs décisions anglaises rendues avant l'arrêt *Lonrho*, précité, semblent appuyer ce dernier aspect du délit civil de complot et ont amené le savant auteur de *Salmond on Torts*, précité, à la p. 379, à conclure:

> [TRADUCTION] Un second type de complot donne ouverture à une poursuite; il s'agit du cas où au moins deux personnes se concertent en vue de nuire à un tiers par des moyens illégaux — par exemple, la perpétration d'un crime ou d'un délit civil, ou la violation d'un droit garanti par la constitution . . . Dans un cas pareil, il est sans intérêt que les conspirateurs aient employé ces moyens pour atteindre un objet qui peut être légitime. Il faut faire une distinction entre les coalitions de ce genre et ce qu'on peut appeler les «complots du type *Quinn v. Leathem*», où les moyens sont légitimes mais non pas l'objet . . . Ainsi, un complot peut donner ouverture à une poursuite si l'objet ou les moyens ou les deux sont illégaux.

Lord Diplock a toutefois rejeté cette analyse, faisant remarquer dans l'arrêt *Lonrho*, précité, aux pp. 189 et 464:

> [TRADUCTION] . . . il ne ressort d'aucune décision rendue dans le cadre d'une action civile en dommages-intérêts pour complot qu'on ait signalé à l'auteur des motifs de jugement des cas où les actes dommageables sans avoir pour objet de nuire au demandeur et sans lui conférer le droit d'intenter des poursuites judiciaires s'ils avaient été accomplis par une seule personne, constituaient néanmoins une infraction à quelque loi pénale.

En définitive, lord Diplock a conclu que la Chambre des lords avait «l'embarras du choix» lorsqu'il s'agissait de préciser l'étendue du délit civil de complot, et il a décidé de restreindre l'action civile aux actes accomplis en exécution d'une coalition dont l'objet prédominant est de nuire aux intérêts du demandeur.

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The history of this tort in the United States has been quite different. While there are cases to the contrary, the courts generally have for many years concluded that the tort of conspiracy to injury forms no part of the law. This has been said to be due to the unreality of the tort of conspiracy when the underlying act is not tortious when committed by an individual; and because of the development of the actions of unfair competition and *prima facie* tort in the field of commercial regulation. See Prosser, *Law of Torts*, 4th ed., at p. 291; *Civil Conspiracy*, L.S.U.C. Special Lectures 1973, 495, at p. 502.

Aux États-Unis, ce délit civil a suivi une évolution tout à fait différente. Malgré certaines décisions en sens contraire, les cours ont conclu d'une manière générale, et cela depuis bien des années, que le délit civil de complot en vue de nuire n'existe pas en droit. On attribue cela d'une part au caractère irréel du délit civil de complot quand il est fondé sur un acte qui, commis par une seule personne, n'est pas délictuel et, d'autre part, à l'émergence, dans le domaine de la réglementation commerciale, d'actions en concurrence déloyale et délit présumé. Voir Prosser, *Law of Torts*, 4e éd., à la p. 291; *Civil Conspiracy*, L.S.U.C., Conférences spéciales, 1973, 495, à la p. 502.

Canadian law concerning the tort of conspiracy displays the same lack of definition which characterized the law of England prior to the *Lonrho* decision. The subject of the tort of conspiracy has been comprehensively and critically examined in *Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest* (1982), 16 U.B.C. L. Rev. 229, by Peter Burns. I agree with respect to his conclusion at p. 254 that:

> The main effect of a finding that a conspiracy by unlawful means has been made out is to exclude the negative defence of predominant legitimate motive, that is, the advancement of the defendants' own legitimate interests.

See as well p. 247.

Le droit canadien relatif au délit civil de complot révèle la même indétermination que celle qui caractérisait le droit anglais avant l'arrêt *Lonrho*. Dans un article intitulé *Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest* (1982), 16 U.B.C. L. Rev. 229, Peter Burns fait une étude critique exhaustive du délit civil de complot. Je partage sa conclusion, à la p. 254, selon laquelle:

> [TRADUCTION] L'effet principal d'une conclusion selon laquelle on a établi l'existence d'un complot qui devait être exécuté par des moyens illégaux, est d'exclure le moyen de défense négatif du motif légitime prédominant, c'est-à-dire du service des intérêts légitimes du défendeur.

Voir aussi la p. 247.

The respondent relies upon two decisions of this Court, *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265, and *Gagnon v. Foundation Maritime Limited*, [1961] S.C.R. 435, in support of its submission that once the unlawfulness of the means has been established, an enquiry into the predominant object of the conspiracy, that is an intent to injure, is unnecessary.

L'intimée invoque les arrêts de cette Cour *International Brotherhood of Teamsters v. Therien*, [1960] R.C.S. 265 et *Gagnon v. Foundation Maritime Limited*, [1961] R.C.S. 435 à l'appui de l'argument selon lequel, une fois établi le caractère illégal des moyens, toute enquête sur l'objet prédominant du complot, c'est-à-dire sur l'intention de nuire, devient superflue.

Referring to statements made in the *Therien* case, Ritchie J., delivering the judgment of the majority in *Gagnon*, said at p. 446:

> In light of these observations, it becomes unnecessary to embark upon the difficult exercise of determining whether or not a breach of s. 22(1) of the *Labour Relations Act* gives rise to a statutory cause of action because when inquiry is "made of the statute law" in the

Dans les motifs qu'il a rédigés au nom de la majorité dans l'affaire *Gagnon*, le juge Ritchie dit, à la p. 446, concernant des déclarations faites dans l'arrêt *Therien*:

> [TRADUCTION] Compte tenu de ces constatations, il n'est pas nécessaire de procéder à l'exercice difficile qui consisterait à déterminer si une infraction au par. 22(1) de la *Labour Relations Act* donne naissance à une cause d'action fondée sur la loi, la raison à cela étant qu'en

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present case it discloses, as has been said, that the means here employed by the appellants were prohibited, and this of itself supplies the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy, the carrying out of which exposes the conspirators to an action for damages if any ensue therefrom.

As Judson J. observed in his dissenting judgment in *Gagnon*, however, at p. 461: "The case of *International Brotherhood of Teamsters v. Therien*, does not carry the matter any further. It was not a conspiracy case." The above-quoted statement from the judgment of Ritchie J. must also be read in light of the facts then before the Court. In the words of Locke J., at p. 453, who delivered a separate concurring judgment:

> It is clear from the evidence that the purpose of setting up the picket line was to inflict injury upon the respondent .... That the actions of Merloni, Gagnon and Blackman were carried on in combination for the purpose of causing injury to the respondent by unlawful means is made clear by the evidence.

Thus, the unlawful conduct of the defendants used by Ritchie J. as the basis for liability was directed towards the plaintiff and was known by the defendants to be likely to result in damage to the plaintiff.

In *Southam Co. Ltd. v. Gouthro*, [1948] 3 D.L.R. 178 (B.C.S.C.), a case relied upon by the trial judge below in reaching his decision, the defendant union members caused damage to the plaintiff company by staging an illegal sympathy strike. Wilson J. made the following findings of fact, at p. 183:

> It is suggested that the object of the strike was to injure the Province or the plaintiff company. I cannot accept this argument .... I think they did so [go on strike] with an honest conviction that they were acting in their own interests and those of their union. True, they knew they would injure the Province and the ... [plaintiff] company. This, however, was not their predominant object, but, perhaps a means of attaining their object.

Wilson J. summarized the law as follows at p. 185:

l'espèce, il se dégage de l'examen de la loi, comme je l'ai déjà dit, que les appelants ont employé des moyens interdits, ce qui suffit en soi à transformer un accord licite qui n'engendrerait aucune cause d'action en complot délictuel dont l'exécution expose les comploteurs à des poursuites en dommages-intérêts s'il en résulte un préjudice quelconque.

Cependant, comme le fait remarquer le juge Judson dans ses motifs de dissidence dans l'affaire *Gagnon*, à la p. 461: [TRADUCTION] «L'arrêt *International Brotherhood of Teamsters v. Therien* ne fait pas avancer les choses. Il ne s'agissait pas d'une affaire de complot.» L'extrait précité des motifs du juge Ritchie doit également être lu à la lumière des faits dont la Cour était saisie. Le juge Locke, dans des motifs distincts au même effet, dit à la p. 453:

> [TRADUCTION] Il se dégage nettement de la preuve que la ligne de piquetage a été dressée en vue de nuire à l'intimée ... La preuve indique clairement que Merloni, Gagnon et Blackman ont agi de concert pour causer un préjudice à l'intimée par des moyens illégaux.

Donc, la conduite illégale sur laquelle le juge Ritchie a fondé sa conclusion de responsabilité visait la demanderesse et les défendeurs savaient qu'elle lui causerait vraisemblablement un préjudice.

Dans l'affaire *Southam Co. Ltd. v. Gouthro*, [1948] 3 D.L.R. 178 (C.S.C.-B.), sur laquelle le juge de première instance a appuyé son jugement en l'espèce, les syndiqués défendeurs ont causé un préjudice à la société demanderesse en faisant une grève de soutien illégale. Le juge Wilson a tiré les conclusions de fait suivantes, à la p. 183:

> [TRADUCTION] On allègue que la grève visait à léser la province ou la société demanderesse. Je ne puis retenir cet argument ... J'estime qu'ils l'ont faite [la grève] avec la sincère conviction qu'ils agissaient dans leur propre intérêt et dans celui du syndicat. Certes, ils savaient qu'ils nuiraient à la province et à la société [demanderesse]. Ce n'était toutefois pas leur objet prédominant, mais peut-être un moyen de l'atteindre.

Le juge Wilson a résumé ainsi le principe de droit applicable à la p. 185:

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All enquiries into conspiracy must, I suggest, commence with the definition given by Willes J. in *Mulcahy* v. *The Queen* (1868), L.R. 3 H.L. 306 at p. 317, and quoted by Lord Wright in the *Crofter* case (p. 157): " 'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.' "

Where the acts agreed on and done are in themselves lawful then, even if their doing damnified the plaintiff, no action of conspiracy will lie unless the object of the conspirators was to injure the plaintiff. If this was the object, then the acts become unlawful. The subject of inquiry is lawfulness or unlawfulness.

But suppose that the acts agreed on and done are not lawful acts, but are unlawful acts. Is an inquiry into the object of the conspiracy then necessary? I think not. The unlawfulness of the acts has been established, it is inherent in the nature of the acts, and an inquiry into their purpose becomes superfluous. The requirements of Willes J.'s definition have been fully complied with.

It is important to bear in mind, when considering this explanation of the tort of conspiracy by unlawful means, the prior finding of fact that the defendants knew that their conduct, which was directed towards the plaintiff, would injure it. The presence of this element appears to be common to all the Canadian cases in which the tort of conspiracy by unlawful means has been applied.

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 cir-

[TRADUCTION] Toute enquête sur l'existence d'un complot doit, selon moi, avoir comme point de départ la définition que donne le juge Willes dans l'affaire *Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306, à la p. 317, et que lord Wright a citée dans l'arrêt *Crofter* (à la p. 157): «Un complot consiste non pas simplement dans l'intention d'au moins deux personnes, mais dans le fait que ces personnes conviennent d'accomplir un acte illégal ou un acte légal par des moyens illégaux.»

Lorsque les actes accomplis en exécution de l'entente sont en soi légaux, alors, même si leur accomplissement porte préjudice au demandeur, cela ne donnera pas lieu à une action en complot, à moins que les comploteurs n'aient eu pour objet de nuire au demandeur. Dans ce cas, les actes sont illégaux. L'enquête doit porter sur la légalité ou l'illégalité.

Mais, supposons que les actes accomplis en exécution de l'entente sont illégaux. Est-il nécessaire alors de s'enquérir de l'objet du complot? Je crois que non. L'illégalité des actes est établie car elle découle de leur nature, et une enquête sur leur objet est dès lors superflue. Dans ce cas, les exigences posées par le juge Willes dans sa définition ont été remplies intégralement.

Il est important de retenir, relativement à cette explication du délit civil de complot exécuté par des moyens illégaux, qu'on avait antérieurement conclu que les défendeurs savaient que leur conduite, dirigée contre la demanderesse, lui porterait préjudice. Toutes les décisions canadiennes où l'on a reconnu le délit civil de complot exécuté par des moyens illégaux paraissent avoir cet élément en commun.

Bien que le droit soit loin d'être clair sur l'étendue du délit civil de complot, je suis d'avis qu'en matière de responsabilité délictuelle, on ne peut poursuivre un défendeur seul qui a causé préjudice à un demandeur, mais que, lorsqu'il y a au moins deux défendeurs qui ont agi de concert, il est possible d'exercer contre eux un recours délictuel pour complot, si:

(1) indépendamment du caractère légal ou illégal des moyens employés, la conduite des défendeurs vise principalement à causer un préjudice au demandeur; ou

(2) lorsqu'il s'agit d'une conduite illégale, elle est dirigée contre le demandeur seul ou contre lui et d'autres personnes en même temps et que les défendeurs eussent dû

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cumstances 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.

The Court of Appeal does not appear to oppose the view that the tort of conspiracy is confined to conduct where there is a real or constructive intent to injure the plaintiff. On the facts in these proceedings, the Court found such an intent, probably in constructive form, to be present, and concluded at p. 89 that:

> The plaintiff was a competitor of the defendants .... It is idle, in the light of these facts, to suggest that the plaintiff was not one of the targets of the conspiracy.

As we have seen, there is no evidence and no finding that the predominant purpose of the appellants' conduct was to cause injury to the respondent. There is no doubt, however, that the conduct of the appellants, although not directed towards the plaintiff, was unlawful. They have been convicted of offences in contravention of a federal statute and have been fined in company with their fellow accused in the total sum of $432,000. The unlawfulness or illegality accompanying the alleged tortious conduct is said to be the breach of the conspiracy section, s. 32(1)(*c*), of the *Combines Investigation Act*. That conspiracy of course was not directed towards the respondent as a supplier to the conspirators, but to the public who were purchasers of the products of the conspirators. It may also be argued, as indeed it was, that some of the fictitious tenders submitted by the appellants on construction projects requiring concrete in British Columbia fell into the category of unlawful activities directed towards the respondent. Again, heinous as the conduct of the appellant was, it cannot be said in fact or in law that those tenders were directed in any way towards causing injury to the respondent. Indeed, the respondent,

savoir dans les circonstances que le préjudice subi par le demandeur était une conséquence probable.

Dans le second cas, il n'est pas nécessaire que l'objet prédominant de la conduite des défendeurs soit de nuire au demandeur, mais il doit y avoir dans les circonstances une intention implicite découlant du fait que les défendeurs auraient dû savoir que le demandeur en subirait un préjudice. Dans l'un et l'autre cas, cependant, le demandeur doit subir un préjudice réel.

La Cour d'appel ne paraît pas s'opposer au point de vue selon lequel il n'y a délit civil de complot que s'il y a une conduite traduisant une intention, réelle ou implicite, de nuire au demandeur. Se fondant sur les faits, la Cour a conclu à la p. 89 que cette intention, probablement implicite, existe en l'espèce et que:

> [TRADUCTION] La demanderesse faisait concurrence aux défenderesses ... Compte tenu de ces faits, il est vain de prétendre que la demanderesse n'était pas une des personnes visées par le complot.

Comme nous l'avons déjà vu, la preuve n'indique pas que la conduite des appelantes avait pour objet prédominant de nuire à l'intimée et il n'y a eu aucune conclusion en ce sens. Il ne fait toutefois pas de doute que, si elle n'était pas dirigée contre la demanderesse, la conduite des appelantes n'en était pas moins illégale. Elles ont été reconnues coupables d'avoir commis des infractions à une loi fédérale et elles se sont vues avec leurs coaccusées imposer des amendes totalisant 432 000 $. On prétend que le caractère illicite ou illégal de la conduite délictuelle alléguée est dans la violation de l'al. 32(1)(*c*) de la *Loi relative aux enquêtes sur les coalitions*, disposition qui porte sur les complots. Le complot en question ne visait évidemment pas l'intimée en sa qualité de fournisseur des conspirateurs, mais plutôt le public qui achetait les produits de ces derniers. Il est en outre possible de plaider, comme on l'a fait d'ailleurs, que certaines soumissions fictives que les appelantes ont faites relativement à des projets de construction en Colombie-Britannique nécessitant l'utilisation de béton peuvent être qualifiées d'actes illégaux dirigés contre l'intimée. Je le répète, si répréhensible que fût la conduite des appelantes, on ne saurait ni

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by entering into the two agreements, sought to participate in the benefits accruing to the appellants as a result of those unlawful activities.

Finally, it was argued by the respondent that the unlawful conduct by the appellants falling under the *Combines Investigation Act* umbrella included the unlawful injury to the respondent's right to the benefits flowing to it from a free and competitive market in British Columbia. Again the conduct in question was not directed towards the participation of the respondent in the concrete products market in British Columbia, and indeed, as will be discussed below in connection with the fourth submission, the respondent sought to avail itself of the advantage not of a free market, but of a neatly shared market for the end products produced in part from the raw materials supplied by the respondent under the agreements. Again one must conclude that this aspect of the unlawful conduct contravening the federal statute cannot sustain the recovery of damages in tort in these proceedings.

The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho*, *supra*, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

I turn then to the third submission relating to the causation and remoteness aspects of the tort of conspiracy. The issue raised by this proposition is

en fait ni en droit prétendre que ces soumissions visaient de quelque manière à causer un préjudice à l'intimée. Bien au contraire, car en concluant les deux conventions, l'intimée a cherché à participer aux bénéfices revenant aux appelantes par suite de ces activités illégales.

Finalement, l'intimée a fait valoir que les appelantes ont enfreint la *Loi relative aux enquêtes sur les coalitions* notamment en portant illégalement atteinte à son droit de jouir des avantages découlant d'un marché libre et compétitif en Colombie-Britannique. Là encore, la conduite reprochée n'était pas dirigée contre la participation de l'intimée sur le marché des produits de béton en Colombie-Britannique, et en fait, comme nous le verrons à l'examen du quatrième moyen, l'intimée a cherché à profiter de l'avantage, non pas d'un marché libre, mais d'un marché méthodiquement partagé pour les produits finis fabriqués en partie avec les matières premières fournies par elle en exécution des conventions. Ici encore, on doit conclure que, vue sous cet aspect, la conduite qui constitue une infraction à la loi fédérale ne peut en l'espèce fonder un recours délictuel en dommages-intérêts.

Le délit civil de complot en vue de nuire, même s'il n'est pas étendu de manière à comprendre un complot en vue d'accomplir des actes illégaux lorsqu'il y a une intention implicite de causer un préjudice, a été la cible de nombreuses critiques partout dans le monde de la *common law*. Comme l'indique si bien lord Diplock dans l'arrêt *Lonrho*, précité, aux pp. 188 et 189, il s'agit réellement d'un anachronisme commercial. En fait, il est possible que dans le contexte commercial actuel cette action ait perdu en grande partie son utilité et qu'elle survive comme une anomalie dans notre droit. Quoi qu'il en soit, il est maintenant trop tard pour déraciner de la *common law* le délit civil de complot en vue de nuire. Sans aucun doute, les cours tenteront dans l'avenir, pour les mêmes motifs que certains invoquent actuellement à l'appui de sa suppression, de limiter l'application de ce délit civil.

Cela nous amène donc au troisième argument qui se rapporte à la causalité et à l'éloignement en ce qui a trait au délit civil de complot. La question

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simply whether or not the loss suffered by the respondent was occasioned by any action or omission on the part of the appellants. That the appellants combined to share between them the concrete market in British Columbia is not disputed. The evidence reveals no loss traceable by reason of this combination, to the account of the respondent. Indeed the converse would appear to be true. The respondent's ultimate claim under this head of argument must be the loss of the value of its undertaking as a going concern; and it must be a loss occasioned by the conduct of the appellants. We have already discussed the submission advanced by the respondent that the failure of the appellants to promote products made from the respondent's raw material caused the respondent's loss. No evidence was drawn to our attention from the record which would support such a finding.

soulevée est simplement de savoir si le préjudice subi par l'intimée est le résultat d'un acte ou d'une omission de la part des appelantes. Que celles-ci se soient concertées en vue de se partager le marché du béton de la Colombie-Britannique n'est nullement contesté. Mais la preuve indique que l'intimée n'a subi aucun préjudice imputable à cette coalition. Tout au contraire. Suivant cet argument, ce que l'intimée doit réclamer en fin de compte est la perte de la valeur de son entreprise à titre de commerce florissant, perte qui doit avoir été occasionnée par la conduite des appelantes. Nous avons déjà parlé de l'argument selon lequel l'omission des appelantes de promouvoir les produits fabriqués à partir de la matière première fournie par l'intimée a été à l'origine du préjudice qu'elle a subi. On n'a attiré notre attention sur rien dans le dossier qui appuie une conclusion dans ce sens.

On the other hand, the answer advanced by the appellants is two-fold. They argue first that the destruction of the respondent's ability to compete in the British Columbia aggregate market was the result of the introduction of the raw material pumice from sources in the State of Washington. Support for this submission is found in a letter written by the respondent to the Department of Industry, Trade and Commerce, Ottawa, on September 30, 1971, *supra*. The letter, after referring to the loss of the Saturnalite market to imported pumice, continues:

Les appelantes, par contre, soulèvent deux points en guise de réponse à cet argument. Elles font valoir en premier lieu que si l'intimée a perdu sa compétitivité sur le marché du granulat de la Colombie-Britannique, cela résulte de l'introduction sur ce marché de la pierre ponce, une matière première provenant de sources situées dans l'État de Washington. Cet argument est appuyé par une lettre déjà mentionnée, en date du 30 septembre 1971, que l'intimée à adressée au ministère de l'Industrie et du Commerce à Ottawa. Après avoir mentionné que le Saturnalite a été remplacé sur le marché par la pierre ponce importée, la lettre poursuit:

The reason for the change is purely price. The landed cost of pumice in Vancouver is approximately $1.25 cubic yard less than the landed cost of our product. This is so because pumice, being a natural aggregate and subject to no further refining or manufacturing costs beyond crushing and screening, has a base cost approximately one third that of our manufactured product. If this were all there was to the competition of our product *vs* [?] pumice this letter would not be written.

[TRADUCTION] Ce changement est motivé par des considérations d'ordre purement pécuniaire. Le coût d'achat à pied d'oeuvre de la pierre ponce à Vancouver est d'environ 1,25 $ la verge cube inférieur au coût d'achat à pied d'oeuvre de notre produit. Cela s'explique par le fait que la pierre ponce, étant un granulat naturel, ne nécessite pas d'autre traitement que le concassage et le criblage ni n'entraîne d'autres coûts de fabrication que ceux imputables à ces opérations, de sorte que son coût de base est inférieur d'environ un tiers à celui de notre produit manufacturé. Mais si c'était là le seul aspect de la concurrence entre notre produit et la pierre ponce, nous n'aurions pas écrit cette lettre.

. . .

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The incursion of American pumice into the Canadian Market, replacing a Canadian product, is forecast to result in a 25% reduction in our sales and output.

The annual report of the respondent, dated May 8, 1970, is even clearer:

There is no way that our manufactured aggregate can be sold competitively with pumice, particularly as the latter is imported free of duty.

The appellants also advanced a submission that the cessation of operations by the respondent was due to the inherent financial weakness of the respondent. It was said in argument that this financial weakness was amplified by improvident investment in the late 1960's. In any case, it is argued that the respondent was not financially capable of undertaking anything approaching vertical integration in the concrete manufacturing and supply business and that their attempt to do so had been, and would continue to be, disastrous. It may very well be that the evidence does support such a submission, but again there is no finding to this effect and the documentation does not clearly demonstrate the applicability of the argument. The learned trial judge, in disposing of this suggestion by the appellants, applied the "thin skull doctrine".

It is sufficient in my view to conclude on this branch of the appeal that there is no causal connection between the unlawful activities of the appellants and the commercial demise of the respondent. On the contrary, the documentary evidence under the hand of the respondent's officers indicates that the termination of the undertaking of the respondent was the result of the introduction of a product on the market which effectively displaced the raw material supplied by the respondent. There is no finding, and indeed no evidence to support any such finding, that the employment by the appellants of this imported raw material was part of a scheme, lawful or unlawful, amounting to a conspiracy directed to the injury of the respondent in its business.

This leaves the fourth branch of the appellants' submission, namely that the respondent is barred from recovery of damages from the appellants by

Selon nos prévisions, la pénétration de la pierre ponce américaine sur le marché canadien en remplacement d'un produit canadien entraînera une baisse de l'ordre de 25 p. 100 de nos ventes et de notre production.

Le rapport annuel de l'intimée, en date du 8 mai 1970, est encore plus catégorique:

[TRADUCTION] Il est impossible que notre granulat manufacturé puisse concurrencer la pierre ponce, d'autant plus que celle-ci bénéficie d'une franchise douanière.

Les appelantes allèguent en outre que l'intimée a dû cesser ses activités en raison de la faiblesse inhérente de sa situation financière. On a fait valoir au cours des débats que de mauvais investissements vers la fin des années 1960 ont accentué cette faiblesse. Quoi qu'il en soit, on prétend que la situation financière de l'intimée était loin de lui permettre d'entreprendre la concentration verticale dans le commerce de la fabrication et de la fourniture de béton, que sa tentative de le faire avait été désastreuse et qu'il ne pouvait en être autrement. Il se peut fort bien que la preuve appuie cet argument, mais il n'y a pas eu de conclusion en ce sens et les documents produits n'établissent pas clairement la pertinence de l'argument. Le savant juge de première instance l'a rejeté en appliquant la théorie dite de la «vulnérabilité de la victime».

À mon avis, il suffit de conclure sur cette branche du pourvoi qu'il n'y a aucun lien causal entre les activités illégales des appelantes et l'effondrement de l'intimée. Bien au contraire, car les pièces justificatives revêtues de la signature des administrateurs de l'intimée montrent que celle-ci a cessé ses activités en raison de l'introduction sur le marché d'un produit qui est venu remplacer la matière première fournie par elle. On n'a pas conclu, et en vérité la preuve n'appuie pas une telle conclusion, que l'emploi par les appelantes de cette matière première importée s'inscrivait dans le cadre d'un plan, légal ou illégal, équivalant à un complot visant à nuire à l'entreprise de l'intimée.

Reste le quatrième moyen invoqué par les appelantes, savoir qu'en raison de sa propre participation volontaire au même projet, plan ou accord

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reason of the voluntary participation of the respondent in the same unlawful scheme, plan or arrangement of which the respondent now makes complaint. The law on this point is not as well developed as one might expect. The doctrine is embodied in two principles, namely *ex turpi causa non oritur actio* and *in pari delicto potior est conditio possidentis*. The former is generally applied where the plaintiff seeks recovery for an injury caused by the defendant while they were engaged together in an illegal or immoral activity. The latter principle is generally imported for the disposition of an action alleged to arise in the course of an illegal or immoral transaction. As Lord Asquith observed in *National Coal Board v. England*, [1954] A.C. 403, at p. 428, cases where a tort action has been defeated by the *ex turpi causa* maxim are exceedingly rare. One instance is where an action failed for the recovery of damages arising from assault in the course of an illegal prize fight. Another example is *Tallow v. Tailfeathers* (1973), 44 D.L.R. (3d) 55 (Alta. C.A.), where the plaintiffs' action for damages for injuries suffered due to the gross negligence of the defendant was dismissed because of their participation with the defendant driver in the theft and unlawful use of a car. See also: *Tomlinson v. Harrison*, [1972] 1 O.R. 670, (1971), 24 D.L.R. (3d) 26 (Ont. H.C.); and *Rondos v. Wawrin* (1968), 68 D.L.R. (2d) 658 (Man. C.A.) Other applications have been seen in cases where one party to an illegal agreement has sought to enforce it or to recover damages for its breach. Lord Asquith concluded at pp. 428-29 that:

> . . . it seems to me in principle that the plaintiff cannot be precluded from suing simply because the wrongful act is committed after the illegal agreement is made and during the period involved in its execution. The act must, I should have supposed, at least be a step in the execution of the common illegal purpose.

His Lordship illustrates this proposition:

> If two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action for negligence against A. But if A and B are proceeding to the premises which they intend

illégal dont elle se plaint en l'espèce, l'intimée ne peut recouvrer des dommages-intérêts des appelantes. Le droit sur ce point n'est pas aussi développé qu'on pourrait s'y attendre. Il se réduit aux deux principes suivants: *ex turpi causa non oritur actio* et *in pari delicto potior est conditio possidentis*. Le premier s'applique généralement lorsque le demandeur réclame des dommages-intérêts pour un préjudice causé par le défendeur alors qu'ils participaient ensemble à une activité illégale ou immorale. Le second est en général invoqué pour régler une action qui est censée avoir pris naissance au cours d'une opération illégale ou immorale. Comme le fait remarquer lord Asquith dans l'arrêt *National Coal Board v. England*, [1954] A.C. 403, à la p. 428, les affaires où une action délictuelle a été rejetée par l'application de la maxime *ex turpi causa* sont extrêmement rares. Dans un cas, une action en dommages-intérêts découlant de voies de fait commises au cours d'un combat de boxe illégal a été rejetée. Un autre exemple est l'affaire *Tallow v. Tailfeathers* (1973), 44 D.L.R. (3d) 55 (C.A. Alb.), où l'action en dommages-intérêts intentée par les demandeurs en raison du préjudice subi par suite de la faute lourde du défendeur a été rejetée parce qu'ils avaient eux-mêmes participé au vol et à l'utilisation illégale de la voiture conduite par le défendeur. Voir aussi: *Tomlinson v. Harrison*, [1972] 1 O.R. 670, (1971), 24 D.L.R. (3d) 26 (H.C. Ont.); et *Rondos v. Wawrin* (1968), 68 D.L.R. (2d) 658 (C.A. Man.). Ces principes ont également été appliqués dans des cas où une partie à un contrat illégal a essayé d'en obtenir l'exécution ou a réclamé des dommages-intérêts pour sa rupture. Lord Asquith conclut aux pp. 428 et 429:

> [TRADUCTION] . . . il me semble qu'on ne peut en principe empêcher le demandeur de poursuivre simplement parce que l'acte fautif est accompli après la signature du contrat illégal et au cours de la période de son exécution. Selon moi, l'acte en cause doit à tout le moins s'inscrire dans le cadre de l'exécution du dessein illégal commun.

Sa Seigneurie illustre ainsi ce principe:

> [TRADUCTION] Si deux cambrioleurs, A et B, s'entendent pour ouvrir un coffre-fort au moyen d'explosifs et qu'en maniant la charge explosive, A soit à ce point négligent qu'il cause des lésions à B, celui-ci pourrait éprouver quelque difficulté à réussir dans une action en

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burglariously to enter, and before they enter them, B picks A's pocket and steals his watch, I cannot prevail on myself to believe that A could not sue in tort (provided he had first prosecuted B for larceny). The theft is totally unconnected with the burglary. There is, however, a surprising dearth of authority on this point.

responsabilité contre A. Mais si A et B se dirigent vers les locaux qu'ils veulent cambrioler et qu'avant d'y entrer B pique la montre d'A dans sa poche, je ne parviens pas à me convaincre qu'A ne pourrait intenter une action en responsabilité délictuelle (pourvu qu'il ait d'abord poursuivi B pour vol). Le vol et le cambriolage sont complètement distincts. Il y a cependant un surprenant manque de décisions sur ce point.

In the present case the plaintiff-respondent clearly sought to avail itself of the benefits apparently attendant upon an ordinary market which has been neatly shared by the members of an illegal combine. The benefit falling to the respondent was the opportunity to be the sole supplier of lightweight aggregate to the combine. If the damages which have been suffered by the respondent flowed from its involvement in the illegal combine or from the contracts entered into between the respondent and the appellants affording the opportunity to the respondent to participate in the combine, then these doctrines prevent the respondent's recovery. On the other hand, if there is not a sufficient causal link between the respondent's participation in the illegal control of the market and the decline and eventual failure of its business, then these doctrines do not operate to provide a further basis for denying the respondent's claim. Without the causal link, of course, the respondent would have no cause of action. It would appear that in these unusual circumstances the respondent must fail whichever way this claim is advanced.

En l'espèce, la demanderesse-intimée a manifestement cherché à profiter des avantages qui se rattachent apparemment à un marché ordinaire méthodiquement partagé entre les membres d'une coalition illégale. À l'intimée revenait l'avantage que constituait la possibilité d'être l'unique fournisseur de granulat léger de la coalition. Si le préjudice subi par l'intimée découle de sa participation à la coalition illégale ou de ses contrats avec les appelantes, en vertu desquels elle pouvait participer à la coalition, alors, suivant les principes susmentionnés, l'intimée ne peut réclamer de dommages-intérêts. En revanche, s'il n'existe pas de lien de causalité suffisant entre la participation de l'intimée à la domination illégale du marché et le déclin puis l'effondrement de son entreprise, alors ces principes ne fournissent pas un motif de plus de rejeter la demande de l'intimée. Sans ce lien de causalité, l'intimée n'aurait évidemment aucune cause d'action. Dans les circonstances inhabituelles de l'espèce, l'intimée paraît devoir échouer quelle que soit la façon dont la demande est présentée.

The respondent makes no attempt to cleanse its operations of the obvious tint of illegality arising out of its agreement not to compete in the end product market in return for a grant of the right to be the sole source of supply of the raw material, lightweight aggregate. On the date the writ of summons was issued the *Combines Investigation Act* did not purport to create a right to recover damages in civil proceedings. Neither did the statute contain a stipulation foreclosing any such recovery by participants in an illegal scheme. The act was entirely neutral. Section 31.1 came into force seven months after the issuance of the writ and purports to authorize the bringing of a civil action to recover losses suffered as a result of certain violations of the Act. This provision has come before the courts in some provinces, and

L'intimée n'a fait aucun effort en vue de l'assainissement de ses activités manifestement teintées d'illégalité en raison de la convention par laquelle elle s'engageait, en échange du droit d'être l'unique fournisseur de la matière première appelée granulat léger, à ne pas entrer à titre de concurrent sur le marché des produits finis. Au moment de la délivrance du bref d'assignation, la *Loi relative aux enquêtes sur les coalitions* ne créait aucun droit d'intenter des procédures civiles en dommages-intérêts, pas plus qu'elle n'empêchait les participants à un projet illégal d'engager de pareilles procédures. Elle était en fait tout à fait neutre. L'article 31.1, entré en vigueur sept mois après la délivrance du bref d'assignation, a pour effet d'autoriser l'introduction d'une action civile en indemnisation pour les pertes subies par suite de

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varying views have been expressed as to its constitutionality. This section did not come before us for determination in these proceedings and it is not necessary to make any further reference thereto. The same lack of a causal connection between the illegal control of the market and the loss suffered by the respondent which is sufficient to dispose of the plaintiff-respondent's claim is determinative of the applicability of the *ex turpi causa* defence. This is so because the illegality of which the respondent was guilty is not, on the record, "causally relevant" to the damage of which the respondent now complains. Nor does the example proffered by Lord Asquith, *supra*, have application here. There is no proof that collateral activity by the appellants during or after the term of the contracts between the appellants and the respondent gave rise to the injury in the respondent and thus, to a cause of action known to the law. In an interesting review of the application of this defence in law by Dale Gibson, (1969), 47 Can. Bar. Rev. 89, the author makes reference to the works of earlier writers wherein considerable doubt is cast on the propriety of the application of the defence of *ex turpi causa* in tort actions. Gibson suggests that if the rule has any application it is only to forestall a plaintiff who is attempting to profit from his illegality and not merely to realize such compensation as may be necessary to restore him to the position he enjoyed prior to the operation of the illegal arrangement. Professor Fridman, on the other hand, in *The Wrongdoing Plaintiff* (1972), 18 McGill L.J. 275, argues that the question of whether the plaintiff's conduct should deprive him of his remedy can only be determined by weighing three factors: causation, remoteness, and blameworthiness. If the plaintiff's wrongdoing is historically related to his loss or injury, if it operated with the defendant's illegal behavior to produce the harm suffered by the plaintiff, and if his conduct makes him morally responsible or blameworthy for what happened to him, the plaintiff's action should not succeed. (See also Cronkite,

certaines violations de la Loi. Dans certaines provinces, les tribunaux ont été appelés à étudier cette disposition et ils ont exprimé des opinions divergentes quant à sa constitutionnalité. Comme l'article n'a pas été soumis à notre examen en l'espèce, il est inutile de s'y arrêter. L'absence de lien de causalité entre la domination illégale du marché et le préjudice subi par l'intimée, qui suffit pour entraîner le rejet de la réclamation de la demanderesse-intimée, emporte également l'inapplicabilité du moyen de défense fondé sur la maxime *ex turpi causa*. Cela s'explique par le fait que l'illégalité dont l'intimée s'est rendue coupable n'a, selon le dossier, aucun «lien de causalité» avec le préjudice dont elle se plaint maintenant. De plus, l'exemple déjà mentionné fourni par lord Asquith ne s'applique pas en l'espèce. Rien n'indique que les activités des appelantes pendant la durée de la validité de leurs contrats avec l'intimée ou après leur expiration ont causé le préjudice subi par elle, donnant ainsi naissance à une cause d'action reconnue en droit. Dans une étude intéressante, (1969), 47 R. du B. can. 89, portant sur l'application en droit de ce moyen de défense, Dale Gibson mentionne les écrits d'auteurs antérieurs qui disent entretenir de forts doutes quant à l'applicabilité dans les actions en responsabilité délictuelle du moyen de défense fondé sur la maxime *ex turpi causa*. Selon Gibson, dans la mesure où cette règle s'applique, ce ne peut être qu'à l'égard d'un demandeur qui essaie de profiter de son acte illégal et non pas simplement d'obtenir l'indemnisation nécessaire pour le remettre dans la situation où il était avant l'exécution de l'entente illégale. Le professeur Fridman, pour sa part, dans son article *The Wrongdoing Plaintiff* (1972), 18 McGill L.J. 275, soutient que la question de savoir si la conduite du demandeur doit avoir pour effet de le priver de son recours ne peut être tranchée qu'en fonction de trois facteurs suivants: la causalité, la causalité lointaine et la faute. S'il existe un lien chronologique entre l'acte fautif du demandeur et la perte ou le préjudice qu'il a subi, si cet acte s'est ajouté à la conduite illégale du défendeur de manière à occasionner le préjudice en question et si, en raison de sa conduite, le demandeur porte la responsabilité morale ou la faute de ce qui lui est arrivé, son action doit être rejetée. (Voir aussi Cronkite,

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Effect of the Violation of a Statute by the Plaintiff in a Tort Action (1929), 7 Can. Bar Rev. 67).

Whatever the state of the law may be at the present time, however, I do not find these circumstances to be an appropriate occasion for the invocation of this defence. If the loss suffered by the respondent was occasioned by his voluntary participation in an illegal transaction, the courts should not come to his assistance. This does not seem to have been the case, however. In any event, since the respondent's loss was not caused by the appellants' actions pursuant to their illegal transaction, there is no basis upon which the respondent can recover in the courts. The third and final points raised by the appellants place the respondent in the hopeless position. If the respondent succeeds on the causation submission, it is defeated on the fourth point. If the respondent fails on causation, the fourth point does nothing to assist it.

For all of these reasons I come regretfully and somewhat reluctantly to the conclusion that the appeal must be allowed and the action dismissed with costs. I have said this conclusion is reached with reluctance because both courts below have found an action residing in the respondent for the recovery of extensive damages for loss of its business undertaking. Were this conclusion founded on findings of fact or on conclusions on factual issues, an appellate tribunal would ordinarily refrain from intervening and disturbing the conclusions reached at trial and confirmed on appeal. It seems to me, however, for reasons already given, that the conclusions are not based upon findings of fact, but in part upon an error in law as to the necessary elements for an action for conspiracy to injure, as well as errors in law relating to causation and remoteness, and the proper consequence of unlawful activity on the part of the defendants. For these reasons I would allow the appeal and dismiss the action of the respondent against the appellants with costs here and below. It follows that the cross-appeal is likewise dismissed but there shall be only one set of costs.

Effect of the Violation of a Statute by the Plaintiff in a Tort Action (1929), 7 R. du B. can. 67.)

Quel que puisse être l'état actuel du droit, cependant, j'estime qu'il n'y a pas lieu en l'espèce d'invoquer ce moyen de défense. Si le préjudice qu'a subi l'intimée résulte de sa participation volontaire à un contrat illégal, les cours ne doivent pas lui venir en aide. Ce ne semble toutefois pas avoir été le cas. De toute manière, puisque le préjudice subi par l'intimée n'est pas imputable à des actes accomplis par les appelantes en exécution de leur contrat illégal, l'intimée ne peut à aucun titre recourir aux tribunaux pour obtenir une indemnisation. Les troisième et quatrième points soulevés par les appelantes mettent l'intimée dans une situation impossible. Si l'intimée a gain de cause sur l'argument relatif à la causalité, elle sera déboutée sur le quatrième point. Si l'intimée est déboutée sur l'argument relatif à la causalité, le quatrième point ne lui est d'aucun secours.

Pour tous ces motifs, je conclus avec regret et avec une certaine hésitation que le pourvoi doit être accueilli et l'action rejetée avec dépens. Je dis avec hésitation parce que l'une et l'autre cours d'instance inférieure ont conclu que l'intimée pouvait réclamer en justice des dommages-intérêts élevés au titre de la perte de son entreprise. Si cette décision reposait sur des conclusions de fait ou sur des conclusions relatives à des questions de fait, un tribunal d'appel n'interviendrait ordinairement pas pour modifier les conclusions tirées en première instance et confirmées en appel. Il me semble, cependant, pour les motifs que j'ai déjà donnés, qu'il s'agit d'une décision qui repose non pas sur des conclusions de fait, mais en partie sur une erreur de droit quant aux éléments nécessaires pour fonder une action pour complot en vue de nuire et aussi sur des erreurs de droit relatives à la causalité, à la causalité lointaine et aux véritables conséquences d'une activité illégale de la part des défenderesses. Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de rejeter, avec dépens dans toutes les cours, l'action de l'intimée contre les appelantes. Il s'ensuit que le pourvoi incident est lui aussi rejeté, mais il n'y aura qu'un seul mémoire de frais.

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Appeals allowed with costs and cross-appeal dismissed.

Solicitors for the appellants, the "LaFarge Group": Lawson, Lundell & Co., Vancouver.

Solicitors for the appellants, the "Ocean Group": Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondent: Ladner, Downs, Vancouver.

Pourvois accueillis avec dépens et pourvoi incident rejeté.

Procureurs des appelantes composant le «groupe LaFarge»: Lawson, Lundell & Co., Vancouver.

Procureurs des appelantes composant le «groupe Ocean»: Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intimée: Ladner, Downs, Vancouver.

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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.

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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)

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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.
>
> 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.
>
> 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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In the Court of Appeal of Alberta

Citation: Mraiche Investment Corporation v. McLennan Ross LLP, 2012 ABCA 95

Date: 20120320
Docket: 1103-0115-AC
Registry: Edmonton

2012 ABCA 95 (CanLII)

Between:

Mraiche Investment Corporation

Appellant
(Plaintiff)

- and -

McLennan Ross LLP

Respondent
(Defendant)

- and -

Gurbachan S. Paul, Harjit Neeta Paul, 1396619 Alberta Ltd.,
Diamond Apartment Laundry Ltd., Robert G. Kent, and
Robert G. Kent Professional Corporation, and John Doe

Not a Party to the Appeal
(Defendants)

The Court:

The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Jack Watson

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice R.P. Belzil
Dated the 14th day of March, 2011
Filed on the 8th day of April, 2011
(2011 ABQB 164, Docket: 0803 16647)

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Memorandum of Judgment

The Court:

I Introduction

[1] This appeal raises the question of what sort of evidence is capable of making a case (of sufficient merit to survive summary judgment) that a solicitor, who carried out instructions from a client to transfer some of the client's property, should be found liable for the tort of conspiracy to defraud a creditor of the client by doing so (by means of fraudulent diversion of assets).

[2] The appellant submits that it is sufficient to lead evidence of facts that, if the solicitor knew or ought to have known of them, might have caused that solicitor, not otherwise motivated to do any harm to the creditor, to become suspicious of his own client's motives in those instructions. In sum, the appellant's position is that a solicitor can be held constructively guilty of the tort of conspiracy by unlawful means. The chambers judge was not persuaded that, on this record, the solicitor (and his law firm) should be held liable for the tort of conspiracy on such a constructive basis. On this record, we agree, and would dismiss the appeal.

II Synopsis

[3] The appellant plaintiff corporation asserts that the solicitor here tortiously conspired with his client to commit the unlawful conduct, knowingly injurious to the appellant, of defrauding the appellant in its position as a creditor of the client. The appellant characterizes each transfer of four real properties belonging to the client as a fraudulent preference under the *Fraudulent Preferences Act*, R.S.A. 2000, c. F-24. The appellant became a judgment creditor of the client in Court of Queen's Bench Action No. 0703-14586 ("Action No. 14586") after the transfers closed. The appellant's suit rests on the inferences it asserts should be drawn about the solicitor's state of mind. The suit was dismissed by a chambers judge by summary judgment: 2011 ABQB 164.

[4] The appellant's case rests entirely on the second prong of the test for the tort of civil conspiracy in ***Canada Cement Lafarge v. BC Lightweight Aggregate***, [1983] 1 SCR 452, pp. 471-472. ***Lafarge***, adopting the statement in ***Lonrho Ltd. v. Shell Petroleum Co. Ltd.***, [1982] AC 173, [1981] 2 AER 456, stated that "the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement". ***Lafarge*** went on to hold (seemingly with some reluctance as it was discussing a tort of economic loss):

> It is important to bear in mind, when considering this explanation of the tort of conspiracy by unlawful means, the prior finding of fact that the defendants knew that their conduct, which was directed towards the plaintiff, would injure it. [.....]
>
> [and]
> 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.

[5] The appellant says that a trial court could arguably find that the solicitor knew or ought to have known enough about the relevant facts to be found to have a mental state equivalent to the conspiracy as alleged. This meant consciously and volitionally engaging in concerted action with the client to unlawfully carry out a fraudulent preference knowing that the appellant would suffer injury as a result. We assume that the appellant put its "best foot forward" in support of this position before the chambers judge.

[6] In its pleadings, the appellant asserted facts which the appellant says would have (a) come to the attention of the solicitor and (b) informed any competent solicitor to the questionable nature of the transfers. The chambers judge rejected the appellant's assertions that the alleged facts, if proven, as to the transactions carried out by the solicitor were sufficient to construct a case of conspiracy by the solicitor to do economic harm to the appellant by unlawful means and that the conspiracy was executed. On appeal, the appellant says that the chambers judge seriously misconceived those circumstances and more generally was wrong about their overall legal effect.

[7] The respondent law firm asserts that, even taking the available evidence in a manner most favourable to the appellant, the conduct of the solicitor was no worse than the solicitor's failure to ask his client questions. It says that questions might, indeed, have occurred to a different prudent solicitor as concerns arising from the client's instructions; or they might not.

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[8] Because the solicitor was not alleged by the pleadings to have had any contractual duty to the appellant, nor any fiduciary duty to the appellant, nor any proximity with the appellant within the law of negligence, the respondent suggests it was a legal leap too far to characterize possible mis-judgment or professional misconduct by the solicitor (neither of which was conceded) into tortious conspiracy. After all, every client of every lawyer probably has creditors, some of whom may have significant and unanswerable claims – of which the solicitor is or ought to be aware.

[9] In sum, the firm submits that there is no triable case that the solicitor committed the tort of conspiracy with the client to do harm to the appellant by unlawful means. It does not dispute that a solicitor might be guilty of the tort of conspiracy to do harm to an identified individual by unlawful means even if the solicitor's only active *participation* is in carrying out instructions of a client. But the firm says there is no triable case involving evidence of the culpable meeting of the minds which is necessary in law to implicate the solicitor as a conspirator in concerted action pursuant to agreement with a shared intent to cause injury to the appellant.

[10] The law firm rejects the submission that there can be constructive liability for the tort of conspiracy to do harm by unlawful means to an identified person. To do so would convert the tort into a form of liability in negligence that steps around the exclusion of proximity in the present facts. The law firm contends that there is no basis in this record to find that this solicitor was obliged to police the actions and motives of his client in these circumstances. The firm submits that failure of the solicitor to do such policing should not be constructed in law as equivalent to concerted action taken pursuant to an unlawful agreement by the solicitor with the client.

III Evidential Context

[11] The chambers judge struck the appellant's suit against the law firm pursuant to Rule 7.3(1) of the *Alberta Rules of Court* AR 124/2010. The chambers judge found that the "claim of fraud against McLennan Ross is purely speculative and has no chance of success." In his view, it had "no merit" and that, in accordance with ***Lameman v. Canada***, 2008 SCC 14, [2008] 1 SCR 372, it should be "weeded out". For the purposes of these reasons, we also are prepared to assume (as did the chambers judge) that the allegations of the appellant in the statement of claim even if not fleshed out in the affidavits and materials before the chambers judge were provable as fact: ***Imperial Tobacco v. Canada***, 2011 SCC 42, [2011] 3 SCR 45 ("The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed."). A summary of the facts follows.

[12] Other defendants in the appellant's action against the law firm were spouses G.S. Paul and H.N. Paul and 1396619 Alberta Ltd. ("1396619"). 1396619 was incorporated by the solicitor, D. Fialkov, based on instructions from G.S. Paul on April 22 to 23, 2008. Also on April

23, 2008, the solicitor opened four files for transfer of four real properties that then belonged to a company called Premier City Investments Ltd. ("Premier") of which G.S. Paul was the sole director, then ultimately to a company called Newcastle Construction (1994) Inc. ("Newcastle"). The principal of the appellant, Mraiche Investment Corporation, is S. Mraiche.

[13] On April 22, 2008, Fialkov was informed by G.S. Paul about two further potential issues relating to two unrelated apartment / condominium buildings which the appellant says would have exposed G.S. Paul or Premier to claims of $800,000. The appellant asserts that "McLennan Ross was aware of at least 4 claims against Premier and Mr. Paul totaling in excess of $15 million": Factum, para. 22. This assertion is a conclusion, not evidence, as to what Fialkov knew in April of 2008. Linked to this is the fact that examinations of G.S. Paul and S. Mraiche are said to have been scheduled within a week of April 23, 2008.

[14] Fialkov did the legal work on transfers of the four properties from Premier to 1396619. Two of the transfers occurred on May 8, 2008 and on May 9, 2008 respectively. Those transfers from Premier to 1396619 were for nominal sums, namely $10 per property. The appellant says that on the face of such transfers, creditors of Premier, or for that matter the Minister of National Revenue if interested would not be mystified about the nature of each transfer. Fialkov acknowledged that he did not inform the lenders on title that the four properties were being transferred and that he had no instructions from G.S. Paul to inform the lenders. He did not recall why he did so. He was aware that eventually the properties were to be transferred to Newcastle for $1,600,000.

[15] H.N. Paul, wife of G.S. Paul, was the sole shareholder and director of 1396619. She professed on examination not to have found out about the incorporation of 1396619 or the transfer of the properties until around August 8, 2008 and that she received no advice from the solicitor about the transfers before then. Her signature purports to appear on many documents as to 1396619 as "effective" on April 23, 2008 [A58-A102]. She acknowledged signing a Directors' Resolution for 1396619 putatively dated June 25, 2008, authorizing G.S. Paul to sign any documents necessary to allow 1396619 to deal with the four properties [A86]. H.N. Paul also professed to having received no advice from Fialkov as to the meaning of that Resolution before August, 2008.

[16] Against this, there is no evidence that it was communicated to Fialkov between April and August, 2008, that H.N. Paul was not in Canada in April, 2008 or that H.N. Paul was not aware of the incorporation of 1396619 or the planned transfers from Premier to 1396619. Nor was there evidence that Fialkov should have questioned G.S. Paul's acting for his wife.

[17] Fialkov's affidavit agreed that he took instructions initially only from G.S. Paul and thereafter from both spouses. As of November 13, 2007, Premier along with G.S. Paul was being

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sued by the appellant on Action No. 14586. The appellant's claim on Action No. 14586 centred on the appellant's investment advances made to Premier on other properties. The total of those advances was $1,500,000. Action No. 14586 was ultimately settled by consent judgment for $2,500,000 plus costs against both Premier and G.S. Paul and two other companies on October 2, 2008 [A290]. Fialkov swears that he was unaware of the particulars of the dispute involving G.S. Paul, and unaware that the consent judgment had been entered until March, 2009. A different lawyer in the respondent law firm, J. Rossall, acted for Premier and G.S. Paul in relation to Action No. 14586 from the inception of that suit until Rossall withdrew as of September 16, 2008 [A238].

[18] The appellant contends that a letter dated June 25, 2008 from Rossall to G.S. Paul which was copied to Fialkov referred to the examinations for discovery in Action No. 14586. Based on this letter copy, the appellant says Fialkov would know of "litigation on behalf of Mr. Paul". The letter's title line refers only to "Mraiche Investment Corporation" and the content refers to "an examination for discovery of Mr. Mraiche". This was not a smoking gun. That letter does not contradict Fialkov's assertion that he knew nothing of the particulars of Action No. 14586.

[19] Between July 31, 2008 and August 6, 2008, Fialkov received copies of the listing agreement and the real estate purchase contract and related documents regarding the sale of the four properties to Newcastle. The appellant characterizes as suspicious the fact that the contract named Premier as vendor and as the party to whom a deposit of $75,000 was to be released. The appellant says it is suspicious that no assignment was then in existence between 1396619 and Premier and Fialkov did not do anything about that until a date on or around August 8, 2008, when H.N. Paul signed the Directors' Resolution for 1396619 which authorized G.S. Paul to act for 1396619 on the sale of the four properties, and authorized G.S. Paul to receive the deposit in trust for 1396619.

[20] On or about August 18, 2008, Fialkov completed the transfer of the four properties from 1396619 to Newcastle for a total price of $1,600,000 which included a vendor take back mortgage of $200,000. After paying out the mortgages, taxes and legal accounts and discharging a caveat, Fialkov paid the remaining proceeds of $250,000 to 1396619, with the further $200,000 owing to 1396619 being on the take back mortgage. Some time later G.S. Paul went to India. There is no evidence Fialkov was aware that he left.

[21] Fialkov continued to do work for G.S. Paul after Rossall withdrew in September, 2008. Fialkov swears that he was not aware of Rossall having withdrawn. Fialkov prepared a trust document on October 1, 2008, which trust document was backdated to April 29, 2008. The trust document was to say that as of April 29, 2008, the four properties were held in trust for Premier by 1396619, with beneficial ownership of the properties solely in Premier. The appellant proposes that this was another suspicious element of the interaction between Fialkov and G.S.

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Paul. This was well after the alleged fraudulent conveyance of the properties. There is no evidence whether this trust document was executed. H.N. Paul on examination denied any awareness of these trust arrangements prior to the trust document being prepared. Fialkov swears that he received his instructions to prepare the trust document from H.N. Paul.

[22] On November 26, 2008, 1396619 sold the $200,000 vendor take back mortgage on the four properties to Canadian Mutual Acceptance Corporation for $146,000. The appellant says that it was unable to capture through Premier any of the $250,000 proceeds of sale of the four properties. There is no evidence that Fialkov was aware of the sale of the take back mortgage.

[23] The solicitor's affidavit on the present motion asserts, *inter alia*, as follows:

> 2. In the fall of 2007 I became aware that Jon Rossall of McLennan Ross LLP was acting for one or more of Dr. Paul, Mrs. Paul and / or Premier Investments in connection with a dispute with Mraiche Investment Corporation but I was not aware that Mraiche had commenced the 'Negligence Action' [14586] referred to in paragraph 28 of the within Statement of Claim prior to March of 2009 when the within action was commenced. Prior to that time I knew nothing of the particulars of the Negligence Action, the status of that Action or the details of any dispute between Mraiche Investment Corporation and Dr. Paul or Premier City Investments Ltd. At no time had I discussed the Negligence Action with Dr. Paul or Mrs. Paul. Nor was I made aware that Jon Rossall and McLennan Ross LLP had ceased to act for Premiere [sic] Investments and Dr. Paul and Premier Investments Ltd. [sic] in September 2008 in the Negligence Action or that the Defendants in that action granted a consent judgment to Mraiche in that action in December 2008.

[24] Other aspects of the Fialkov affidavit are noted below. The respondent on appeal submits that the snippets of the examination of H.N. Paul as a defendant are not properly admissible on the motion or the appeal as evidence against Fialkov. We do not find it necessary to deal with this procedural point as we find that the evidence does not advance the appellant's position in any event.

IV Reasons of the Chambers Judge

[25] The chambers judge was entitled to draw inferences on undisputed facts before him: ***Lameman*** at para. 11 ("The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts*: Guarantee Co. of North America*, at para. 30.") Côté JA of this Court in his decision in ***Lameman*** at 2006 ABCA 392, 66 AltaLR 4th 243 at para. 95 added that "summary judgment

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does not permit choosing among competing reasonable inferences arising from the primary facts in evidence: *Walters v. Clark* (2006), 211 O.A.C. 278, 279 (para. 6) (C.A.). But that did not occur here.". As in ***Lameman***, the chambers judge here was entitled to consider the evidence in the round on the crucial issues.

[26] The chambers judge acknowledged that merely because a lawyer is acting in accordance with instructions from his client is not exemptive, if in so doing the law is actually engaged in the tort of conspiracy to harm by unlawful means. The chambers judge proceeded on the assumption, solely for the purposes of argument, that the conduct of G.S. Paul involved an effort to effectuate a fraudulent preference expressly to the disadvantage of the appellant: 2011 ABQB 164 at para. [16].

[27] The appellant's principal, S. Mraiche, on examination on his affidavit, effectively conceded that his position was mounted on interpretation of the circumstances. He pointed to no evidence in the appellant's possession showing an actual agreement by the solicitor to conspire to injure let alone to defraud the appellant (R7-R10): 2011 ABQB 164 at para. [9]. The chambers judge also noted the content of Fialkov's affidavit: at para. [8]. He summarized the appellant's assertions: at paras. [3] to [7]. There does appear to be error in one aspect of his summary of the appellant's position but we do not find it to be significant in the outcome: see below.

[28] The appellant contends that the chambers judge ignored or misapprehended the affidavit of S. Mraiche in reaching his conclusion that the appellant's 'best foot forward' provided no evidence of such an agreement being reached, let alone an agreement being effectuated and only provided speculation. The elaborate affidavit of S. Mraiche with exhibits as provided to the chambers judge (and to this court as the appellant's extracts [A1-A292]) consists essentially of a concatenation of available records, correspondence, portions of examination of some witnesses, and the principal's interpretive argument. Despite one error, the reasons of the chambers judge, read fairly, reveal that he was fully conscious of all this material.

[29] Against this was the sworn denial of the solicitor including that aspect quoted earlier in these reasons. The solicitor asserted under oath other details of his involvement with his clients which conform with the other documentary evidence and correspondence. He denied knowledge of the particulars of Action No. 14578. He denied under oath having any awareness of any insolvency on the part of Premier, 1396619 or the Pauls "or that any of the aforesaid were taking steps to convey property of any sort, including the Lands, to avoid the claims of any creditor". He specifically denied that any of them told him they were incapable of paying their debts or that the conveyance of the lands was undertaken to avoid the claims of any creditors.

[30] The chambers judge's decision at 2011 ABQB 164, paras. [3] - [4] addressed the interpretive contentions of the appellant *seriatim*. The appellant says that the chambers judge

erred in stating that the four properties being transferred were actually subject matter of Action No. 14578. The appellant says that this is significant because Premier had equity in those properties and had no equity in the properties that were the subject matter of Action No. 14578. We find no significance to this error. The balance of the reasons of the chambers judge makes it clear that he appreciated that the question was whether Fialkov conspired in a fraudulent preference scheme that, for the sake of argument, the chambers judge assumed against G.S. Paul.

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V Standard of Review

[31] The standard of review was put this way in ***Encana***:

> [19] The parties agree that the standard of review of a decision to grant summary judgment is reasonableness, and that the identification of the legal test for summary judgment is a question of law for which the standard of review is correctness: *Tottrup v. Clearwater (Municipal District No. 99)*, 2006 ABCA 380, 68 Alta. L.R. (4th) 237 at para. 8. An appeal court reviewing a summary judgment decision will be reluctant to interfere where the chambers judge has stated and applied the proper principles and where there was evidence to support the findings made and inferences drawn: *De Shazo v. Nations Energy Co.*, 2005 ABCA 241, 48 Alta. L.R. (4th) 25 at para. 16; *Wolfert v.Shuchuk*, 2003 ABCA 109, 15 Alta. L.R. (4th) 5 at para. 9. Absent palpable and overriding error, findings of fact and inferences drawn will not be overturned: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 10; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221 at para. 10; *De Shazo, supra*; *Wolfert*, *supra*.
>
> See also: ***Murphy Oil Co. v. Predator Corp.***, 2006 ABCA 69, 384 AR 251 at para. 23; ***Wolfert v. Shuchuk***, 2003 ABCA 109, 15 AltaLR (4th) 5 at para. 9; ***Samson Indian Band v. Chevron Canada Resources***, 2009 ABCA 180, 6 AltaLR 5th 5; ***Milavsky v. Milavsky***, 2011 ABCA 231, at paras. 13 to 16 (quoting) ***De Soto Resources Ltd. v. Encana Corporation***, 2011 ABCA 100, 44 Alta LR 5th 253 at para. 19; ***Reece v. Edmonton (City)***, 2011 ABCA 238 at paras. 9 to 10 (majority) and at paras. 132 to 133 (dissent); ***Gayton v. Lacasse,*** 2010 ABCA 123, 482 AR 179 at para. 9.

[32] In this case, the decision as to summary judgment turned on the definitive elements of the conspiracy tort rather than on whether there was an overwhelming shortfall in the reliability and sufficiency of the available evidence. As such, this was a decision which evaluated the overall effect of the available evidence and pleadings vis-à-vis those defined elements and thus involved the extricable question of law as to the definition. It therefore attracts correctness review.

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[33] A brief side-step seems to be necessary. When a court tunes in on the concept of "no reasonable prospect of success" as mentioned in the pleadings case of ***Imperial Tobacco***, it does so with consideration of reasonable viability in law even if the law is not settled: see *e.g.* ***Reece***, *supra*; ***Imperial Tobacco*** at para. 21 ("The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed.") Thus, neither mere novelty of a viable claim, nor the mere fact the available evidence on the crucial matters may be debatable should drive a *bona fide* claimant from the judgment seat in pleadings challenge cases. A motion for summary judgment could well turn on a similar question as to the legal viability of the action.

[34] In the case at bar, there is no doubt about the definition of the tort of conspiracy to injure by unlawful means. So tort novelty is not directly an issue here. But the appellant's argument amounts to a contention that the conspiracy tort can be made out constructively at virtually every point in the required analysis. If that argument succeeded on the record before the chambers judge, it would, as the respondent says, arguably expand the definition of the tort as set out in ***Lafarge*** by including within it a form of liability in negligence in substitution for actual conspiracy. We note, however, that the appellant does not directly ask this court to re-engineer the conspiracy tort (assuming we were empowered to do so). That being so, we hasten to say that we are not addressing the complex question of whether the essential ingredients of the conspiracy tort should be re-cast to substitute different ingredients for what the law now requires. That can wait for another day.

[35] Returning to this case, we note that although the appellant contends that there is a crucial difference between the position of the appellant and the position of the respondent on material issues of fact, we find that both sides are essentially arguing on common ground. As the respondent says, the appellant's case rests entirely on suspicions of the appellant contrived from the basic facts indicated by the documents, transactional history, and evidence. The respondent says there is no actual evidence of any entry into a conspiracy by Fialkov and that is that.

VI Discussion

[36] As noted above, the chambers judge assumed for argument's sake that a solicitor can be found to be culpable in a conspiracy tort to assist a client in fraudulent conveyances to do harm to a specific creditor of the client of which the solicitor is aware, depending on the available evidence. He was satisfied that if such conspiracy tort could be proven, the solicitor would not be shielded by the *Code of Professional Conduct* for lawyers in so doing: see *e.g.* ***Datanet Information Systems v. Belzil***, 2010 ABQB 72, 485 AR 301 at para. 91.

[37] Indeed, the Law Society of Alberta *Code of Professional Conduct* and the Canadian Bar Association *Code of Professional Conduct* indicate that lawyers must guard against becoming the

tool of an unscrupulous client. On the other hand, a lawyer for the defendant in a lawsuit does not have a general duty of care towards the plaintiff in that suit; such duties as may exist are interpreted strictly or else the adversarial system would become impossible: see *e.g.* ***Martel v. Andrew***, 2005 ABCA 63, 40 AltaLR (4th) 199, leave denied [2005] SCCA No. 177 (QL).

[38] As noted above, the form of conspiracy tort asserted by the appellant is exclusively in the second category described by ***Lafarge***. ***Bank of Montreal v. Tortora***, 2010 BCCA 139, 287 BCAC 14, at para. rejected the submission that the ***Lafarge*** test could include a "third category of conspirator: someone who does not meet either of the first two branches of the test, but is drawn in because of his familial or business relationship with another conspirator".

[39] The ***Lafarge*** test was also raised in a fraudulent conveyance situation in ***Waters v. Michie***, 2011 BCCA 364, 309 BCAC 305. The conspiracy tort was again noted there to be an anomaly. Although the pleading of conspiracy there raised no reasonable claim, in part in light of the doctrine of merger, ***Waters*** does not assist either side here other that to point out that the form of suit is far from 'novel' within the meaning of ***Imperial Tobacco***. Rather, it is controversial and has been for a considerable time because it is anomalous in its character.

[40] It is important to read ***Lafarge*** accurately as to what constitutes this unusual form of economic tort. In ***Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*** (1993) 96 BCLR 2d 156, 26 CPC 3d 395 (CA), McEachern CJBC wrote:

> 5 Accordingly, the following elements must be proved:
>
> 1. an agreement between two or more persons;
>
> 2. concerted action taken pursuant to the agreement;
>
> 3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
>
> (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
>
> 4. actual damage suffered by the plaintiff.

[41] This summary was affirmed in ***Louie v. Le Soleil Hospitality Inc.***, 2011 BCCA 305, 308 BCAC 122 at para. 111, where the trial judge found the unlawful means to include fraud, perjury and breach of court orders. See also ***Pro-Sys Consultants Ltd et al v. Microsoft Corporation et***

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al., 2011 BCCA 186, 331 DLR (4th) 671, leave granted [2011] SCCA 396 (QL), and ***Sun-Rype Products Ltd. v. Archer Daniels Midland Company***, 2011 BCCA 187, 331 DLR (4th) 631, leave granted [2011] SCCA No. 236 (QL) where a divided Court of Appeal found no cause of action.

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[42] It is clear, as noted in ***Capital Estate Planning Corporation v. Lynch***, 2011 ABCA 224, 510 AR 244 that direct evidence of conspiracy will not be the usual case:

> 81 Capital Estate correctly pointed out that direct evidence is rarely available to prove the essential agreement between the parties, so that resort must be had to circumstantial evidence. However, the evidentiary difficulty faced by the appellant does not relieve it of adducing at least some evidence from which it may be inferred that there was an intentional participation by the parties with a view to the furtherance of a common design. Here, there is none.

[43] So the question on a summary judgment motion is whether there is any triable case of evidence on all of the essential ingredients of the conspiracy tort. It is not enough that there is some evidence of some parts of the tort if there is no evidence of any one or more essential ingredients. What is important in the present context is the existence of an actual agreement. The artificial imposition of a deemed agreement arising from a purely constructively determined 'ought to know' state of mind would make this tort so elastic as to make it mere negligence without proximity, privity, or fiduciary duty. This Court in ***Maguire v. Calgary (City)***, 1983 ABCA 121, 43 AR 268, [1983] 4 WWR 342 at paras. 11 to 13 said:

> 11 The wording "concerted action taken pursuant to agreement" was used by Lord Diplock in *Lonrho et al. v. Shell Petroleum Co. et al.*, [1981] 2 All E.R. 456, at 463.
>
> 12 In order to be found to be a party to a conspiracy one must know the facts of the alleged agreement or combination and intend to be a party to the "combining". This principle was adopted by the English Court of Appeal in *Belmont Finance Corp. v. Williams Furniture et al. (No. 2)*, [1980] 1 All E.R. 393, wherein both Buckley, L.J., and Waller, L.J., referred to *Churchill v. Walton*, [1967] 2 A.C. 224, approving the words of Viscount Dilhorne at p. 237:
>
> ... I would say that *mens rea* is only an essential ingredient in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act; that knowledge of the law on the part of the accused is immaterial and that knowledge of the facts is only material in so far as such knowledge throws a light on what was agreed.
>
> (emphasis added)

> (Leave to appeal this decision of the British Columbia Court of Appeal to the Supreme Court of Canada has been granted). [See 47 N.R. 191 for the decision of the Supreme Court of Canada reversing the British Columbia Court of Appeal.]

[44] These passages from ***Maguire*** bring to the fore the appellant's argument for a constructive form of agreement. This arises, *inter alia*, in the appellant's contention that Fialkov should be taken to have realized that G.S. Paul and / or Premier were being sued for as much as $15,000,000 not merely by the appellant but by other creditors. There is no evidence that Fialkov was aware of any such parlous economic state of G.S. Paul and / or Premier.

[45] The appellant contends that Fialkov should have become aware of economic embarrassment of G.S. Paul and / or Premier initially by reason of potential claims by persons *other* than the appellant. That element of the appellant's argument is another reflection of the constructive manner in which the appellant would define the evidence for this tort. The appellant in effect suggests that the tort of conspiracy to injure a plaintiff creditor by unlawful means can be made out without reference to a specific agreement to harm that specific plaintiff so long as the solicitor should have known that some creditor[s] of the client were pressing the client for money, even if the solicitor does not know who they are.

[46] A moment's reflection reveals that such reasoning seems to extend the concept of the 'target group' referred to in the English cases in ***Maguire***. It is not necessary for this Court to grapple with this interesting point whether a conspiracy tort grounded on the execution of an agreement to defraud a specific creditor can be made out on evidence that the solicitor might have been aware of claims of other creditors. We note only that the argument perhaps re-engages the tort with its root in trade competition cases. It raises the question of whether the tort can be made out towards a foreseeable category of plaintiff who will be injured as a result of the clear agreement and unlawful conduct of the conspirators: see ***Sun-Rye Products*** and ***Pro-Sys Consultants***. Perhaps those cases will shed light on this aspect of the conspiracy tort. We need not resolve the question here because the appellant appears to contend that the solicitor should be held liable in a conspiracy to specifically harm the appellant. We take it that the reference to other creditors should be taken only to be a contextual factor that the appellant says should be added to the basis of imposing on the solicitor a state of mind that he ought to have known that the specific appellant would be injured by the conduct of the solicitor's client.

[47] The generality of the 'target group' claimed by the appellant is, indeed, reflected in the first "badge of fraud" which the appellant asserts relates to the chambers' judge's finding that there was "no evidence that Mr. Fialkov had any knowledge of Mr. Paul's financial status": 2011 ABQB 164 at para. [26]. The appellant asserts in a conclusory way that "Mr. Fialkov was aware of numerous claims against Premier, including the negligence Action and two further potential claims totaling approximately $15,000,000.": Factum, para. 62. The chambers judge found no

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evidence of that actual awareness. There is no palpable and overriding error in that finding. Imbedded in this is the appellant's suggestion that Fialkov could have figured out the creditor risks of the client by asking around the firm. The chambers judge was not persuaded that on these facts there was enough to create in the solicitor the equivalent of a conspirator's state of mind on that basis.

[48] We find no error in the chambers' judge conclusion that there was no evidence that Fialkov was aware of the particulars or quantum of claims against G.S. Paul or Premier, nor was there any pleading or evidence supporting a duty on the part of Fialkov to find out what the issues were between G.S. Paul or Premier and Mraiche. While the appellant says there is no evidence that Fialkov would have believed G.S. Paul was a "Condo King" in Edmonton, that is neither here nor there. The chambers judge merely said, reasonably on the material before him, that there was no evidence that Fialkov knew that G.S. Paul or Premier was insolvent.

[49] The appellant's second "badge of fraud" is an allegation that the sale of the four properties by Premier to 1396619 was done in haste. The appellant says that the chambers judge was not correct to conclude that because the sale to Newcastle did not close until August 18, 2008, there was no haste. The chambers judge did not err in finding that the transfers to Newcastle were not done in haste, at least from the point of view of putting the solicitor into the conspiracy tort frame.

[50] It was the transfers to Newcastle which turned the equity of G.S. Paul and Premier into cash. The nominal transactions in the meantime from Premier to 1396619 are unexplained and perhaps inexplicable. But in any event they would not have been difficult to trace or unwind. The process of involving 1396619 seems doubly curious when G.S. Paul expended legal fees in October, 2008, to engage Fialkov to backdate a trust agreement so as to make even more obvious that it was Premier's beneficial interest in the properties that passed through 1396619 to Newcastle. But this after fact evidence is not evidence of an actual agreement by the solicitor to defraud the appellant as a creditor months earlier.

[51] This raises the third "badge of fraud" accused by the appellant here, namely the nominal price for the transfer to 1396619. Once again, Fialkov was under instructions that the four properties were being transferred ultimately to Newcastle. This bare title interlude with 1396619 had no obvious effect (or reason for that matter). Premier owned the properties to begin with. Fialkov in the regular manner paid off the mortgage holders and taxes and caveators on the properties when closing those transactions almost four months after being instructed to do so. We find nothing in this to contradict Fialkov's assertion that he was unaware that G.S. Paul or Premier was doing anything fraudulent to put assets out of the appellant's reach by these steps.

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[52] As noted above, we do not find any significance to the chambers' judge's error about the four properties being associated with the earlier Action No. 14578. Indeed, had the properties been tied into that suit, it might have been somewhat more suspicious at least from the point of view of G.S. Paul. It is not plain how the difference enhances the evidence of Fialkov's knowledge of any significant facts such as to constructively immerse Fialkov in a fraudulent conspiracy.

[53] We do not need to discuss the chambers judge's observations about lack of proof of damages. While we agree with him on the evidence in this case that the appellant's damages claim seems doubtful on causation grounds, it may be that unwinding a fraudulent preference might involve a claim of damages in terms of legal costs. That said, we refrain from getting into the topic of damages.

[54] We also find the references by the appellant to professional obligations by solicitors do not advance the appellant's argument, and we elect not to elaborate on them. What the Law Society of Alberta might make of this situation is up to that Society.

[55] Finally, much of the appellant's argument is aimed at showing that a fraudulent preference by a debtor is sufficiently unlawful conduct to support a claim of the tort of conspiracy to do harm by unlawful means. It is not necessary to be elaborate on that issue. We have considered this appeal as if that foundational element of the appellant's claim had validity. In the end result, it makes no difference as the chambers judge concluded correctly that there was no evidence of the requisite elements of the alleged conspiracy.

[56] As a consequence, we agree with the chambers judge that there is simply no triable basis for finding that Fialkov entered into a conspiracy to injure Mraiche by unlawful means.

VII Conclusion

[57] The appeal is dismissed.

Appeal heard on January 31, 2012

Memorandum filed at Edmonton, Alberta
this 20th day of March, 2012

Ritter J.A.

Authorized to sign for: Martin J.A.

Watson J.A.

Appearances:

D.M. Hawreluk / A.L. Archer
for the Appellant

R.B. Drewry, Q.C. / N.D. Tymchuk
for the Respondent

2012 ABCA 95 (CanLII)

1968 CanLII 6 (SCC)

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WILFRED M. POSLUNS (*Plaintiff*) ..... APPELLANT;

AND

THE TORONTO STOCK EXCHANGE (*Defendant*) ..... RESPONDENT;

AND

GEORGE GARDINER (*Defendant*).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law—Investigation by Board of Governors of Stock Exchange concerning certain option transactions by member company—Representative of company fined and Board's approval of appellant's association with company withdrawn—Whether Board in taking action against appellant exercised its jurisdiction legally and in accordance with rules of natural justice.

The Board of Governors of the Toronto Stock Exchange was informed that a member company was acting for both sides in certain option transactions and as a result four directors of the company, including the appellant, were interviewed by some members of the Board. In consequence of these discussions the Board decided to hold a meeting to investigate and consider the question of whether or not the member of the Exchange for the company was guilty of any offence under the by-laws or rulings of the Exchange. A notice was issued that an inquiry would be held to determine, *inter alia,* whether the member company, while acting as agent for a customer on one side of the transactions in question, had acted on the other side for a company in which the appellant had a one-sixth personal interest.

On the day before the meeting was to take place the appellant consulted the member firm's counsel as to whether he should have his own

*PRESENT: Abbott, Judson, Ritchie, Hall and Spence JJ.

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counsel at the hearing. He was advised that the hearing was to be with reference to the company and that his position was not particularly different from that of the other directors. The appellant was present at the hearing and was given an opportunity to explain his role in the matter. The Board found that the company was guilty and the maximum fine was imposed. The Board then went on to deal independently and additionally with the appellant and after some discussion it was resolved to terminate all prior consents given to the appellant as a director, officer and shareholder of the company.

On the day following the hearing, representations were made to the Board that there should be a rehearing with respect to the appellant's personal position. The Board having acceded to this request a rehearing was held at which a statement was read reviewing what had transpired at the original hearing in so far as it related to the appellant. Appellant's counsel was asked whether he wished to call any additional evidence and replied that there was no dispute about the evidence but only as to the interpretation to be placed upon it. Appellant's counsel then made full representations to the Board, following which the Board considered the matter and concluded that appellant's conduct was such to warrant the withdrawal of the Board's approval of his association with the member company, but they agreed to give him ten days in which to resign and withheld official publication of the resolution passed against him until that period had expired. The appellant, however, declined to resign and a letter was accordingly forwarded from the Board to the company giving formal notice of the resolution. The appellant was subsequently removed as a director and was discharged from his association with the firm.

An action brought by the appellant against the Exchange for substantial damages and for a declaration that the Board of Governors of the Exchange had acted illegally and contrary to the rules of natural justice in terminating all prior consents given by it for the appellant to act as a director, officer, shareholder or employee of the member company was dismissed by the trial judge and an appeal from his judgment was dismissed by the Court of Appeal. The appellant then appealed to this Court.

Held: The appeal should be dismissed.

The Court found that neither the good faith nor the mode of procedure of the Board had been successfully impugned. The appellant had been fully informed of what was alleged against him and was given an opportunity to present his version and explanation of the allegations. *Russell v. Russell* (1880), 14 Ch. D. 471; *Board of Education v. Rice*, [1911] A.C. 179, applied; *Ridge v. Baldwin*, [1964] A.C. 40, distinguished; *Weinberger v. Inglis*, [1919] A.C. 606, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Gale J. (now C.J.O.). Appeal dismissed.

W. B. Williston, Q.C., and *R. B. Tuer*, for the plaintiff, appellant.

[1] [1966] 1 O.R. 285, 53 D.L.R. (2d) 193.

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A. S. Pattillo, Q.C., and *J. F. Howard, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario dismissing an appeal from the judgment rendered at trial by Mr. Justice Gale (as he then was) whereby he dismissed the action which the appellant had brought against the Toronto Stock Exchange (hereinafter called the "Exchange") for substantial damages and for a declaration that the Board of Governors of the Exchange had acted illegally and contrary to the rules of natural justice in terminating all prior consents given by it for the appellant to act as a director, officer, shareholder or employee of R. A. Daly and Company Limited (hereafter called the "Daly Company") a member corporation of the Exchange which was represented thereon by one of its directors, R. A. Daly, Jr. The result of the order which is challenged in these proceedings was that the appellant was removed as a director of the Daly Company and was discharged from his association with that firm where he had been an active partner and where the trial judge found that he had been engaged as a "customers' man" for the solicitation of commission business in securities listed on the Exchange.

The background of this case has been carefully and accurately described in the very full judgment of the learned trial judge which is reported in 46 D.L.R. (2d) at pp. 210 to 347 and which was confirmed by the Court of Appeal[1] so that I do not find it necessary to do more than present a summary of the circumstances which provided the immediate cause for the Board of Governors of the Exchange acting as they did.

When the appellant became associated with the Daly Company in the year 1960, he had already become interested in the somewhat specialized field of dealing in the buying and selling of options on shares and he had acquired a one-sixth interest in a partnership under the name of Lido Investments which engaged in that business. During 1960 one of the appellant's clients, a Mr. Lynch who was a Peter-

[1] [1966] 1 O.R. 285, 53 D.L.R. (2d) 193.

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borough druggist, sold 570 options through the Daly Company acting as his agent and the Daly Company in turn purchased 313 of these options in its capacity as agent for Lido and in the same capacity sold most of these in New York at a price higher than the price received by Lynch. The Daly Company charged Lynch a commission of 5.5 per cent on the options sold to Lido and charged Lido 1.1 per cent on their purchase, but no commission charge was made to Lido on any of the sales made in New York. The appellant, as one of the owners of Lido, shared in the substantial profit which was made by that partnership through these transactions, and through his association with the Daly Company he also participated in the profits made on the other side of the transactions both through commissions and as a shareholder of that company.

Early in February 1961, it came to the attention of the Exchange that the Daly Company was acting for both sides in the Lynch-Lido option transactions and this was reported to the Board of Governors of the Exchange as a result of which four of the directors of the Daly Company, including the appellant, were interviewed by some members of the Board on February 15 when the appellant was questioned about the operations of Lido and his interest in it, and there was a discussion about the Daly Company's position in relation to the transactions. In consequence of these discussions the Board decided to hold a meeting on February 28 to investigate and consider the question of whether or not R. A. Daly, Jr., as a member of the Exchange and director of the Daly Company, was guilty of any offence under the by-laws or rules of the Exchange. Pursuant to the provisions of its by-laws, the Board of Governors issued a notice on February 22 addressed to R. A. Daly, Jr., as an individual member of the Exchange and to the President of the Daly Company. In this notice the purpose of the meeting to be held on February 28 was stated to be:

> ...in connection with transactions in 'put and call' options conducted between January 1st, 1960, and January 31st, 1961, with its customer John T. Lynch by R. A. Daly & Co. Limited (herein referred to as 'Daly'), a member corporation of which you are a shareholder and director, and through which you, as a member of the Toronto Stock Exchange, carry on business, and for the acts and omissions of the directors, officers and employees of which you as a member, are responsible:

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The first of the acts of omission into which the inquiry was to be held was specified in the notice in the following terms:

> (a) whether Daly, while acting as agent for the said Lynch on one side of such transactions, acted on the other side in such transactions, or some of them, for or with a company or partnership known as Lido Investments, in which Wilfred M. Posluns, a director of Daly, on his own admission, had a one-sixth personal interest.

As I have said, the appellant, as a director of the Daly Company, had been interviewed by members of the Board of Governors and discussed the subject-matter of the first act of omission and his role concerning it. On being advised of the notice for the February 28 meeting he postponed his holiday plans so as to be present there and on the day before it was to take place, he and his solicitor consulted Mr. Stapells, counsel for Daly and Company, as to whether he should have his own counsel at the hearing. It is true that Mr. Stapells advised him and his solicitor that the hearing was to be with reference to the Daly Company and that he did not think the appellant's position to be particularly different from that of the other directors, but in light of all the circumstances, it must I think, be accepted that he knew that his conduct was to be the subject of an inquiry which was to be held for the purpose of determining whether or not his firm should be penalized by the Exchange. I do not, however, think that the appellant was alerted to the fact that he might be personally penalized at the same meeting.

The appellant was present at the hearing of February 28 at which a statement was read reciting the facts known to the Board concerning the transactions in question and he was given an opportunity to explain his association with Lido. After considering the matter amongst themselves, the members of the Board called in the representatives of the Daly Company and announced that they were unanimously of the opinion that the Company was guilty of six of the seven acts of omission preferred against it, including the first. After representations had been made on the company's behalf with respect to penalty, the matter was again considered and it was decided to impose the maximum fine of $5,000 on R. A. Daly, Jr.

There then occurred what the trial judge referred to as "an unfortunate error" because the Board, instead of accepting the fact that it had completed the inquiry with respect

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to the Daly Company upon which it had properly embarked, went on to deal independently and additionally with the appellant.

This new issue was introduced when the chairman said something to the effect "What about the directors of Daly individually?" and another governor then referred to Mr. Posluns as being the one who had caused all the trouble. After relatively little discussion, it was unanimously resolved that all prior consents given to the appellant as a director, officer and shareholder of the Daly Company be terminated forthwith and it was the general understanding that his association with the Daly firm was to be severed in all respects.

Although the president of the Daly Company was informed of the resolution withdrawing the appellant's approvals, no action was at that time taken by the Board to put the terms of the resolution into effect and on the following day representations were made to the Board that there should be a rehearing with respect to Posluns' personal position. The Board acceded to this request and a rehearing was set for March 2 on which date the same members of the Board were present who had conducted the February 28 meeting and a statement was read reviewing what had transpired at the meeting in so far as it related to the appellant. The appellant was represented at this meeting by counsel who was asked whether he wished to call any additional evidence and replied that there was no dispute about the evidence but only as to the interpretation to be placed upon it. The appellant's counsel then made full representations to the Board and concluded with a plea in mitigation urging that the publication of the resolution withdrawing the approvals would do irreparable damage to the appellant and his family. There being no dispute as to the facts, the members of the Board adjourned to consider the matter in light of the interpretation placed on them by the appellant's counsel and in light of the submissions which he had made concerning the penalty to be imposed; in the result they concluded that the appellant's conduct was such as to warrant the withdrawal of the Board's approvals of his association with the Daly Company, but they agreed that the resolution directing that withdrawal passed at the meeting of February 28 would not be acted upon or published if the appellant resigned

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by March 10. The appellant, however, decided not to tender his resignation and a letter was accordingly forwarded from the Board to the Daly Company giving formal notice of the resolution.

For the reasons stated by the learned trial judge and the Court of Appeal, I am satisfied that under the by-laws of the Exchange the Board of Governors had jurisdiction to take the action which they did against the appellant, but the question raised by this appeal is whether they exercised that jurisdiction legally and in accordance with the rules of natural justice.

I do not find it necessary to review the considerable number of cases which discuss the meaning and effect to be given to the rules of natural justice because the trial judge has dealt extensively with all the leading authorities in that regard and it would be redundant for me to retrace the ground which has been so thoroughly covered.

It does, however, appear to me to be desirable to mention the case of *Russell v. Russell*[2], in which Sir George Jessel M.R. made the following comment on the earlier case of *Wood v. Wood*[3]:

> . . . it contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than judges who have judicial functions to perform, . . . The passage I mean is this, referring to a committee:
>
> > They are bound, in the exercise of their functions, by the rule expressed in the maxim *audi alteram partem*, that no man should be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

This language was quoted with approval by the Privy Council in *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montréal*[4].

Although the case of *Board of Education v. Rice*[5] has been referred to in the Courts below, I think it desirable to reiterate what was there said by Lord Loreburn at p. 182 where, speaking of the duty of the Board of Education in considering a complaint against a local education authority, he said:

> In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law.

[2] (1880), 14 Ch. D. 471.
[3] (1874), L.R. 9 Ex. 190.
[4] [1909] A.C. 535.
[5] [1911] A.C. 179.

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It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either *they must act in good faith* and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial.

The italics are my own.

In light of the findings of the Courts below, I do not think that the good faith of the Board of Governors is open to question, but under the authorities they were also required, before taking any final action against the appellant, to inform him of what was alleged against him and to give him an opportunity to present his version and explanation of any such allegations.

The position as I interpret it, is that the appellant was fully informed at and before the meeting of February 28 that the Board of Governors disapproved of his conduct in relation to the Lynch-Lido-Daly transactions and he was given an opportunity to present and did present his explanation of that conduct at that meeting but, although he must have realized at that time that he was personally open to censure by the Board, he was not alerted to the fact that his own case was to be dealt with at the February meeting. It is now contended on behalf of the appellant that the February hearing was a nullity so far as he was concerned and that the second hearing of March 2 was in the nature of an appeal and did not afford him the new hearing to which he was entitled. The key submission made in the factum filed on behalf of the appellant is phrased as follows:

2. It is submitted that the Appellant could not have had a fair hearing on March 2nd by reason of the state of mind of the Governors on that occasion in:

(a) Failing to understand and accept the fact that the proceedings on February 28th had no legality and that they must consider the matter afresh;

(b) By their failure to exercise their proper function as members of a tribunal determining the propriety of the Appellant's conduct for the first time rather than as members of an appellate board prepared to be convinced that their earlier decision was wrong.

Counsel on behalf of the appellant relied in great measure on the decision of Lord Reid in the case of *Ridge v. Baldwin*[6], and particularly on the passage at p. 79 in which

[6] [1964] A.C. 40.

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he commented on the two meetings held in that case by the "watch committee" to consider the question of the dismissal of the Chief Constable of the Borough of Brighton. The passage in question reads as follows:

> Next comes the question whether the respondents' failure to follow the rules of natural justice on March 7 was made good by the meeting on March 18. I do not doubt that if an officer or body realizes that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid. An example is *De Verteuil v. Knaggs,* [1918] A.C. 557. But here the appellant's solicitor was not fully informed of the charges against the appellant and the watch committee did not annul the decision which they had already published and proceed to make a new decision. In my judgment, what was done on that day was a very inadequate substitute for a full rehearing. Even so, three members of the committee changed their minds, and it is impossible to say what the decision of the committee would have been if there had been a full hearing after disclosure to the appellant of the whole case against him. I agree with those of your Lordships who hold that this meeting of March 18 cannot affect the result of this appeal.

Counsel for the appellant sought to apply this language directly to the circumstances of the present case and it therefore becomes necessary to examine the facts in *Ridge v. Baldwin* so as to fully understand Lord Reid's reference to the two meetings. In that case the Chief Constable of Brighton was dismissed from office by a resolution of the watch committee passed at a meeting of which he had no notice and at which he was given no opportunity to be heard in his own defence. Following his dismissal, the chief constable's solicitor asked to be allowed to appear before the watch committee saying that he wished to be informed about the case against his client so that he could deal with it and furthermore, he submitted that the best way of dealing with the situation would be to allow his client to resign and take his pension.

The distinction between the two cases is, in my view, clearly apparent from a description of the initial meeting at which the chief constable was dismissed as contained in the judgment of Lord Morris at p. 113:

> The watch committee were under a statutory obligation (see Police Act, 1919, s. 4(1)) to comply with the regulations made under the Act. They dismissed the appellant after finding that he had been negligent in the discharge of his duty. That was a finding of guilt of the offence of neglecting or omitting diligently to attend to or to carry out his duty. Yet they had preferred no charge against the appellant and gave him no notice. They gave him no opportunity to defend himself or to be heard. Though their good faith is in no way impugned, they completely disregarded the regulations and did not begin to comply with them.

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The meeting of March 18 to which reference is made in Lord Reid's judgment is briefly described by Lord Hodson at p. 129 of the same report where he made the following comment on the reception given to the appellant's solicitor at that meeting:

> On March 18 Mr. Bosley was given not only a full but a courteous hearing by the watch committee but received no indication of the nature of the charges which his client had to answer, notwithstanding his repeated statements that he did not know what they were. It is plain, therefore, that if there were a failure on March 7 to give justice to the appellant this was not cured on March 18 when the watch committee confirmed their previous decision. At this hearing it was made plain by Mr. Bosley that his client was not seeking reinstatement but only his pension rights of which he had been deprived by his dismissal. This position is maintained by the appellant through his counsel before your Lordships.

I am in sympathy with the observations made by Lord Hodson later in his reasons for judgment at p. 133 where he said:

> It may be that I must retreat to that last refuge of one confronted with as difficult a problem as this, namely, that each case depends on its own facts, and that here the deprivation of a pension without a hearing is on the face of it a denial of justice which cannot be justified on the language of the section under consideration.

From the above recital of the facts it will be apparent that the circumstances in *Ridge v. Baldwin* were quite different from those in the present case. In *Ridge v. Baldwin* the appellant was never told of the case which he had to meet, whereas Mr. Posluns knew what was complained of in his conduct some days before the first hearing. In *Ridge v. Baldwin* the appellant was given no opportunity to be heard at either meeting, whereas Posluns gave evidence and had a full opportunity to explain himself at the first hearing and declined, through his counsel, to add anything at the second hearing to the evidence which had already been taken. In *Ridge v. Baldwin* the plea made by the chief constable's solicitor at the second hearing that his client should be permitted to resign was of no avail, whereas after listening to the submissions of Posluns' solicitor at the March 2 hearing, the Board of Governors gave him ten days in which to resign and withheld official publication of the resolution passed against him until that period had expired and Posluns had declined to resign.

In my opinion, the contention that the proceedings at the meeting of March 2 were in the nature of an appeal

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from the decision of February 28 rather than a rehearing, leaves out of account the fact that the Board gave the appellant's solicitor full opportunity to call any evidence he pleased at the second hearing and that it was he and not the Board who made the election to abide by the evidence taken in February. He then reviewed all the circumstances afresh and advanced at every turn the construction of the facts which was most favourable to his client. In the result, although the Board of Governors did not change their ruling, they offered to withdraw it altogether if the appellant would resign. In my view also it is inconsistent to speak of the March 2 hearing as an appeal when the disputed resolution was not formally published until March 10.

The learned trial judge expressed the view that it was "an unfortunate error" for the Board of Governors to have proceeded against the appellant personally at the first hearing. I do not find it necessary to express an opinion as to this because, in any event, the circumstances are governed by the general proposition stated in the paragraph above quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin* where he said:

> I do not doubt that if an officer or body realizes that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid. An example is *De Verteuil v. Knaggs,* [1918] A.C. 557.

The case of *Weinberger v. Inglis*[7] was one in which the committee of the London Stock Exchange had refused re-election to a German member and their decision was challenged as having been reached without regard to the rules of natural justice. It appears to me that the language used by Lord Birkenhead in that case is directly applicable to the present appeal. He there said, at p. 617:

> The Committee formed their opinion. It is conceded that they formed it honestly. They formed it in my opinion upon grounds which were made known to the appellant and which he had a chance of answering. The short answer, therefore, to the appellant's case is that the Committee did not deem him eligible to be a member of the Stock Exchange, and that neither their good faith nor their mode of procedure has been successfully impugned.

I think that the Board of Governors in the present case is in the same position and I find, to use Lord Birkenhead's

[7] [1919] A.C. 606.

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language, "that neither their good faith nor their mode of procedure has been successfully impugned".

For all these reasons, as well as for those contained in the reasons for judgment of the learned trial judge and the majority of the Court of Appeal, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Goodman & Goodman, Toronto.

Solicitors for the defendant, respondent: Blake, Cassels & Graydon, Toronto.

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[Indexed as: **Polimeni v. Danzinger**]

DR. PHILIP I. POLIMENI
v. DR. RUDOLPH G. DANZINGER
and DR. JOHN FOERSTER

Manitoba Queen's Bench
Beard J.

Judgment – November 9, 1995.

1995 CanLII 16146 (MB KB)

1995 CanLII 16146 (MB KB)

1995 CanLII 16146 (MB KB)

Sidney Green, Q.C., for plaintiff.
Allan H. Adam, for defendants.

(Doc. Winnipeg CI 91-01-55146)

November 9, 1995. BEARD J.:–

I. THE ISSUES

1 The plaintiff has sued the two defendants in their personal capacities for torts alleged to have been committed in relation to his employment at the St. Boniface General Hospital ("St. Boniface Hospital"), in Winnipeg, Manitoba. More specifically, he alleges the commission of the following two torts:

(i) conspiracy; and

(ii) interference with employment relations.

2 The factual basis for these torts is stated to be as follows:

(i) that the defendants conspired to and did prevent the plaintiff from realizing his potentiality as an employee of the St. Boniface Hospital;

(ii) that the defendants conspired and agreed to bring about the plaintiff's dismissal from the St. Boniface Hospital; and

(iii) that each defendant individually used his position of authority to interfere with the plaintiff's employment relationship with the St. Boniface Hospital, wrongfully prevented the plaintiff from obtaining

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professional advancement at the Hospital, and brought about his dismissal in an attempt to prevent the plaintiff from exercising his lawful right to pursue litigation against employees of the University of Manitoba.

3 The defendants deny these allegations.

4 The parties did not argue the quantum of damages at the trial, but, rather, agreed to postpone that aspect of the case until after resolving the issue of liability.

II. THE FACTS

1. *The Plaintiff*

5 The plaintiff is a research scientist holding a doctorate of physiology and working in the field of cardiology. He worked as a researcher and teacher at the University of Chicago until 1978, but was unable to obtain a tenured position there due to financial cut-backs and a university policy that tenure positions would be offered to clinicians rather than researchers. It is uncontradicted that his work at that institution was highly regarded by his co-workers and his supervisor.

6 In 1978 the plaintiff accepted a position as an associate professor and researcher at the University of Manitoba, which position was created as part of a large medical research grant. The grant was awarded on the condition that the plaintiff be hired to form part of the research team, and it provided funding for a salary for the plaintiff for five years, from August 1, 1978 to July 31, 1983. At the end of that time, the plaintiff's salary at the University was terminated.

7 During the term of his employment, the plaintiff became involved in two legal disputes at the University:

(i) He was part of a group of five researchers who lodged a complaint against the project co-ordinator, Dr. Dhalla, for a misallocation of research funds. After an inquiry, the University found the complaint to be valid, so the money was returned to the researchers and Dr. Dhalla was removed as the project co-ordinator;

(ii) The plaintiff claimed to have been promised an opportunity to apply for tenure after he completed three years of his five-year term; however, when he tried to do so, he was advised that he did not, in fact, have that right. He filed a grievance which was decided in favour of the University. He then sued the University, but the lawsuit was dismissed on the basis that his only remedy was through the labour arbitration procedure. The plaintiff then sued Dr. Dhalla and two other University officials personally for conspiring to deprive him of his position and other

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employment opportunities at the University of Manitoba as a result of his having pursued the funding misallocation against Dr. Dhalla. Notwithstanding that that claim was filed on May 17, 1988, it remains unresolved today, some 7 1/2 years later.

8 Although the plaintiff's salary at the University ended in 1983, he retained an academic appointment at that institution and is currently appointed to a position within the Department of Pharmacology. He still has an office, does some teaching, attends seminars and provides assistance to students and others in that department, all without receiving any salary from the University. The Head of the Department of Pharmacology has attempted to obtain an academic salary for him, but to date has been unsuccessful.

9 In December 1985, at the instigation of Dr. Sharma, the plaintiff was hired to work at the R.O. Burrell Laboratory ("Burrell Lab") which is part of the St. Boniface Hospital. Dr. Sharma was the director of the Burrell Lab and had been a member of the research team with which the plaintiff had worked at the University of Manitoba. Dr. Sharma had a vacant technician's position which had a salary equal to approximately one-half of a researcher's salary, and he was able to obtain permission to hire the plaintiff as a half-time researcher by reallocating the technician's salary to pay the plaintiff. The plaintiff was also appointed to the medical staff of the St. Boniface Hospital in the scientific category, which appointment did not carry a salary, but which was a requirement to enable him to work as a researcher at that facility. The plaintiff's appointment as a member of the support staff at the Burrell Lab was effective December 9, 1985, and was the plaintiff's only position which provided him with a salary. The appointment to the Burrell Lab was for a one-year term, renewable annually on the plaintiff receiving a favourable performance evaluation and on the continuing availability of funds.

10 At the time he was hired, the plaintiff was not allocated any independent research space; however, Dr. Sharma agreed to share his laboratory space with the plaintiff to enable him to carry out any independent research projects for which he was able to obtain funding. It was anticipated, when the plaintiff was hired, that he would apply for funding to carry out his own independent research, and he was successful in obtaining grants for several projects.

2. *The Burrell Lab*

11 When the plaintiff was hired at the Burrell Lab, the lab was located in its own building on the grounds of the St. Boniface Hospital; however,

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the Hospital had obtained funding for a magnetic resonance imaging unit ("MRI unit") and required a new building in which to house it. It was decided to demolish the Burrell Lab building to provide space for a new facility for the MRI unit and to move the Burrell Lab services into the St. Boniface Research Centre ("Research Centre") which was also located on the Hospital grounds and owned by the Hospital. The Research Centre was a building shell constructed in the mid-1980's as a research facility and was just in the process of being completed for use. It was anticipated that the interior would be completed for use as laboratory space to accommodate research projects as those projects were approved and as independent funding was obtained to finance interior renovations and the related research.

12 At the time that the plaintiff was hired, Dr. Sharma, as the Director of the Burrell Lab, reported to Dr. Riese, who had been the Head of the Department of Surgery and was, then, the Vice-President of Medicine for the St. Boniface Hospital. Dr. Sharma retired effective August 30, 1989; however, he continued in a consultative position at the Hospital for a period of time and also continued to function as the Director of the Burrell Lab until the late spring or early summer of 1990.

13 There were extensive negotiations surrounding the relocation of the Burrell Lab, especially in relation to the specific space to be allocated to it within the Research Centre. One of the major issues affecting the relocation was that of funding to develop space inside the new building suitable to service the several different functions carried out in the old Burrell Lab building. Dr. Sharma was not directly involved in these negotiations due to his anticipated retirement, and the actual negotiations took place between other employees of the St. Boniface Hospital, with the two defendants being major players in those negotiations.

14 The final arrangements saw space allocated to the Burrell Lab on a temporary basis, which space, it was generally acknowledged, was less than optimal for the functions previously carried out at the laboratory. The long-term plan was to develop contiguous space on one floor to house all of the Burrell Lab functions; however, that had to await the receipt of adequate funding to cover the renovation costs. The plaintiff, in particular, saw a lowering of the quality of the research space available to him as he moved from having access to one large laboratory assigned to and shared with Dr. Sharma to several small spaces shared with at least two other users and which were located on different floors of the Research Centre. The Burrell Lab moved in mid-1989; however, the long-term plan to develop the larger space has yet to be funded or im-

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plemented, and those functions of the laboratory which had been preserved continue to be carried out in the temporary space initially allocated to the laboratory.

15 In addition to the changes resulting from the physical relocation of the Burrell Lab, two other changes were triggered by Dr. Sharma's retirement. One was a review of the future role of the Burrell Lab, and the second was the appointment of a new director to replace Dr. Sharma. Dr. Sharma prepared a discussion paper with his views on both of these issues, in which he recommended that the appointment of a director await a decision on the future role of the laboratory. Due to his retirement, he did not participate any further in either of these decisions.

3. *The Defendants*

16 The defendant Foerster was the Head of the Department of Medicine at the St. Boniface Hospital until 1986, when he was appointed as the Director of Research for the Hospital. As such, he reported to the Executive Vice-President of the Hospital, Mr. Jack Litvak. As the Director of Research, Foerster was chairman of the Research Advisory Committee, which Committee advised him on all major decisions related to the operation of the Research Centre, such as the allocation of space, the acceptance or refusal of research projects, and the dismissal of staff. The decisions of the Committee were subject to the approval of the Board of Directors of the Hospital prior to implementation. Foerster also had some authority separate from the Research Advisory Committee, including authority to allocate space in the Research Centre on a temporary basis. It was in this role that he negotiated on behalf of the Research Centre to allocate temporary space to house the Burrell Lab in the Research Centre pending the allocation of permanent space and, as well, he located the funds to develop that temporary space.

17 The defendant Danzinger was appointed as the Head of the Department of Surgery at the St. Boniface Hospital in 1986. At the time of his appointment, Danzinger had no involvement with the Burrell Lab, which was under the direct responsibility of his supervisor, Dr. Riese, who was then the Vice-President of Medicine. In approximately 1987, Dr. Brown replaced Dr. Riese as the Vice-President of Medicine and, shortly after his appointment, Dr. Brown transferred the responsibility for the Burrell Lab to Danzinger; however, because he remained Danzinger's direct supervisor, he continued to have an indirect responsibility for the laboratory.

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18 On taking over direct responsibility for the Burrell Lab, Danzinger became responsible for both negotiating the relocation of the Burrell Lab into the Research Centre and making a recommendation for a new director for the laboratory to replace Dr. Sharma.

4. *The Plaintiff's Employment at the St. Boniface Hospital*

19 The Plaintiff worked as a research scientist in the Burrell Lab from December 1985 to June 1989, during which time he was awarded several research grants. In 1986 he applied to the Research Advisory Committee for independent research space in the Research Centre, but his application was not approved. Under the terms of the research grants, he hired technicians and worked on those projects, working in the space allocated to Dr. Sharma in the Burrell Lab building. When the Burrell Lab was finally moved to the Research Centre, the plaintiff found that the laboratory space to which he was granted access was too small to accommodate all of his staff and his projects, so he was forced to scale back his research activities, letting some of his technicians go and returning some of the grants. He attempted to obtain more space in conjunction with the Burrell Lab, but was unsuccessful. Foerster suggested that he re-apply to the Research Advisory Committee for his own independent research space in the Research Centre, but he also suggested that the plaintiff had more likelihood of success in that regard if he could first resolve his lawsuit at the University of Manitoba. Foerster made this suggestion because he felt that the Research Advisory Committee had been influenced in its decision to refuse the plaintiff's earlier application for space by the plaintiff's ongoing lawsuit, which led to Foerster recommending to the plaintiff that he would have more likelihood of success with that Committee if he first resolved the issue of that lawsuit. The plaintiff was not prepared to resolve the lawsuit, so he did not re-apply for his own research space. Instead, he retained a lawyer who wrote directly to the Board of Directors of the St. Boniface Hospital to complain of the treatment being received by the plaintiff as regarded the allocation of space and the effect on his ability to function.

20 Later, in 1990, a technician with much less education and lower academic credentials was appointed as the Acting Director of the Burrell Lab. In the fall of 1990 the plaintiff was advised that his term contract, which was to expire October 31, 1990, was under review, and in late October 1990 he met with a committee to review his ongoing research projects. Shortly after that meeting, the plaintiff was advised of the St. Boniface Hospital's decision to extend his contract only to March 31, 1991, to allow him to wrap up his research, after which his appointment

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to the Burrell Lab was to be terminated, which is what eventually occurred.

III. EMPLOYEE EXEMPTION FROM LIABILITY

1. *The Issue*

21 The plaintiff has alleged that the defendants have each interfered with his employment relations with his employer, the St. Boniface Hospital, for the purpose of preventing him from exercising his lawful right to pursue litigation against employees of the University of Manitoba and, in so doing, they have committed a tort for which he is entitled to compensation. Based on the facts alleged by the plaintiff, the wrongs complained of in this part of the statement of claim encompass two separate torts:

(i) inducing or procuring a breach of contract regarding the termination of the plaintiff's employment at the St. Boniface Hospital; and

(ii) unlawful interference with economic relations (or interference with an existing contract without causing a breach) regarding the plaintiff's employment at the St. Boniface Hospital, and, in particular, his failure to obtain suitable research space and his failure to be appointed Director of the Burrell Lab.

22 In both instances, the plaintiff has alleged that, in committing these torts, the two defendants wrongfully used their positions of authority at the St. Boniface Hospital. However, as it has been alleged in the statement of claim that the two defendants were both acting in their capacities as employees of the Hospital, this raises the question of whether they can be found personally liable for either tort.

2. *The Law*

(i) Inducing or Procuring a Breach of Contract

23 The law is clear that an employee is not liable for inducing or procuring a breach of contract regarding a contract between his employer and another party where that employee:

(1) is acting within the scope of his employment;

(2) is acting in good faith for the protection of his employer's interests;

(3) is not acting for personal gain.

(See *Clerk and Lindsell on Torts*, The Common Library No. 3, 16th ed. (London: Sweet & Maxwell, 1989), at p. 811; Fleming, *The Law of Torts*, 8th ed. (The Law Book Company Limited, 1992), at p. 697; and Levitt, *The Law of Dismissal in Canada*, 2nd ed. (Aurora: Canada Law Book Inc., 1992), at pp. 76-77.)

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24 There are two rationales suggested for this exemption from liability:

(1) The traditional rationale is that an employee, acting within the scope of his employment, is treated as the alter ego of his employer and is thereby exempt from personal liability. In the often-quoted case of *Said v. Butt*, [1920] 3 K.B. 497 at 505-506, McCardie J. stated as follows:

> 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 the contract he has made, and in my view an action against the agent under the *Lumley v. Gye* [(1853) 2 E. & B. 216] principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract.

(See also Clerk and Lindsell at p. 811.)

(2) The other rationale is that an employee acting in the course of his employment is immune from liability on the basis that there is a justification for his acts, being that he was acting under a compulsion of duty to his employer. This rationale is contained in Fleming's text at p. 697 and is also adopted by Callon J. in *McFadden v. 481782 Ontario Ltd.* (1984), 47 O.R. (2d) 134 (H.C.), at pp. 145-46, where the judge states as follows:

> It appears to me that the real reason for relieving the agent of liability lies instead in the realm of justification, inasmuch as an act of inducement may be excused if there is "sufficient justification" for it: *per* Lord Macnaghten, *Quinn v. Leathem* [[1901] A.C. 495] at p. 510. And it is clear that under both statute and common law a director or officer of a company is under a duty to act with a view to the best interests of the company. Acts of inducement are justified where they are "taken as a duty": *De Jetley Marks v. Greenwood* [[1936] 1 All E.R. 863] at p. 873; *Posluns v. Toronto Stock Exchange* [[1964] 2 O.R. 547] at p. 608 . . . and see the discussion in Richardson, "Making an End Run Around the Corporate Veil: The Tort of Inducing Breach of Contract", 5 Adv. Q. (1984), pp. 103-9.
>
> In short, if an officer or director of a corporation is to be relieved, as an agent, of the consequences of his otherwise tortious act of inducement, it is not because he is the company's *alter ego*. Rather, it is because in so acting he acts under the compulsion of a duty to the corporation. His act is thus justified. But where he does not act under such a duty, as, for example, where he fails to act *bona fide* within the scope of his authority, his act is no longer justified, and he becomes liable.

25 While the *McFadden* case refers to directors and shareholders, Fleming and Levitt, in their texts, include servants, agents and employees within this protection.

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(ii) Interference with Economic Relations/Existing Contract

26 The cases and texts dealing with an employee's exemption from liability while acting in the course of his employment do so largely in relation to the tort of inducing or procuring a breach of contract. In this case, the plaintiff has alleged that the defendants both interfered with his employment contract with the St. Boniface Hospital by bringing about the termination of his employment *and* interfered with his employment relations with the Hospital by refusing to allocate to him suitable laboratory space in the Research Centre and by not treating him fairly in relation to the selection of a new director for the Burrell Lab. Clearly, the plaintiff had no contractual right to either the research space or the director's position, so his claim in this regard must be based on some tort other than procuring or inducing a breach of contract. The plaintiff, in his statement of claim, has referred to this as interfering with employment relations. Clerk and Lindsell refer to the newly-emerging tort of "unlawful interference with economic and other interests" (at pp. 850-70), while Fridman, in his text *The Law of Torts in Canada*, vol. 2 (Carswell, 1990), refers to the newer tort of "interference with an existing contract (without inducing a breach)" (at pp. 307-10).

27 As has been pointed out by both Fridman (at p. 310) and Clerk and Lindsell (at p. 850), this newer tort is still in the development phase and, therefore, is not well-defined. Fridman states as follows (at p. 310):

> However, there are uncertainties about the scope of this tort. Furthermore, concerns have been expressed that the principle of the *Torquay Hotel* [[1969] 2 Ch. 106 (C.A.)] case is expansive without any correlative development in the defence of justification. It has already been noted that the nature and scope of that defence is vague and unclear with respect to the inducement of a breach of contract. The wider form of liability [under the newer tort] is even more unclear in respect of limitations of liability founded on the idea of justification. (Words in parenthesis are mine.)

28 The texts do not refer to any cases where this tort has been claimed against an employee of one of the parties to the contract (economic interest); however, I have concluded that the exemption granted to an employee from liability for procuring or inducing a breach of a contract can, in fact, be applied to the newer tort for the following reasons:

(1) When one looks at the two torts, it is clear that the newer tort of interference with contractual relations without inducing a breach of contract is an extension of the older tort of interference with contractual relations.

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(2) The essence of both the older and the newer torts is that a third party has, in some way, interfered with the relationship between two other parties – either by causing a breach of an existing contract between those two parties or by interfering with an existing contractual relationship between them. Neither tort, by its definition, can be committed by one of the two parties directly involved in the contract or the relationship (although the parties may, depending on the facts of the particular case, be liable for some other tort, such as a breach of contract).

(3) Assuming that the employee otherwise meets the three criteria required to invoke the exemption from liability available to the employee, both rationales which support the exemption from liability would apply equally to the newer tort and to the older tort.

29 If one looks at the "alter ego" rationale, there is no reason why an employee, acting on behalf of the employer, would be exempt from liability for inducing the breach of an existing contract, but that same employee would not be exempt from interfering with an existing contract or economic relationship where no breach resulted. Likewise, if one accepts that the exemption is based on the rationale that the employee was justified in his actions because he was acting under the compulsion of a duty to the employer, then it should not matter whether there was a breach of a completed contract or an interference with the contractual or other economic relationship between the plaintiff and the employer. On either rationale, the exemption arises from the employee's relationship to the employer and not from the relationship between the employee or the employer and the plaintiff, so the exemption should apply equally in relation to both torts.

30 Thus, I find that the defendants in this case will be exempt from liability for both inducing or procuring a breach of contract and interfering with an existing contract or economic relationship without inducing a breach if they can establish that they were acting within the scope of their employment, they were acting bona fide in the best interests of their employer, and they were not acting in their own personal interests.

3. *Scope of Employment*

(i) Rationale

31 The cases dealing with this exemption from liability have tended to focus on the "bona fide" criterion, rather than the issue of what constitutes "acting within the scope of employment." This latter criterion has, however, been considered extensively in tort law in relation to the issue of an employer's vicarious liability for torts committed by

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employees. A comparison of the historical rationales for holding an employer liable for the tortious acts of an employee and those for exempting employees from liability for inducing a breach of contract between his employer and another party shows them to be similar – that is:

(1) qui facit per alium facit per se – The employer is regarded as having authorized the acts of the employee, so that in law the acts of the employee are the acts of the employer (Fridman, pp. 314-15). This rationale mirrors the "alter ego" rationale supporting the employee's exemption from liability, which states that the employee should be exempted from liability because his acts are the acts of his employer.

(2) respondeat superior – The master is in charge or command of the servant and, as such, has or ought to have, control of the actions of the servant (Fridman, p. 315). This is similar to the "duty to act" rationale in support of the exemption from liability, whereby the employee is exempted from liability because he is under a duty to act in the best interests of the employer.

(ii) Test

32 Fleming states that the test for determining whether an employee is acting in the course of his employment is as follows (at p. 377):

> In general terms, the "course of employment" is said to encompass such unauthorised acts by the servant as can be regarded [as] wrongful and unauthorised *modes* of performing an authorised task. The precise terms of the authority conferred on him is not the test but rather the function, the operation, the class of act to be done – whatever be the instructions as to the time, the place or the manner of doing it . . . But the limit is exceeded when, instead of acting in furtherance of the assigned task, the servant indulges in an unrelated and independent venture of his own, that is "when he so acts as to be in effect a stranger in relation to his employer with respect to the act which he has committed."

(See *Chaplin v. Dunstan Ltd.* (1938), S.A.S.R. 245.)

33 Fridman states the test as follows (at pp. 328-29):

> The ultimate question, in all cases, is whether what the employee did was sufficiently connected with what he was employed to do so as to lead to the logical, as well as practical conclusion that the employer should, and can be held responsible . . .
>
> The real issue in all alleged instances of vicarious liability for the acts of agents and servants is whether the tortfeasor was doing something which he was authorised or employed to do when he committed the tort even if the act in question was, or involved a mode of performance of an act which was not itself authorised, and may even have been expressly or impliedly forbidden by the employer.

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34 In relation to a general delegation of responsibility to an employee, Clerk and Lindsell note as follows (at p. 218):

> If tasks have been delegated to a servant or agent in very general terms, then that delegation necessarily implies the grant of a discretion to determine how the tasks may best be completed.

35 The question of fact to be determined in each case is, therefore, whether the act of the employee constitutes an improper mode of carrying out an employee's duties (in which case, it is within the scope of his employment) *or* falls outside the scope of his employment. (See Clerk and Lindsell, at p. 210.)

(iii) Where the Employee is the Wrongdoer

36 One may ask whether an employee is ever acting in the scope of his employment if he is committing a tort or a wrongful act which was not authorized by the employer. The answer is clearly yes – the fact that the actions of an employee may be unauthorized or even prohibited does not necessarily mean that they are done outside the scope of employment. Fridman states as follows (at p. 332):

> . . . courts have said that to perform an authorised act or function in an unauthorised manner, for example negligently, or dishonestly, will not take what was done outside the course of employment. *The essential issue is whether the act complained of*, such as striking the plaintiff, *was closely connected with a duty being carried out in the authorised course of employment and not performed at a time when the servant has divested himself of his character as a servant* . . .
>
> What has caused difficulty have been cases involving deliberate tortious acts such as assault, fraud, and the like, where the nature of the act tends to lead to the conclusion that the act was not done in the course of employment since the act may have been purely for the personal purposes of the agent or servant and, in any event, they are the kinds of acts which, if not directly forbidden, would certainly be impliedly prohibited. *Nonetheless, it has been held that such acts can be considered to have been committed in the course of the perpetrator's employment, as long as the surrounding circumstances indicate the necessary connection with what the servant or agent was employed to do on his employer's behalf.* (Emphasis is mine.)

4. *Decision – Foerster*

(i) Scope of Employment

37 The uncontradicted evidence of Foerster was that, as the Director of Research, his responsibilities included making recommendations regarding the permanent allocation of research space based on the advice which

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he received from the Research Advisory Committee, making temporary allocations of research space and finding funding to complete the building renovations to accommodate research projects as they were approved. Thus, when he made decisions regarding the allocation of temporary space to the Burrell Lab, he was acting within the scope of his employment, in that he was carrying out one of the employment functions assigned to him by his employer.

38 In this case, the plaintiff has alleged that Foerster refused to allocate adequate laboratory space to him for an improper motive or wrongful reason, that is, as a means of preventing the plaintiff from pursuing his lawsuit. Even if I found that that was the, or one of the, principal motivations for Foerster's decision, I would still find that Foerster was acting in the course of his employment in arriving at that decision, as he was clearly doing something he was authorized to do – that is, to allocate space – and the evidence is clear that he was acting in what he thought were the best interests of his employer (see the evidence referred to on pp. 320-21, items (1) and (2) of this decision) and not in furtherance of his own personal gain or to further a personal interest (see the evidence referred to on pp. 321-22, item (3) of this decision).

(ii) Acting Bona Fide

39 If the employee is found not to be acting bona fide in the best interests of the employer, he will not be entitled to the benefit of the exemption from liability. This is noted in the *Said v. Butt* case, where McCardie J. refers to "a servant acting bona fide" (at p. 506) and also in the *McFadden* case, where Callon J. states at p. 146:

> But where he (that is, the officer or director of a corporation) does not act under such a duty, as, for example, where he fails to act *bona fide* within the scope of his authority, his act is no longer justified, and he becomes liable. (Words in parenthesis are mine.)

40 Was Foerster acting bona fide in the best interests of his employer when he acted to allocate space in the Research Centre to the Burrell Lab and particularly in regard to the allocation of laboratory research space to be available for use by the plaintiff? Or was he, as is alleged by the plaintiff, motivated by a desire to prevent the plaintiff from pursuing his lawsuit and, if so, did that constitute a lack of bona fides on his part?

41 The evidence regarding Foerster's position on the subject of the lawsuit is as follows:

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(1) Foerster made two references in writing to the plaintiff's litigation which set out the reason why the litigation was of concern to him, and in addition he and the plaintiff had one conversation in that regard. The first reference is found in a letter by Foerster to Dr. Riese, which letter is dated October 16, 1985 (Ex. 48) and was written by Foerster, in his capacity as Head of the Department of Medicine, in support of the plaintiff's application for appointment to the medical staff of the St. Boniface Hospital prior to the plaintiff being employed by the Hospital. In that letter, Foerster stated as follows:

> It must also be understood clearly that Dr. Polimeni must not use his appointment at St. Boniface Hospital as a base for legal or other actions against the University of Manitoba or its officers, including the Dean and the President, since Dr. Polimeni's disagreements with that Institution preceded his contemplated association with St. Boniface General Hospital. As you know this Institution has always endeavoured to maintain good and constructive relationships with the University and I would not wish to see our constructive and productive relationship jeopardized through direct or indirect involvement in a matter that is of no immediate concern to us.

Later, in a memorandum to the plaintiff dated February 25, 1987 (Ex. 7) regarding the plaintiff's 1986 application for independent research space in the Research Centre, Foerster discussed the decision not to grant the plaintiff space and then said:

> You also indicated that you were undertaking legal action against the University and certain members of its staff. Since St. Boniface Hospital, as an affiliated teaching hospital, is developing research efforts at the Institution in close collaboration with the University, it might be best if these issues were settled before St. Boniface Hospital, of necessity linked closely to the University, enters into new contracts with you. I trust that these matters can be resolved to everyone's satisfaction at an early date and that we can get on with the business at hand.

This memorandum refers to an earlier discussion between the plaintiff and Foerster, being the only conversation they had in this regard. In direct examination, the plaintiff explained that earlier discussion as follows (transcript, September 21, 1993, p. 61, ll. 7-16):

> Q. Had that been discussed earlier between you and Dr. Foerster?
>
> A. It had, but not quite like this.
>
> Q. Will you tell us how it was discussed?
>
> A. I think we discussed in a general way – in fact, actually, I think in the meeting before this, if my recollection is accurate, Dr. Foerster had made an inquiry concerning the litigation.

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> Q. Right.
>
> A. But there was no sense of any threat or any conditional thing about it. It was just a question, and I responded to that.

The plaintiff confirmed this in his cross-examination (transcript, September 23, 1993, p. 100, II. 19-23), and he also confirmed that this was the only conversation which he and Foerster had regarding the lawsuit.

(2) In his testimony, Foerster explained that he thought that the plaintiff would have a better chance of getting an academic salary from the University of Manitoba to go along with his appointment there and also to have an application for independent research space approved by the Research Advisory Committee (both decisions being outside the control of Foerster) if he resolved his lawsuit. He testified that he thought that the lawsuit could be resolved quickly and that, in so thinking, he was, perhaps, being naive. There was no evidence to support the suggestion that, by "resolve," Foerster meant that the plaintiff should withdraw or compromise his claim to his disadvantage – and I accepted that he was just encouraging the plaintiff to conclude the matter as quickly as possible.

(3) According to the plaintiff's own testimony, he did not believe that the defendants were acting to deliberately hurt him. In cross-examination (transcript, September 23, 1993, at p. 83, II. 8-16), he stated as follows:

> Q. So you do not have the belief that either of the Defendants wanted to deliberately hurt you, is that it?
>
> A. I don't believe that they sat down together and plotted, "Let's give this man a difficult time. Let's ruin his career for no purpose at all." I believe that that is the result of their actions and they knew it. They knew that that would be the result of their action, although that was not the primary reason.
>
> Q. Excuse me. The primary reason was what?
>
> A. The primary reason was other than trying to hurt me deliberately.

He goes on to explain that one reason Danzinger wanted to let him go from the laboratory was to have the position available for another candidate (that being the assistant to the proposed new Head of the Cardiology Unit at the University of Manitoba, as per item (4) on p. 326 of this decision).

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The plaintiff, in his own testimony, also acknowledged that he was not aware of either defendant having any personal animosity towards him (see transcript of the plaintiff's examination for discovery, p. 110, II. 23-36).

(4) Foerster testified that he allocated temporary space to the Burrell Lab based on the space available in the Research Centre and on the funds he was able to locate to outfit that space to accommodate the Burrell Lab functions. He believed that that space was temporary and that a more suitable space would be allocated on a permanent basis at a later date, that allocation being dependent upon the availability of funding to develop the space. To date, that has not happened, but Dr. Brown made it clear in this evidence that the Burrell Lab was not a priority for the Board of Directors of the St. Boniface Hospital at that time; rather, the Board of Directors had a new funding priority, being the development of the MRI facility, which occurred at a time when the Hospital was experiencing a reduction in funding from the government. Therefore, funds were directed to the development of the MRI facility, resulting in the reduction of funds and the downsizing of the Burrell Lab. This was not a decision participated in by Foerster, but rather one which was made by those higher up than him in the administration.

42 The plaintiff has argued that one must look behind this evidence and examine the defendants' actions – that is, one must "read between the lines" – to find the motive suggested in his statement of claim. In that regard, he refers to the following:

- the fact that Foerster was "adamantly opposed" to the plaintiff being appointed director or interim director of the Burrell Lab and that this opposition was probably known to the selection committee because Foerster's assistant was a member of that committee;

- Foerster's participation on the committee which set the criteria for the new director, which criteria included a preference for a veterinarian with some research experience which, obviously, the plaintiff could not comply with and which he feels was not a bona fide requirement, but rather designed to exclude him from consideration;

- the fact that Foerster did not apply to the St. Boniface Hospital Board for funding to develop permanent space for the laboratory in the Research Centre, but rather offered the temporary space in several locations and on different floors;

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– the fact that Foerster did not assign satisfactory space to the Burrell Lab and, therefore, the plaintiff was unable to complete all of his research.

43 I do not accept that one must read between the lines to find Foerster's motives; rather, I accept Foerster's evidence that he did the best he could when allocating temporary space to the Burrell Lab and for the plaintiff's use, based on the space and funding available at that time, and that any limitations or downsizing in the space or functions of the Burrell Lab and/or of space available to the plaintiff resulted solely from a lack of funds to develop larger and more suitable laboratory space. While Foerster expressed concerns about the possible effect of the lawsuit on the relationship between the St. Boniface Hospital and the University of Manitoba and how it may have affected the allocation of permanent space by the Research Advisory Committee, I find that he did not act on those concerns when he made any decisions regarding the allocation of temporary space to the Burrell Lab.

44 Even if I had concluded otherwise and had found, as a fact, that Foerster had acted, at least in part, to pressure the plaintiff to resolve his lawsuit, I would also find that he did so bona fide and in the best interests of his employer. His only concern in relation to the lawsuit was to ensure the continued good relationship between the University of Manitoba and the St. Boniface Hospital and, as well, to point out to the plaintiff what he thought was the impediment to the Research Advisory Committee approving the plaintiff's earlier application for independent research space, so that, if this concern did, in fact, affect his decision (which I do not accept), he would still have been acting bona fide and in the best interests of his employer.

45 Thus, I find that Foerster was acting bona fide and in the best interests of his employer when he made the decision regarding the allocation of temporary space in the Research Centre to the Burrell Lab.

(iii) Personal Gain

46 There was no evidence that Foerster acted for personal gain or to advance any personal interests when he was making decisions regarding the allocation of research space to the Burrell Lab. Even the plaintiff, in his own evidence, denies this suggestion. In fact, there was no evidence to suggest that Foerster had any personal interest, outside of his responsibilities as the Director of Research for the St. Boniface Hospital, in relation to any of the decisions which he made.

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4. *Decision – Danzinger*

(i) Scope of Employment

47 After direct responsibility for the Burrell Lab was transferred to Danzinger in 1987, he became responsible to supervise its operation. Due to the retirement of Dr. Sharma, Danzinger was also responsible for the staffing of the laboratory, for the initiation of a process to find a replacement for Dr. Sharma and to make a recommendation in that regard. He was also responsible to negotiate on behalf of the laboratory for space in the Research Centre. While Danzinger did not make a final decision on any of these issues, that authority being reserved for the Board of Directors of the St. Boniface Hospital, he was clearly acting within the scope of his employment in dealing with those issues and in making recommendations related thereto.

(ii) Acting Bona Fide

48 As with Foerster, the plaintiff has alleged that Danzinger was motivated, in the exercise of his authority, to prevent the plaintiff from exercising his lawful right to continue to pursue litigation against the employees of the University of Manitoba and that this constituted a wrongful use of that authority.

49 The evidence regarding the issues affecting Danzinger's decisions on space allocation, staff and the directorship of the Burrell Lab is as follows:

(1) While it is clear that the recommendations made by Danzinger had very negative effects on the plaintiff, ultimately resulting in the loss of the plaintiff's employment, Danzinger testified that he was not motivated to make those decisions by a desire to prevent the plaintiff from pursuing his litigation. Danzinger testified that, while he was aware of the existence of the plaintiff's lawsuit, he was never aware of any of the details. He understood from Foerster that, in Foerster's opinion, the lawsuit had in some way affected the plaintiff's application for independent research space, but he told Foerster that he did not want to know the details because the lawsuit was not important to the decisions which Danzinger had to make.

The only written reference by Danzinger to the plaintiff's lawsuit is that contained in Dr. Sharma's memorandum dated May 23, 1989 (Ex. 34) which followed a meeting between Dr. Sharma and Danzinger. That memorandum states:

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> During the discussion Dr. Danzinger made a remark that it should be understood that Dr. Polimeni is being provided Lab. Space in view of his currently active Research Grants. Whereas his (Dr. Polimeni's) present salaries position is not in any immediate jeopardy and can be carried for a couple of years he (Dr. Danzinger) gave no guarantee beyond two years. He (Dr. Danzinger) stated that it would be helpfull (sic) if Dr. Polimeni resolved his dispute with the University because the persistence of this is a constant matter of concern and weighs against him (Polimeni) in sustaining his claim to a position within the faculty. He asked Dr. Sharma to convey this to Dr. Polimeni.

Danzinger confirmed that he had a discussion with Dr. Sharma along these lines which resulted from comments made by Foerster. Danzinger's recollection was that, while Foerster himself had no problems arising out of the lawsuit, he had concluded that the lawsuit would continue to give the plaintiff difficulties in his application for research space and that Foerster was frustrated that he could not help the plaintiff resolve the space issue while the lawsuit was outstanding. Danzinger was merely asking Dr. Sharma to pass this concern on to the plaintiff.

(2) In addition to Dr. Sharma's written memorandum, the plaintiff referred, in his examination for discovery, to a conversation which he had with Danzinger regarding the lawsuit, wherein he stated as follows (transcript of examination for discovery of Polimeni, pp. 68-69, I. 18):

> All I can say in summary of that discussion concerning the litigation is that I did not feel that Dr. Danzinger was threatening me. That he indeed was making me aware that he was aware of its existence. That he was not particularly pleased about it. That he understood that it could raise some problems for him, but that he was also trying to reassure me that he wasn't going to be overly concerned about it. He did not suggest to me that I'd better stop the litigation or else something will happen. That is not what happened.

(3) The role of the Burrell Lab and that of all of its staff were under review in the mid to late-1980's, even before Dr. Sharma's retirement. This review was caused by several factors:

- The funding of health care was undergoing major cuts which affected funding to the St. Boniface Hospital. Dr. Brown testified that there had been government funding reductions at the Hospital and that all department heads were instructed to look for methods of cost cutting.

- The Burrell Lab had, historically, carried out a medical research function for the St. Boniface Hospital; however, the Hospital had developed the Research Centre in the mid-1980's and obtained the

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MRI unit, both of which, according to Dr. Brown, took priority over the Burrell Lab in terms of importance and the allocation of funds. When it was decided to move the Burrell Lab to the Research Centre, this decision resulted in a review of the functions of the laboratory, including its research function.

– Dr. Sharma had been the Director of the Burrell Lab for many years. He had excellent skills as both a surgeon and a researcher, which fulfilled the requirements of several of the functions of the laboratory. The laboratory serviced several St. Boniface Hospital departments and had seen its functions grow under Dr. Sharma. His retirement raised the question of which department should control the laboratory, how its functions should be priorized and which of those functions should dominate in the selection of a new director (see Ex. 47 – memorandum by Sharma to Bob [Robert Miller] dated December 12, 1988, entitled "R.O. Burrell Laboratory – Future Role – Discussion Paper").

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(4) The staffing of the Burrell Lab was affected by other factors which complicated and delayed the decisions being made regarding the role and staffing of the laboratory, the main factors being:

– Problems with animal rights groups in relation to both the quality of facilities and staffing to operate an animal research laboratory – These groups also made it difficult to obtain funding for this type of facility, which funding was essential, both for the development of the space in the Research Centre and for the continued operation of the animal research function of the Burrell Lab.

– The appointment of a director was put on hold for over a year when the director's salary was earmarked to cover the salary of a researcher who was part of a recruitment package being pursued by the University of Manitoba and the St. Boniface Hospital, the goal being to hire a doctor as the new Head of the Cardiology Unit at the University of Manitoba. While the Head of the Unit would be paid by the University of Manitoba, the person being recruited insisted on bringing his own assistant, who was a researcher for whom the University did not have funds for a salary. Danzinger's superiors put considerable pressure on him to make the director's position available to provide both a job and a salary for this researcher, should the doctor accept the recruitment package. Dr. Brown testified that, even though the researcher was not a veterinarian, Danzinger would have had little choice but to make the position available for this purpose.

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(5) While the plaintiff felt that he should be the frontrunner for the position and be appointed as acting director, and while he had certain research skills and a knowledge of the laboratory, there were valid reasons for not giving him the appointment. Those included the following:

– In his memorandum of December 1988 (Ex. 47), Dr. Sharma clearly states that Polimeni is not the ideal candidate to be the new director and that selecting a suitable person would depend on the future role of the Burrell Lab. In that memorandum, he makes the following comment regarding the plaintiff (at p. 7):

> Of all the contenders (to run the laboratory), only Dr. Polimeni will qualify for this (generating research funds) but *then he will be grossly deficient in both the other areas stated above* (infrastructure, including animal care and surgical input) . . . (Emphasis and words in parenthesis are mine.)

And at p. 8 he stated:

> This brings to head the question of Dr. Philip Polimeni. He was hired upon my request that the funds on line item HEMODYNAMIC TECHNICIAN would be better utilized if these were used to hire a Scientist. The scientific input could augment the quality of our work while the work of the hemodynamic data acquisition and processing, including surgical procedures, could be easily done by me. *This argument would no longer exist once I retire and the justification for Dr. Polimeni to hold his position will depend upon how he fits into the new mandate of the Lab. He cannot provide hemodynamic or surgical services* . . . (Emphasis is mine.)

– The committee setting criteria for the new director decided to give priority to finding a veterinarian to meet the needs of the animal research facility, which was determined to be a major component of the Burrell Lab. A veterinarian would also bring the qualifications necessary to meet some of the criticisms of the animal rights groups.

– The selection committee, which included Danzinger, decided to appoint Danzinger's assistant, a technician with lower academic training than that of the plaintiff, in the position of acting director to save the costs of an acting director and to avoid placing a candidate in the job and then having to remove him if he was not selected to fill the position on a permanent basis.

(6) Danzinger was involved in negotiations with Foerster for space for the Burrell Lab in the Research Centre; however, he had few bargaining chips with which to negotiate. The decision to move the laboratory

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had already been made, and Danzinger had no authority to change that decision. Foerster was responsible to allocate temporary space, and Danzinger had no authority over Foerster as regards the space which was allocated. Further, Danzinger had no funding to offer for the development of any space, so the only funding available was that put together by Foerster.

While there was documentation confirming Danzinger's dissatisfaction with the space being offered, especially the space allocated to the Burrell Lab for use by the plaintiff in carrying out his research projects, Danzinger testified that the pressure was mounting to move the Burrell Lab equipment so that the building could be torn down and the MRI facility constructed. Finally, Danzinger had no choice but to agree with the space offered by Foerster and get on with the move.

(7) Finally, Danzinger testified that the decision was made not to renew the plaintiff's half-time research position with the Burrell Lab, as his salary was needed to form part of the recruitment package for the head of the Cardiology Unit and his assistant, and Danzinger was required to have a salary immediately available in the event that this doctor and his assistant decided to accept the offer being made to them.

50 The plaintiff has questioned the validity of these reasons, arguing that one must look to the defendant's actions to find the true reasons why the decisions were made. He points to the following as supporting his claim against Danzinger:

- After taking over responsibility for the laboratory, Danzinger had set up a committee of doctors to advise him of the use and role of the Burrell Lab, most or all of whom favoured hiring the plaintiff to replace Dr. Sharma. While Danzinger called these people "major stakeholders" in the Burrell Lab, none of them were placed on the committee appointed to draft criteria for the new director or its successor committee appointed to select a candidate. The plaintiff has suggested that the two latter committees were composed of a majority of people who opposed his appointment, rather than those who favoured his appointment, and that this decision was made to stack the appointment process against him for the reason alleged in the statement of claim.

- Danzinger agreed with Foerster regarding the allocation of space in the Research Centre, which was unsatisfactory for the plaintiff's research projects and which resulted in the plaintiff being unable to complete those projects in accordance with the grants he had obtained.

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– Danzinger's decision to appoint his assistant as acting director over the plaintiff, even though the plaintiff had higher academic and research credentials, was an inexcusable insult which the plaintiff felt could be explained only as an effort to force him to discontinue his lawsuit. He argued that the selection committee's decision was a sham because Danzinger had stacked the committee against him.

– The plaintiff disagreed with the necessity for having a veterinarian as the new director of the laboratory and felt that this criterion was selected as a way of excluding him as a suitable candidate.

– The selection committee did not give adequate consideration to the plaintiff's background in working in animal laboratories for many years as being a satisfactory substitute for veterinary training when considering his application.

– The decision to terminate the plaintiff's position was motivated by the letter sent by the plaintiff's lawyer to the Board of Directors of the St. Boniface Hospital, which letter complained of the treatment the plaintiff was receiving.

51 I find that it is not necessary to "read between the lines" to interpret Danzinger's actions. I have carefully considered the evidence, and I am not satisfied, on a balance of probabilities, that it supports the plaintiff's claim that decisions made or participated in by Danzinger were motivated as suggested by the plaintiff. I find ample evidence, as set out above, that, in making the decisions and recommendations required of him, Danzinger was acting bona fide and in the best interests of his employer and not for the purpose of having the plaintiff discontinue his lawsuit or to in any way harm the plaintiff.

(iii) Personal Interest or Gain

52 There was no evidence to suggest that Danzinger had any personal interest or anything to gain in relation to the decisions which he made on behalf of his employer or in relation to the plaintiff's lawsuit or the resolution of that lawsuit, and the plaintiff's own evidence indicates that he did not believe that Danzinger acted for personal reasons.

5. *Decision – Employee Exemption from Liability*

53 Thus, I find that both defendants were acting within the scope of their employment, that they acted bona fide in the best interests of their employer, and that they were not acting for personal gain or in their per-

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sonal interest when they made the decisions affecting the plaintiff's employment at the St. Boniface Hospital. That being the case, both are exempt from liability for the alleged torts of inducing/procuring a breach of contract and/or interfering with an existing contract/economic relationship without inducing a breach.

IV. PROCURING/INDUCING A BREACH OF CONTRACT

54 One of the claims being advanced by the plaintiff is that the defendants, either together or individually, brought about his wrongful dismissal from the St. Boniface Hospital and have thereby committed the tort of procuring/inducing a breach of contract. It is clear from the texts and cases that, to establish this tort, the plaintiff must establish that there was, in fact, a breach of contract – in this case, a wrongful dismissal (see Clerk and Lindsell, at p. 796 and Fridman, at p. 294).

55 The evidence as to whether or not there was a breach of employment contract in this case was, at best, weak, and that aspect of the claim was virtually ignored by both parties. On the evidence which was led, it is clear that the plaintiff, and indeed all members of the medical staff, including both defendants, were appointed to the medical staff of the St. Boniface Hospital for one-year, renewable terms (Ex. 58, By-law 3-90 of the St. Boniface Hospital, art. I, paras. 15-18). Further, as regards the plaintiff's appointment to a salaried position at the Burrell Lab (which appointment was separate from his appointment to the medical staff of the Hospital), Dr. Riese's memorandum of October 7, 1985 (Ex. 75) states as follows:

> The only requirement that I must have on this (that is, the plaintiff's) appointment is that it be clearly understood by all concerned that this is a term appointment for one year renewable on favorable performance evaluation and the continued availability of funds originally designated for support staff. (Words in parenthesis are mine.)

56 The plaintiff confirmed in cross-examination (transcript, September 23, 1993, p. 95, II. 16-22) that he had received a form each year confirming the annual renewal of his term, although he qualified this by stating that "everyone gets one" and that Dr. Sharma told him that it did not mean anything. It is unclear from the evidence as to whether this form related to his appointment to the medical staff of the St. Boniface Hospital or to the Burrell Lab. While there was no other evidence indicating that a review was held on a regular, annual basis regarding either of the plaintiff's two appointments, documentation was filed wherein Dr. Sharma wrote for approval to carry on the plaintiff's appointment to the Burrell Lab position from November 1, 1988 to October 31, 1989, which

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documentation included correspondence on the issue of whether there was adequate funding for the position. There was also a review of the plaintiff's position at the laboratory in October 1990, and the plaintiff was present at a meeting on October 30, 1990, to review his activities for the purpose of deciding whether his position at the Burrell Lab would be renewed. This documentation would support the position that the plaintiff's appointment to the Burrell Lab was, indeed, on a year-to-year basis and that renewal depended on the factors referred to by Dr. Riese – including performance and the continuation of funding.

57 The plaintiff argued that, on paper, all medical staff had one-year, renewable appointments, but that the fact was that renewal was automatic unless an individual was found to be professionally inadequate or incompetent (which was never suggested as regards the plaintiff's performance). This point was never followed up by either party, and I am not satisfied, on the evidence before me, that the plaintiff has proven that all renewals were automatic or that his employment was other than for a renewable one-year term.

58 It is also necessary to distinguish between the plaintiff's two separate appointments at the St. Boniface Hospital. As I understand it, he maintains his appointment to the medical staff, scientific category, which appointment is equivalent to the appointments of the two defendants to the medical staff, none of which have an accompanying salary. It was his appointment to the position at Burrell Lab, and the salary which went with it, which was terminated. There was no evidence led as to the St. Boniface Hospital's review policy of other salaried positions, so it is impossible to know whether the Hospital reviews unsalaried appointments to the medical staff differently from appointments to salaried positions.

59 Finally, one must take into account the terms of the plaintiff's employment with the St. Boniface Hospital as they relate to an action for wrongful dismissal. There was no written employment contract between the plaintiff and the Hospital, so the Hospital was at least entitled to terminate the plaintiff for just cause or upon giving him reasonable notice of the termination of his employment. The question of whether there was reasonable notice was not canvassed at all by either party. According to the evidence, however, the plaintiff was given notice in October 1990 that his contract, which terminated October 31, 1990, was being reviewed and the question of its extension was under consideration. Soon after that, he was given notice that the contract would be extended only until March 31, 1991, that is, for a period of five months, to enable him to complete his research projects. Thus, the facts are that the plaintiff was employed

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in a salaried position at the Burrell Lab from December 1985 to October 1990, a period of just less than five years, and he received approximately five months' notice of the termination of his employment or the decision not to renew his term position. In the absence of proof to the contrary, this notice is in the range of what would ordinarily be considered reasonable and, again, leads me to the conclusion that there has been no wrongful dismissal and, therefore, no breach of contract in this case.

V. INTERFERENCE WITH CONTRACTUAL RELATIONS/UNLAWFUL INTERFERENCE WITH ECONOMIC OR OTHER RELATIONS

60 As I have previously noted, both Fridman and Clerk and Lindsell state that this is a new, but relatively undeveloped, tort of uncertain ambit. In attempting to define the scope of the tort in the context of Canadian law, Fridman relies on dicta from several Canadian cases, but points out that each of those cases, on its facts, could have been decided on more traditional grounds, such as breach of contract, intimidation, deceit, etc. He states at p. 309 that the strongest authority for the proposition that there is a tort of unlawful interference with a contract is the case of *Spicer v. Volkswagen Canada Ltd.* (1978), 91 D.L.R. (3d) 42 (N.S.C.A.); however, again he points out that the case could have been decided on the basis of breach of contract.

61 One particular area of uncertainty in relation to this tort is that of the type of interference which must be committed by the defendant to result in liability. Clerk and Lindsell state at p. 851:

> . . . the cause of action exists only when the defendant has brought about the damage by use of unlawful means. Interference with contract, or with trade or business, by *unlawful* means is therefore a "genus" tort, which includes indirect and direct interferences with economic interests.

62 And at p. 854:

> This tort is based upon the deliberate use of *unlawful means* . . .

63 The plaintiff has quoted the case of *Carnahan v. McGregor* (1991), 121 N.B.R. (2d) 284 (Q.B.), as an example of a case decided on the basis of the tort of interference with economic relations. In that case, the judge refers to the requirement that there be interference by unlawful means and goes on to find that the defendants acted unlawfully when they deceived the plaintiffs and the owner of the land in question as to their (that is, the defendants') intentions. Thus, the unlawful means was that of deceit.

64 The exact parameters of the "unlawful" means necessary to commit this tort have not yet been determined. The question of what constitutes

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"unlawful means" as defined in the Canadian and English texts and cases was not canvassed in any detail by either counsel. Clearly, the acts of the defendants in allocating space, recommending a new director for the laboratory and terminating the plaintiff's employment were not, on their face, unlawful or wrongful acts. If the plaintiff is to succeed, he must show that those acts became unlawful as a result of the defendant's motivation in carrying them out and establish that, in law, otherwise lawful acts can, in fact, be rendered unlawful by being done with a bad motive. Russell J. refers to this question in the *Carnahan* case, where he quotes from Lord Denning in *Chapman v. Honig*, [1963] 2 All E.R. 513 at 516 (C.A.).

65 I raise these questions because they caused me difficulty when I considered whether the defendants, individually, would have committed this tort if I had found the suggested motivation. Given my finding that both defendants are exempt from liability because they were acting in the course of their employment at St. Boniface Hospital, I have determined that I do not have to resolve this difficult issue.

VI. CONSPIRACY

1. *The Law*

(i) Definition of "Conspiracy"

66 Clerk and Lindsell define a conspiracy as follows (p. 871):

> "A conspiracy consists ... in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means."

(*Mulcahy v. R.* (1868), L.R. 3 H.L. 306 at 317.)

67 Fridman also adopts this definition of conspiracy (at p. 263) and then goes on to state (at pp. 265-66):

> In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances. So far as England is concerned, the first two situations will give rise to liability. The third may not.

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(ii) Agreement Necessary

68 While there may be some differences in the factual situations giving rise to the tort of conspiracy between the law of England and that of Canada, both authors are in agreement that an essential element for liability is that there be an agreement between the alleged conspirators.

69 Fridman states this requirement as follows (at p. 267):

> An actionable conspiracy will not arise unless and until there is an agreement between two or more persons to act unlawfully or to injure another. Participation is the essence of conspiracy. Mere knowledge that a conspiracy exists, or acquiescence in the agreement, will not suffice. Hence, a common intention among several persons does not constitute an agreement that amounts to a conspiracy, (any more than correspondence between two people that indicates they both wish to contract about the same subject-matter, without such correspondence taking the form of an offer and acceptance, will constitute a contract).

70 Clerk and Lindsell state this requirement as follows (at p. 873):

> The tort requires an agreement, combination, understanding, or concert to injure, involving two or more persons.

71 And at p. 874:

> . . . there must be a combination; lack of overt acts or an uncommunicated intention to join a conspiracy may show there has not been an effective combination.

72 And at p. 875:

> The question is whether a particular defendant, having regard to his knowledge, utterances and actions, was sufficiently a party to the combination and the common design. In the normal case the issue of combination will involve only a question of fact.

2. *Decision*

73 I am not satisfied that there is any evidence of an agreement, combination or understanding between the two defendants to either act unlawfully or to injure the plaintiff.

(i) Regarding Space Allocation

74 Foerster was responsible to allocate space in the Research Centre for the Burrell Lab on an interim basis, and Danzinger, as the person responsible for the Burrell Lab, was to negotiate on behalf of the laboratory for the allocation of that space. I accept that all involved in the negotiations were dissatisfied with the space which was eventually allocated as being less satisfactory in some ways than was the old Burrell Lab. I find that

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the reason for this was that there was a lack of funds to develop more suitable space. Specifically, there was no evidence to support the plaintiff's allegation that Foerster and Danzinger, in the course of their negotiations, agreed to limit space for the Burrell Lab to prevent the plaintiff from having access to adequate research space, with an intent to injure the plaintiff or with an intent to prevent the plaintiff from realizing his potentiality as an employee of the St. Boniface Hospital. Rather, after discussing the Burrell Lab space requirements, Foerster told Danzinger that the space offered, though less than optimal, was the best that he could do due to the lack of available funding to develop other space, and Danzinger eventually accepted the fact that nothing more was available at that time. This does not constitute an agreement or combination to injure the plaintiff.

(ii) Directorship of Laboratory

75 Danzinger was responsible to make a recommendation through Dr. Brown to the Board of Directors of the St. Boniface Hospital regarding a person to replace Dr. Sharma as Director of the Burrell Lab and, further thereto, to establish a process to select that person. The process followed was a two-step process in which an initial committee, which included Foerster, was set up to develop criteria for the director's position and, later on, a second committee which did not include Foerster, but did include his assistant, was put in place to interview the applicants and make a recommendation. While Foerster expressed opposition to the plaintiff being appointed as acting director or director of the laboratory in a memorandum which he wrote to his superior and while he agreed that his assistant probably knew of his opinion in that regard and may have been affected by it, there is no evidence of any agreement or understanding between the two defendants to either prepare job criteria to exclude the plaintiff or to tailor the selection process to specifically exclude the plaintiff.

76 I find that the decision to look first for a veterinarian with research experience was motivated by a bona fide desire to emphasize the animal care aspects of the laboratory, which even Dr. Sharma recognized in his discussion paper as being "so vital that the Laboratory could not run without them." While the plaintiff had considerable animal care experience, he was not a veterinarian and could not bring the credibility of such qualifications to the position. I find that these were legitimate concerns for the future of the laboratory, as there was a genuine need for the St. Boniface Hospital administration to respond to the concerns of the animal rights groups, both to be able to continue the operation of the

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laboratory and to obtain funding in that regard. I specifically find that the decision to look first for a veterinarian was in no way a sham or an artifice to exclude the plaintiff from the competition for the director's position. Further, there was no agreement to include such a requirement for the purpose of affecting the plaintiff's suitability as a potential candidate for this position.

77 The plaintiff has pointed out that Danzinger was prepared to overlook this criterion to hire the assistant to the new Head of Cardiology Unit at the University of Manitoba, if that recruitment had been successful. That plan, however, was not one which either Foerster or Danzinger participated in, but rather was one which was being literally forced on Danzinger. As was testified to by Dr. Brown, Danzinger would have been under "undue pressure" to accept the assistant had the doctor agreed to accept the position at the University of Manitoba, and I accept that, practically speaking, Danzinger had no choice in that regard. While it would have meant hiring someone who was less than optimal according to the criteria established by the committee, it in no way made the criteria less valid. It means that the needs of the Burrell Lab had to give way to what was seen by those above Danzinger in the administrative hierarchy as the greater needs of the University and the St. Boniface Hospital, which had nothing to do with an attempt to injure the plaintiff or to prevent him from advancing at the Hospital. Clearly, this aspect of the selection process had nothing to do with Foerster, so there was no possibility of an agreement or understanding between Foerster and Danzinger in this regard.

(iii) Termination of Employment

78 Foerster testified that he had nothing to do with the termination of the plaintiff's employment at the St. Boniface Hospital, that he was not involved or consulted in that decision and that he had not discussed it with Danzinger. This was confirmed by Danzinger, who said that the decision was made by him and Dr. Brown. Thus, there was not even an opportunity for agreement between the defendants on this issue.

79 I therefore find that there was no evidence of any conspiracy, agreement or understanding between the two defendants in relation to the termination of the plaintiff's employment.

80 The statement of claim is therefore dismissed as against both defendants, with costs to the defendants.

Action dismissed.

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In the Court of Appeal of Alberta

Citation: Maguire v. Calgary (City), 1983 ABCA 121

Date: 19830412
Docket: 13676
Registry: Calgary

1983 ABCA 121 (CanLII)

Between:

Derek Paul Maguire suing on his own behalf and on behalf of all taxpayers of the City of Calgary

Plaintiff
(Appellant)

- and -

The City of Calgary

Defendant
(Respondent)

The Court:

The Honourable Chief Justice McGillivray
The Honourable Mr. Justice Lieberman
The Honourable Mr. Justice Laycraft

Reasons for Judgment of the Court

COUNSEL:

D. P. Maguire. Esq, for the Plaintiff (Appellant)

A. J. Rynd. Esq. and A. A. Abougoush. Esq., for the Defendant (Respondent)

REASONS FOR JUDGMENT OF THE COURT

[1] The appellant (plaintiff), a barrister and solicitor and a ratepayer in the City of Calgary, brought action on his own behalf and on behalf of all taxpayers of the City of Calgary claiming a declaration that the giving of money by the respondent, (defendant), to the Calgary Birth Control Association, (the Association), was unlawful. He further claimed

an injunction restraining the respondent from giving any further monies to the Association. The action was dismissed. This is an appeal from that dismissal.

[2] The status of the appellant to bring the action herein is not in dispute.

[3] The Association is a charitable non-profit organization that provides information to citizens on birth control, anatomy and physiology, human sexuality, pregnancy, childbirth, therapeutic abortion, the reproductive system, women's health, and venereal disease.

[4] Evidence adduced at trial establishes that if, after receiving information on the subject of therapeutic abortion from the Association, a woman wishes to have such an abortion performed, an employee of the Association will make an appointment for her with a medical doctor who performs such abortions pursuant to a certificate under s.251 of the *Criminal Code.* The evidence also discloses that a woman who, after consulting with the Association, wishes to have a therapeutic abortion is required by the Association to fill out a form, at the bottom of which is written:

> "Please continue to weigh in your mind whether abortion is the right answer for you. Do not feel that because you have gone this far, you cannot change your mind. If you should decide that you would rather continue your pregnancy, everyone will be sympathetic to this decision. However, please let our office and the doctor know as soon as possible."

[5] On the basis of the advice and information which the Association gives to women who consult it with respect to therapeutic abortions and because the Association arranges appointments for these women to see a medical doctor, the appellant contends that the Association conducts an abortion referral service and is a party to a civil conspiracy to commit an unlawful act (the tort of battery)and that therefore the City cannot contribute tax monies to it (Municipal *Government Act.* R.S.A. 1980 C.M-26. s.212).

[6] The starting point for a consideration of the issues in this appeal is s.251 of the *Criminal Code,* the relevant parts of which are:

> "251.(1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.
>
> (2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

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. . .

(4) Subsections (1) and (2) do not apply to

(a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage.

If, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(d) has caused a copy of such certificate to be given to the qualified medical practitioner."

[7] The appellant, although conceding that abortions resulting from advice and information given by the Association are therapeutic abortions within s.251(4) and that persons having them performed or performing them are thereby immune from prosecution, contends that the abortions are nevertheless unlawful in that they constitute the tort of battery upon the foetus. Thus, if the position urged upon us by the appellant is correct, a person performing a therapeutic abortion within s.251(4) although protected from criminal prosecution would be liable for damages in a civil action based upon the tort of battery.

[8] Fundamental to the position taken by the appellant is the existence of a civil conspiracy of which the Association is a party. This is set out in the appellant's factum:

"If the procuring of an abortion is unlawful, then knowingly co-operating with another person to achieve that end is unlawful, as constituting the tort of conspiracy. This is constituted by two or more persons agreeing to do something contrary to law, or harmful to another person. Operating an abortion referral agency constitutes the commission of a civil conspiracy whenever such a referral is made."

For the purpose of dealing with this issue, and for that purpose only, we shall assume that the performance of an abortion visits the tort of battery upon a foetus.

Civil Conspiracy

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[9] The tort of conspiracy is defined by Viscount Cave L.C. in *Sorrell's* case [1925] A.C.700 at 712:

> "A combination of two or more persons wilfully to injure a man … is unlawful and, if it results in damage to him, is actionable (as the tort of conspiracy)".

It is to be noted that this definition specifies damage as one of the essential ingredients of a civil conspiracy. In the tort of battery, however, damage is presumed.

[10] Civil conspiracy has its roots in cases involving trade competition, but its application has not been confined to those cases. In *Crofter Hand Woven Harris Tweed Company Limited v. Veitch, et* al [1942] A.C.435 Viscount Simon L.C. said at pp.446-447:

> "Although most of the cases have dealt with trade rivalry in some form or other. I do not see why the proposition as to the conditions under which conspiracy becomes a tort should be limited to trade competition."

And at pp.478-479 Lord Wright says this:

> "I may here note that the doctrine of civil conspiracy to injure extends beyond trade competition and labour disputes. *Thompson v. New South Wales Branch* of the British Medical Association shows that it may extend to the affairs of a profession, as was expressly stated in that case in the judgment of the Privy Council. By way of contrast. *Gregory v. Duke* of Brunswick, may be regarded as a striking illustration of what might be held to constitute a conspiracy to injure; what was alleged was a conspiracy to hiss an actor off the stage in order to ruin him. To what legitimate interests other than those mentioned the general doctrine may extend I do not here seek to define, since beyond question it extends to the present case, whether the object of the action were the prosperity of the industry or the obtaining 100 per cent membership. But the objects or purposes for which combinations may be formed are clearly of great variety. It must be left to the future to decide on the facts of the particular case, subject to the general doctrine, whether any combination is such as to give rise to a claim for a conspiracy to injure."

[11] The wording "concerted action taken pursuant to agreement" was used by Lord Diplock in *Lonrho et al v. Shall Petroleum Co. et al* [1981] 2 All E.R. 456 at 463.

[12] In order to be found to be a party to a conspiracy one must know the facts of the alleged agreement or combination and intend to be a party to the "combining". This principle was adopted by the English Court of Appeal in *Belmont* Finance *Corp. v. miliums Furniture et al* (No.2) [1980] 1 All E.R.393 wherein both Buckley L.J. and Waller L.J. referred to *Churchill v. Walton* [1967] 2 A.C.224 approving the words of Viscount Dilhorne at p.237:

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> "… I would say that *mens rea* is only an essential ingredient in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act: that knowledge of the law on the part of the accused is immaterial and that knowledge of the facts is only material in so far as such knowledge throws a light on what was agreed."

[13] One further principle of the law of civil conspiracy should be mentioned, that is, that the "combiners" must have as the predominant purpose of their combination, the intention to inflict damage on another. Viscount Simon L.C. stated this proposition in *Crofter* at p.445:

> "The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realize or should realize will follow, but what is in truth the object in the minds of the combiners when they acted as they did.
>
> * * * * *
>
> If that predominant purpose is to damage another person, and damage results, that is tortious conspiracy."

It is not necessary that there be direct evidence of the intent to damage the plaintiff: all the plaintiff need establish is that it is a member of the "target group". In *British Columbia Lightweight Aggregate v. Canada Cement Lafarge Ltd.* [1981] 4 W.W.R.385 the Court at pp.412-13 said this:

> "It is not necessary that there be express malice or "deliberate" intent. The defendants are presumed to intend the natural and probable consequences of their acts. The learned trial judge found that the defendants conspired to eliminate all competitors and succeeded in so doing. The plaintiff was a competitor of the defendants. This finding is supported by the evidence and by the admissions of the defendants through pleading guilty that they had conspired to unduly lessen competition by achieving virtual domination of the market in British Columbia. It is idle, in the light of these facts, to suggest that the plaintiff was not one of the targets of the conspiracy. The defendants were aware that all persons and corporations engaged in the cement and concrete business were entitled to carry on their operations in a completely free and competitive market. They also knew, or ought to have known, that their conduct was such as to deprive the plaintiff of its legal right to operate its business in such a market. The plaintiff fell within the broad objective of the conspiracy, namely, to lessen competition and control and share the market."

(Leave to appeal this decision of the British Columbia Court of Appeal to the Supreme Court of Canada has been granted).

<u>The Facts</u>

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[14] We shall, for the purpose of applying the law of civil conspiracy to the case at bar, expand upon the general outline of the facts set out at the beginning of this opinion.

[15] The Executive Co-ordinator of the Association estimated that only between eight and ten percent of the Association's work related to abortion counselling. She stated that during each abortion information session all alternatives to therapeutic abortions and the complications and risks involved are discussed with the client. The Association took the position that the final decision of whether to seek a therapeutic abortion rested with the client. In our view the evidence does not support the suggestion that the Association advised or pressured clients to seek an abortion. The position of the Association is clearly defined in the "caution" set out on the bottom of the form supplied to the client (see *supra*).

[16] If the client decided that she wanted a therapeutic abortion she was advised of the manner in which she could proceed and frequently an appointment was made for her by the Association with a physician familiar with the procedures. The Association's involvement, in a process that admittedly might ultimately culminate in a therapeutic abortion, ends at this point.

[17] There was evidence of the procedures adopted by one hospital in Calgary before a therapeutic abortion is performed. There, the woman seeking the abortion must first be examined by a gynaecologist who discusses the question with her and makes an assessment of the situation. The woman is then referred to a counsellor. Information from the gynaecologist and from the counsellor is assembled and presented to the hospital's therapeutic abortion committee where the decision is finally made as to whether an abortion will be authorized. (Section 251(4) *Criminal Code.*)

Conclusion

[18] It certainly cannot be contended that the Association was doing anything wrongful or illegal in advising members of the public of the procedures set out in the *Criminal Code.* The appellant's argument based on conspiracy must therefore be founded upon the Association's step in putting a woman who consults it in touch with a physician. This act, in my respectful view, cannot make the Association a "combiner" in a conspiracy to obtain a therapeutic abortion. It cannot be construed as conduct forming a common design with others to effect such an abortion.

[19] On the evidence the position of the Association is one of strict and explicit neutrality. The decisions involved in the procedures outlined are, firstly, that of the woman

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in deciding to consult a physician, and secondly that of the therapeutic abortion committee of the hospital in deciding whether, in the light of the reports of the physician and the counsellor, to authorize an abortion.

[20] The essence of conspiracy is agreement. With whom then has the Association made an agreement? Firstly, it is not with the pregnant woman. She is merely given advice as to the options open to her and as to procedures if she persists in wishing a therapeutic abortion. There is no agreement to effect a result. Then, is there an agreement with the doctor or doctors to whom the Association refers the pregnant woman? Surely at its highest, it is an agreement that, when advising pregnant women who seek therapeutic abortions, the Association may refer such women to these doctors as a step to getting them before a therapeutic abortion committee referred to in s.251 of the *Criminal Code.* In our view this does not make them guilty of conspiring to commit an abortion. There remains the opinion of the physician to whom the woman has been referred. There remains the possibility of change of heart by the woman, and there remains the possibility that the therapeutic abortion committee will refuse to approve of an abortion. Equally, we can see no agreement with the members of any of the therapeutic abortion committee of the hospital. In a conspiracy one's agreement may be express or tacit, it is also frequently to be inferred from the part one plays in reaching a common end. Such an inference here, in out view, is not justified because the Association does not seek with others a common end of abortion. Indeed, it counsels a woman to consider whether that is the best solution and if she so decides she is then referred to others who in turn will decide whether a therapeutic abortion is to proceed.

[21] The appellant has, in our view, failed to establish the existence of a combination or an agreement between the Association and others, much less a predominant purpose and intention that a therapeutic abortion be obtained.

[22] There being no tortious conspiracy to which the Association is a party, the appeal must be dismissed.

[23] Having arrived at this conclusion, on the basis of the assumption that abortion, therapeutic or otherwise, constitutes the tort of battery on the foetus, it is unnecessary for us to deal with the other grounds of appeal advanced by the appellant.

[24] The appeal is dismissed with costs.

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DATED at Calgary. Alberta
this 12th day of April,
A.D. 1983.

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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

evidence and owed deference. They establish the first element of the tort of unlawful conduct conspiracy.

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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

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.

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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

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

2013 ABCA 235 (CanLII)

Costigan J.A.

Slatter J.A.

Authorized to sign for: McDonald J.A.

2013 ABCA 235 (CanLII)

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

2013 ABCA 235 (CanLII)

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 (4^{th}) 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.

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[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

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.

2014 ABCA 230 (CanLII)

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.

2014 ABCA 230 (CanLII)

Appearances:

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

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

2014 ABCA 230 (CanLII)

IN THE MATTER OF the Bankruptcy of Peoples Department Stores Inc./Magasins à rayons Peoples inc.

Caron Bélanger Ernst & Young Inc., in its capacity as Trustee to the bankruptcy of Peoples Department Stores Inc./Magasins à rayons Peoples inc. *Appellant*

v.

Lionel Wise, Ralph Wise and Harold Wise *Respondents*

and

Chubb Insurance Company of Canada *Respondent*

INDEXED AS: PEOPLES DEPARTMENT STORES INC. (TRUSTEE OF) *v.* WISE

Neutral citation: 2004 SCC 68.

File No.: 29682.

2004: May 11; 2004: October 29.

Present: Iacobucci,* Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Corporations — Directors and officers — Fiduciary duty and duty of care — Directors of bankrupt corporation being sued by trustee — Trustee claiming that directors breached fiduciary duty and duty of care — Whether directors owe fiduciary duty or duty of care to corporation's creditors — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1).

Bankruptcy and insolvability — Reviewable transactions — Transfer of assets between wholly-owned subsidiary and parent corporation — Wholly-owned subsidiary and parent corporation declaring bankruptcy — Parent corporation's directors sued by trustee of wholly-owned subsidiary — Trustee claiming that certain transactions were reviewable — Whether consideration for impugned

* Iacobucci J. took no part in the judgment.

DANS L'AFFAIRE DE la faillite de Peoples Department Stores Inc./Magasins à rayons Peoples inc.

Caron Bélanger Ernst & Young Inc., en sa qualité de syndic de la faillite de Peoples Department Stores Inc./Magasins à rayons Peoples inc. *Appelante*

c.

Lionel Wise, Ralph Wise et Harold Wise *Intimés*

et

Chubb du Canada, Compagnie d'assurance *Intimée*

RÉPERTORIÉ : MAGASINS À RAYONS PEOPLES INC. (SYNDIC DE) *c.* WISE

Référence neutre : 2004 CSC 68.

N° du greffe : 29682.

2004 : 11 mai; 2004 : 29 octobre.

Présents : Les juges Iacobucci*, Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Sociétés — Administrateurs et dirigeants — Obligation de fiduciaire et obligation de diligence — Administrateurs d'une société faillie poursuivis par le syndic — Administrateurs accusés par le syndic de manquement à leur obligation de fiduciaire et à leur obligation de diligence — Les administrateurs ont-ils une obligation de fiduciaire et une obligation de diligence envers les créanciers de la société? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 122(1).

Faillite et insolvabilité — Transactions révisables — Transfert d'actifs entre la filiale à part entière et la société mère — Faillite de la filiale à part entière et de la société mère — Administrateurs de la société mère poursuivis par le syndic de la filiale à part entière — Allégation par le syndic que certaines transactions sont révisables — La contrepartie reçue dans les transactions

* Le juge Iacobucci n'a pas pris part au jugement.

2004 SCC 68 (CanLII)

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transactions conspicuously less than fair market value — Whether directors "privy" to transactions — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 100.

Wise Stores Inc. ("Wise") acquired Peoples Department Stores Inc. ("Peoples") from Marks and Spencer Canada Inc. ("M & S"). L.W., R.W. and H.W. (the "Wise brothers") were majority shareholders, officers and directors of Wise, and the only directors of Peoples. Because of covenants imposed by M & S, Peoples could not be merged with Wise until the purchase price had been paid. Almost from the outset, the joint operation of Wise and Peoples did not function smoothly. Parallel bookkeeping, combined with shared warehousing arrangements, caused serious problems for both companies. As a result, their inventory records were increasingly incorrect. The situation, already unsustainable, was worsening. L.W. consulted the vice-president of administration and finance of both Wise and Peoples in an attempt to find a solution. On his recommendation, the Wise brothers agreed to implement a joint inventory procurement policy whereby the two firms would divide responsibility for purchasing. Peoples would make all purchases from North American suppliers and Wise would, in turn, make all purchases from overseas suppliers. Peoples would then transfer to Wise what it had purchased for Wise, charging Wise accordingly, and vice versa. The new policy was implemented on February 1, 1994. Before the end of the year, both Wise and Peoples declared bankruptcy. Peoples' trustee filed a petition against the Wise brothers. The trustee claimed that they had favoured the interests of Wise over Peoples to the detriment of Peoples' creditors, in breach of their duties as directors under s. 122(1) of the *Canada Business Corporations Act* ("CBCA"). In the alternative, the trustee claimed that the Wise brothers had in the year preceding the bankruptcy been privy to transactions in which Peoples' assets had been transferred to Wise for conspicuously less than fair market value within the meaning of s. 100 of the *Bankruptcy and Insolvency Act* ("BIA"). The trial judge found the Wise brothers liable on both grounds. The Court of Appeal set aside the trial judge's decision.

Held: The appeal should be dismissed. The Wise brothers did not breach their duties under s. 122(1) of the CBCA, nor were the impugned transactions in violation of s. 100 of the BIA.

attaquées est-elle manifestement inférieure à la juste valeur du marché? — Les administrateurs étaient-ils des parties intéressées dans les transactions? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 100.

Wise Stores Inc. (« Wise ») a acquis de Marks & Spencer Canada Inc. (« M & S ») les Magasins à rayons Peoples Inc. (« Peoples »). L.W., R.W. et H.W. (les « frères Wise ») étaient actionnaires majoritaires, dirigeants et administrateurs de Wise, et les seuls administrateurs de Peoples. En raison des conditions imposées par M & S, Peoples ne pouvait fusionner avec Wise avant le paiement intégral du prix d'achat. Presque dès le début, l'exploitation en commun de Wise et de Peoples s'est avérée difficile. La tenue d'une comptabilité parallèle, conjuguée à l'entreposage en commun des marchandises, a causé de graves problèmes aux deux sociétés. En conséquence, les fiches de stocks des deux sociétés sont devenues de plus en plus inexactes. La situation, déjà intolérable, a empiré. L.W. a consulté le vice-président à l'administration et aux finances de Wise et Peoples pour tenter de trouver une solution. Sur sa recommandation, les frères Wise ont accepté de mettre en œuvre une politique d'approvisionnement commun en vertu de laquelle les deux entreprises se partageraient la responsabilité des achats. Peoples s'occuperait de tous les achats auprès de fournisseurs en Amérique du Nord et Wise, pour sa part, se chargerait de tous les achats faits outre-mer. Peoples transférerait ensuite à Wise les marchandises achetées pour Wise et lui en réclamerait le prix, et vice versa. La nouvelle politique est entrée en vigueur le 1er février 1994. Avant la fin de l'année, Wise et Peoples ont été déclarées en faillite. Le syndic de Peoples a présenté contre les frères Wise une requête dans laquelle il a prétendu que ces derniers avaient privilégié les intérêts de Wise plutôt que ceux de Peoples au détriment des créanciers de Peoples, en contravention des obligations que le par. 122(1) de la *Loi canadienne sur les sociétés par actions* (« LCSA ») leur imposait en tant qu'administrateurs. Le syndic a soutenu aussi que, au cours de l'année ayant précédé la faillite, les frères Wise étaient des parties intéressées aux transactions en vertu desquelles des biens de Peoples avaient été transférés à Wise pour une contrepartie manifestement inférieure à la juste valeur du marché au sens de l'art. 100 de la *Loi sur la faillite et l'insolvabilité* (« LFI »). En première instance, le juge a conclu que les frères Wise étaient responsables en regard des deux moyens invoqués. La Cour d'appel a infirmé cette décision.

Arrêt : Le pourvoi est rejeté. Les frères Wise n'ont pas manqué aux obligations que leur imposait le par. 122(1) de la LCSA, et les transactions attaquées n'étaient pas contraires à l'art. 100 de la LFI.

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The fiduciary duty under s. 122(1)(*a*) of the CBCA requires directors and officers to act in good faith and honestly *vis-à-vis* the corporation. Here, the trial judge found that there was no fraud or dishonesty in the Wise brothers' attempts to solve the mounting inventory problems of Peoples and Wise. The Wise brothers considered the serious inventory management problem and implemented a joint inventory procurement policy they hoped would solve it. In the absence of evidence of a personal interest or improper purpose in the new policy, and in light of the evidence of a desire to make both Wise and Peoples "better" corporations, the directors did not breach their fiduciary duty under s. 122(1)(*a*). An honest and good faith attempt to redress a corporation's financial problems does not, if unsuccessful, qualify as such a breach. The fiduciary duty does not change when a corporation is in the nebulous "vicinity of insolvency". At all times, they owe their fiduciary obligations to the corporation, and the corporations' interests are not to be confused with the interests of the creditors or those of any other stakeholder. There is no need to read the interests of creditors into the fiduciary duty set out in s. 122(1)(*a*) in light of the availability under the CBCA both of the oppression remedy (s. 241(2)(*c*)) and of an action based on the duty of care (s. 122(1)(*b*)).

Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(*b*) of the CBCA if they act prudently and on a reasonably informed basis. The standard of care is an objective one. The decisions of directors and officers must be reasonable business decisions in light of all the circumstances, including the prevailing socio-economic conditions, about which they knew or ought to have known. While courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are often involved in corporate decision-making, they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision. In this case, in adopting the joint inventory procurement policy, the directors did not breach their duty of care in respect of Peoples' creditors. The implementation of the new policy was a reasonable business decision made with a view to rectifying a serious and urgent business problem in circumstances in which no solution may have been possible. The trial judge's conclusion that the new policy led inexorably to Peoples' failure and bankruptcy was factually

L'obligation fiduciaire prévue à l'al. 122(1)*a*) de la LCSA impose aux administrateurs et aux dirigeants le devoir d'agir avec intégrité et de bonne foi aux mieux des intérêts de la société. En l'espèce, le juge de première instance a conclu qu'il n'y a eu ni fraude ni malhonnêteté de la part des frères Wise lorsqu'ils ont tenté de régler les problèmes d'approvisionnement de plus en plus graves de Peoples et de Wise. Les frères Wise ont examiné le grave problème de gestion des stocks et ont mis en application une politique d'approvisionnement commun qui, espéraient-ils, permettrait de le régler. En l'absence d'éléments de preuve de l'existence d'un intérêt personnel ou d'une fin illégitime de la nouvelle politique, et compte tenu de la preuve d'une volonté de faire de Wise et de Peoples de « meilleures » entreprises, les administrateurs n'ont pas manqué à leur obligation fiduciaire énoncée à l'al. 122(1)*a*). On ne peut conclure à un tel manquement en cas d'échec d'une tentative faite avec intégrité et de bonne foi pour redresser la situation financière d'une société. L'obligation fiduciaire reste la même lorsqu'une société se trouve dans la situation que décrit l'expression nébuleuse « au bord de l'insolvabilité ». Ils ont en tout temps leur obligation fiduciaire envers la société, et les intérêts de la société ne doivent pas se confondre avec ceux des actionnaires, avec ceux des créanciers ni avec ceux de toute autre partie intéressée. Il n'est pas nécessaire d'interpréter les intérêts des créanciers comme étant visés par l'obligation prévue à l'al. 122(1)*a*) compte tenu de la possibilité, en vertu de la LCSA, d'un recours en cas d'abus de droit (al. 241(2)*c*)), en plus de l'action fondée sur l'obligation de diligence (al. 122(1)*b*)).

On ne considérera pas que les administrateurs et les dirigeants ont manqué à l'obligation de diligence énoncée à l'al. 122(1)*b*) de la LCSA s'ils ont agi avec prudence et en s'appuyant sur les renseignements dont ils disposaient. La norme de diligence est une norme objective. Les décisions des administrateurs et des dirigeants doivent constituer des décisions d'affaires raisonnables compte tenu de toutes les circonstances, notamment les conditions socio-économiques existantes, qu'ils connaissaient ou auraient dû connaître. Si les tribunaux ne doivent pas substituer leur opinion à celle des administrateurs qui ont utilisé leur expertise commerciale pour évaluer les considérations qui entrent dans la prise de décisions des sociétés, ils sont toutefois en mesure d'établir, à partir des faits de chaque cas, si l'on a exercé le degré de prudence et de diligence nécessaire pour en arriver à ce qu'on prétend être une décision d'affaires raisonnable au moment où elle a été prise. En l'espèce, en adoptant la politique d'approvisionnement commun, les administrateurs n'ont pas contrevenu à leur obligation de diligence à l'égard des créanciers de Peoples. L'instauration de la nouvelle politique était une décision d'affaires raisonnable qui a été prise en vue de corriger un problème d'ordre commercial

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incorrect and constituted a palpable and overriding error. Many factors other than the new policy contributed more directly to Peoples' bankruptcy.

Section 44(2) of the CBCA as it then read (the provision has since been repealed) cannot exempt directors and officers from potential liability under s. 122(1) for any financial assistance given by subsidiaries to the parent corporation. Nor can the Wise brothers successfully invoke good faith reliance on the opinion of the vice-president of administration and finance under s. 123(4)(*b*) of the CBCA. As a non-professional employee, the vice-president did not belong to any of the professional groups named in s. 123(4)(*b*). He was not an accountant, was not subject to the regulatory overview of any professional organization and did not carry independent insurance coverage for professional negligence.

The trustee's claim under s. 100 of the BIA must fail. The relevant transactions are those spanning the period from February to December 1994 when the new procurement policy was in effect. With regard to all the circumstances of this case, a disparity of slightly more than six percent between fair market value and the consideration received does not constitute a conspicuous difference.

While, in light of this conclusion, there is no need to consider whether the Wise brothers would have been "privy" to the transactions, the disagreement between the trial judge and the Court of Appeal on the interpretation of "privy" in s. 100(2) of the BIA warrants the following comments. Since the provision's remedial purpose is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person, the word "privy" should be given a broad reading to include those who benefit directly or indirectly from, and have knowledge of, a transaction occurring for less than fair market value. This rationale is particularly apt when those who benefit are the controlling minds behind the transaction.

Cases Cited

Applied: *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, [2002] 4 S.C.R. 312, 2002 SCC 81; **approved:** *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.* (1986), 59 O.R. (2d) 254; *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1; **referred to:** *Automatic Self-Cleansing Filter*

grave et urgent dans un cas où il n'existait peut-être aucune solution. En concluant que la nouvelle politique avait inexorablement entraîné le déclin et la faillite de Peoples, le juge de première instance a mal interprété les faits et a commis une erreur manifeste et dominante. De nombreux facteurs, outre la nouvelle politique, ont contribué plus directement à la faillite de Peoples.

Le paragraphe 44(2) de la LCSA qui s'appliquait à l'époque (abrogé depuis) ne permet pas de soustraire les administrateurs et les dirigeants à leur responsabilité éventuelle en vertu du par. 122(1) pour toute aide financière fournie par une filiale à sa société mère. Les frères Wise ne peuvent non plus faire valoir avec succès qu'ils s'appuyaient de bonne foi sur l'opinion du vice-président aux finances comme le prévoit l'al. 123(4)*b*) de la LCSA. Le vice-président était un employé non professionnel et n'était membre d'aucun des groupes de professionnels désignés à l'al. 123(4)*b*). Il n'était pas un comptable, ses activités n'étaient pas réglementées par une organisation professionnelle et il n'avait pas lui-même souscrit d'assurance-responsabilité professionnelle.

La réclamation du syndic fondée sur l'art. 100 de la LFI doit échouer. Les transactions en cause sont celles qui ont été effectuées au cours de la période de février à décembre 1994 pendant laquelle la nouvelle politique d'approvisionnement était appliquée. Compte tenu de toutes les circonstances de la présente espèce, un écart d'un peu plus de 6 pour 100 entre la juste valeur du marché et la contrepartie reçue ne constitue pas une différence manifeste.

Si, compte tenu de cette conclusion, il est inutile d'examiner si les frères Wise auraient eu un « intérêt » à la transaction, le désaccord entre le juge de première instance et la Cour d'appel sur l'interprétation des mots « ayant intérêt » au par. 100(2) de la LFI justifie les observations qui suivent. Puisque l'objet réparateur de cette disposition est d'annuler les effets d'une transaction qui a diminué la valeur des actifs d'un failli, il convient de donner aux termes « ayant intérêt » un sens large afin qu'ils s'appliquent aux personnes qui tirent un avantage direct ou indirect d'une transaction tout en sachant que la contrepartie est inférieure à la juste valeur du marché. Ce raisonnement est particulièrement pertinent lorsque les personnes qui touchent un avantage sont les instigatrices de la transaction.

Jurisprudence

Arrêt appliqué : *373409 Alberta Ltd. (Séquestre de) c. Banque de Montréal*, [2002] 4 R.C.S. 312, 2002 CSC 81; **arrêts approuvés :** *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.* (1986), 59 O.R. (2d) 254; *Standard Trustco Ltd. (Trustee of) c. Standard Trust Co.* (1995), 26 O.R. (3d) 1; **arrêts**

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Syndicate Co. v. Cuninghame, [1906] 2 Ch. 34; *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51; *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592; *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123, aff'd (1991), 3 B.L.R. (2d) 113; *Teck Corp. v. Millar* (1972), 33 D.L.R. (3d) 288; *Brasserie Labatt ltée v. Lanoue*, [1999] Q.J. No. 1108 (QL); *Regent Taxi & Transport Co. v. Congrégation des Petits Frères de Marie*, [1929] S.C.R. 650, rev'd [1932] 2 D.L.R. 70; *Lister v. McAnulty*, [1944] S.C.R. 317; *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1978] 1 S.C.R. 605; *Dovey v. Cory*, [1901] A.C. 477; *In re Brazilian Rubber Plantations and Estates, Ltd.*, [1911] 1 Ch. 425; *In re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407; *Soper v. Canada*, [1998] 1 F.C. 124; *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177; *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.* (1989), 37 B.C.L.R. (2d) 88.

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 100(1) [repl. 1997, c. 12, s. 81], (2).

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 44(1) [rep. 2001, c. 14, s. 26], (2) [*idem*], 102(1) [repl. *idem*, s. 35], 121, 122(1) [am. *idem*, s. 135 (Sch., item 43)], 123(4) [now 123(5)], 185, 238, 239, 240, 241.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 300, 311, 1457, 2501.

Interpretation Act, R.S.C. 1985, c. I-21, s. 8.1.

Authors Cited

Allen, William T., Jack B. Jacobs and Leo E. Strine, Jr. "Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law" (2001), 26 *Del. J. Corp. L.* 859.

Beck, Stanley M. "Minority Shareholders' Rights in the 1980s". In *Corporate Law in the 80s*, Special Lectures of the Law Society of Upper Canada. Don Mills, Ont.: Richard De Boo, 1982, 311.

Brock, Jason. "The Propriety of Profitmaking: Fiduciary Duty and Unjust Enrichment" (2000), 58 *U.T. Fac. L. Rev.* 185.

Crête, Raymonde, et Stéphane Rousseau. *Droit des sociétés par actions: principes fondamentaux.* Montréal: Thémis, 2002.

Dickerson, Robert W. V., John L. Howard and Leon Getz. *Proposals for a New Business Corporations Law for Canada*, vols. I and II. Ottawa: Information Canada, 1971.

Gray, Wayne D. "*Peoples v. Wise* and *Dylex*: Identifying Stakeholder Interests upon or near Corporate

mentionnés : *Automatic Self-Cleansing Filter Syndicate Co. c. Cuninghame*, [1906] 2 Ch. 34; *K.L.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 403, 2003 CSC 51; *Canadian Aero Service Ltd. c. O'Malley*, [1974] R.C.S. 592; *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113, conf. par (1991), 3 B.L.R. (2d) 123; *Teck Corp. c. Millar* (1972), 33 D.L.R. (3d) 288; *Brasserie Labatt ltée c. Lanoue*, [1999] J.Q. nº 1108 (QL); *Regent Taxi & Transport Co. c. Congrégation des Petits Frères de Marie*, [1929] R.C.S. 650, inf. par [1932] 2 D.L.R. 70; *Lister c. McAnulty*, [1944] R.C.S. 317; *Hôpital Notre-Dame de l'Espérance c. Laurent*, [1978] 1 R.C.S. 605; *Dovey c. Cory*, [1901] A.C. 477; *In re Brazilian Rubber Plantations and Estates, Ltd.*, [1911] 1 Ch. 425; *In re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407; *Soper c. Canada*, [1998] 1 C.F. 124; *Maple Leaf Foods Inc. c. Schneider Corp.* (1998), 42 O.R. (3d) 177; *Skalbania (Trustee of) c. Wedgewood Village Estates Ltd.* (1989), 37 B.C.L.R. (2d) 88.

Lois et règlements cités

Code civil du Québec, L.Q. 1991, ch. 64, art. 300, 311, 1457, 2501.

Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 44(1) [abr. 2001, ch. 14, art. 26], (2) [*idem*], 102(1) [rempl. *idem*, art. 35], 121 [mod. *idem*, art. 49], 122(1) [mod. 1994, ch. 24, art. 13], 123(4) [maintenant 123(5)], 185, 238, 239, 240, 241 [mod. 2001, ch. 14, art. 117].

Loi d'interprétation, L.R.C. 1985, ch. I-21, art. 8.1.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 100(1) [rempl. 1997, ch. 12, art. 81], (2).

Doctrine citée

Allen, William T., Jack B. Jacobs and Leo E. Strine, Jr. « Function Over Form : A Reassessment of Standards of Review in Delaware Corporation Law » (2001), 26 *Del. J. Corp. L.* 859.

Beck, Stanley M. « Minority Shareholders' Rights in the 1980s ». In *Corporate Law in the 80s*, Special Lectures of the Law Society of Upper Canada. Don Mills, Ont. : Richard De Boo, 1982, 311.

Brock, Jason. « The Propriety of Profitmaking : Fiduciary Duty and Unjust Enrichment » (2000), 58 *R.D.U.T.* 185.

Crête, Raymonde, et Stéphane Rousseau. *Droit des sociétés par actions : principes fondamentaux.* Montréal : Thémis, 2002.

Dickerson, Robert W. V., John L. Howard et Leon Getz. *Propositions pour un nouveau droit des corporations commerciales canadiennes*, vol. I et II. Ottawa : Information Canada, 1971.

Gray, Wayne D. « *Peoples v. Wise* and *Dylex* : Identifying Stakeholder Interests upon or near Corporate

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Insolvency — Stasis or Pragmatism?" (2003), 39 *Can. Bus. L.J.* 242.
Houlden, L. W., and G. B. Morawetz. *Bankruptcy and Insolvency Law of Canada*, vol. 2, 3rd ed. Toronto: Carswell, 1989 (loose-leaf updated 2003, release 9).
Iacobucci, Edward M. "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003), 39 *Can. Bus. L.J.* 398.
Iacobucci, Edward M., and Kevin E. Davis. "Reconciling Derivative Claims and the Oppression Remedy" (2000), 12 *S.C.L.R.* (2d) 87.
Martel, Paul. "Le 'voile corporatif' — l'attitude des tribunaux face à l'article 317 du Code civil du Québec" (1998), 58 *R. du B.* 95.
McGuinness, Kevin Patrick. *The Law and Practice of Canadian Business Corporations*. Toronto: Butterworths, 1999.
Thomson, David. "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?" (2000), 58 *U.T. Fac. L. Rev.* 31.

APPEAL from a judgment of the Quebec Court of Appeal, [2003] R.J.Q. 796, 224 D.L.R. (4th) 509, 41 C.B.R. (4th) 225, [2003] Q.J. No. 505 (QL), setting aside a decision of the Superior Court (1998), 23 C.B.R. (4th) 200, [1998] Q.J. No. 3571 (QL). Appeal dismissed.

Gerald F. Kandestin, *Gordon Kugler* and *Gordon Levine*, for the appellant.

Éric Lalanne and *Martin Tétreault*, for the respondents Lionel Wise, Ralph Wise and Harold Wise.

Ian Rose and *Odette Jobin-Laberge*, for the respondent Chubb Insurance Company of Canada.

The judgment of the Court was delivered by

MAJOR AND DESCHAMPS JJ. —

I. Introduction

1 The principal question raised by this appeal is whether directors of a corporation owe a fiduciary duty to the corporation's creditors comparable to the statutory duty owed to the corporation. For the reasons that follow, we conclude that directors owe a duty of care to creditors, but that duty does not rise to a fiduciary duty. We agree with the disposition of

Insolvency — Stasis or Pragmatism? » (2003), 39 *Rev. can. dr. comm.* 242.
Houlden, L. W., and G. B. Morawetz. *Bankruptcy and Insolvency Law of Canada*, vol. 2, 3rd ed. Toronto : Carswell, 1989 (loose-leaf updated 2003, release 9).
Iacobucci, Edward M. « Directors' Duties in Insolvency : Clarifying What Is at Stake » (2003), 39 *Rev. can. dr. comm.* 398.
Iacobucci, Edward M., and Kevin E. Davis. « Reconciling Derivative Claims and the Oppression Remedy » (2000), 12 *S.C.L.R.* (2d) 87.
Martel, Paul. « Le "voile corporatif" — l'attitude des tribunaux face à l'article 317 du Code civil du Québec » (1998), 58 *R. du B.* 95.
McGuinness, Kevin Patrick. *The Law and Practice of Canadian Business Corporations*. Toronto : Butterworths, 1999.
Thomson, David. « Directors, Creditors and Insolvency : A Fiduciary Duty or a Duty Not to Oppress? » (2000), 58 *R.D.U.T.* 31.

POURVOI contre un arrêt de la Cour d'appel du Québec, [2003] R.J.Q. 796, 224 D.L.R. (4th) 509, 41 C.B.R. (4th) 225, [2003] J.Q. n^{o} 505 (QL), qui a infirmé une décision de la Cour supérieure (1998), 23 C.B.R. (4th) 200, [1998] J.Q. n^{o} 3571 (QL). Pourvoi rejeté.

Gerald F. Kandestin, *Gordon Kugler* et *Gordon Levine*, pour l'appelante.

Éric Lalanne et *Martin Tétreault*, pour les intimés Lionel Wise, Ralph Wise et Harold Wise.

Ian Rose et *Odette Jobin-Laberge*, pour l'intimée Chubb du Canada, Compagnie d'assurance.

Version française du jugement de la Cour rendu par

LES JUGES MAJOR ET DESCHAMPS —

I. Introduction

La principale question soulevée par le présent pourvoi est de savoir si les administrateurs d'une société ont, envers les créanciers de la société, une obligation fiduciaire comparable à l'obligation que leur impose la loi à l'égard de la société. Pour les motifs qui suivent, nous concluons que les administrateurs ont envers les créanciers une obligation

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the Quebec Court of Appeal. The appeal is therefore dismissed.

As a result of the demise in the mid-1990s of two major retail chains in eastern Canada, Wise Stores Inc. ("Wise") and its wholly-owned subsidiary, Peoples Department Stores Inc. ("Peoples"), the indebtedness of a number of Peoples' creditors went unsatisfied. In the wake of the failure of the two chains, Caron Bélanger Ernst & Young Inc., Peoples' trustee in bankruptcy ("trustee"), brought an action against the directors of Peoples. To address the trustee's claims, the extent of the duties imposed by s. 122(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), upon directors with respect to creditors must be determined; we must also identify the purpose and reach of s. 100 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

In our view, it has not been established that the directors of Peoples violated either the fiduciary duty or the duty of care imposed by s. 122(1) of the CBCA. As for the trustee's submission regarding s. 100 of the BIA, we agree with the Court of Appeal that the consideration received in the impugned transactions was not "conspicuously" less than fair market value. The BIA claim fails on that basis.

II. Background

Wise was founded by Alex Wise in 1930 as a small clothing store on St-Hubert Street in Montreal. By 1992, through expansion effected by a mix of internal growth and acquisitions, it had become an enterprise operating at 50 locations with annual sales of approximately $100 million, and it had been listed on the Montreal Stock Exchange in 1986. The stores were, for the most part, located in urban areas in Quebec. The founder's three sons, Lionel, Ralph and Harold Wise ("Wise brothers"), were majority shareholders, officers, and directors of Wise. Together, they controlled 75 percent of the firm's equity.

de diligence, mais cette obligation ne s'élève pas au niveau d'une obligation fiduciaire. Nous souscrivons au dispositif de la Cour d'appel du Québec. Le pourvoi est donc rejeté.

2 En raison de la faillite, au milieu des années 1990, de deux importantes chaînes de magasins de détail de l'Est du Canada, Wise Stores Inc. (« Wise ») et sa filiale à part entière, les Magasins à rayons Peoples Inc. (« Peoples »), de nombreuses créances de Peoples sont demeurées insatisfaites. Caron Bélanger Ernst & Young Inc., le syndic à la faillite de Peoples (« syndic »), a intenté une action contre les administrateurs de Peoples. Pour statuer sur les réclamations du syndic, il convient de déterminer l'étendue des obligations envers les créanciers qu'impose aux administrateurs le par. 122(1) de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, ch. C-44 (« LCSA »). Nous devons également préciser l'objet et la portée de l'art. 100 de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« LFI »).

3 À notre avis, il n'a pas été démontré que les administrateurs de Peoples ont manqué à l'obligation fiduciaire ou à l'obligation de diligence qu'impose le par. 122(1) de la LCSA. Pour ce qui est de l'argument du syndic concernant l'art. 100 de la LFI, nous concluons comme la Cour d'appel que la contrepartie reçue dans le cadre des transactions contestées n'était pas « manifestement » inférieure à la juste valeur du marché. La réclamation fondée sur la LFI est rejetée pour ce motif.

II. Contexte

4 Wise a été fondée en 1930 par Alex Wise et était à l'origine un petit magasin de vêtements sur la rue St-Hubert, à Montréal. En 1992, l'entreprise avait élargi ses activités par sa croissance interne et des acquisitions. Elle exploitait 50 magasins dont les ventes annuelles s'élevaient à environ 100 millions de dollars et elle avait été inscrite à la Bourse de Montréal en 1986. Ses magasins se trouvaient pour la plupart dans des régions urbaines du Québec. Les trois fils du fondateur, Lionel, Ralph et Harold Wise (« frères Wise »), étaient actionnaires majoritaires, dirigeants et administrateurs de Wise. Ensemble, ils contrôlaient 75 pour 100 des actions ordinaires de l'entreprise.

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5 In 1992, Peoples had been in business continuously in one form or another for 78 years. It had operated as an unincorporated division of Marks & Spencer Canada Inc. ("M & S") until 1991, when it was incorporated as a separate company. M & S itself was wholly owned by the large British firm, Marks & Spencer plc. ("M & S plc."). Peoples' 81 stores were generally located in rural areas, from Ontario to Newfoundland. Peoples had annual sales of about $160 million, but was struggling financially. Its annual losses were in the neighbourhood of $10 million.

En 1992, Peoples poursuivait déjà ses activités commerciales, sous une forme ou une autre, depuis 78 ans sans interruption. Elle était une division non constituée en société de Marks & Spencer Canada Inc. (« M & S ») jusqu'en 1991, année de sa constitution en société distincte. M & S était elle-même une filiale à part entière de la grande société britannique Marks & Spencer plc. (« M & S plc. »). Les 81 magasins de Peoples se trouvaient plutôt dans des régions rurales, de l'Ontario à Terre-Neuve. Les ventes annuelles de Peoples s'élevaient à environ 160 millions de dollars, mais avec des pertes annuelles d'environ 10 millions de dollars, l'entreprise se trouvait en difficulté financière.

6 Wise and Peoples competed with other chains such as Canadian Tire, Greenberg, Hart, K-Mart, M-Stores, Metropolitan Stores, Rossy, Woolco and Zellers. Retail competition in eastern Canada was intense in the early 1990s. In 1992, M-Stores went bankrupt. In 1994, Greenberg and Metropolitan Stores followed M-Stores into bankruptcy. The 1994 entry of Wal-Mart into the Canadian market, with its acquisition of over 100 Woolco stores from Woolworth Canada Inc., exerted significant additional competitive pressure on retail stores.

Wise et Peoples étaient en concurrence avec d'autres chaînes comme Canadian Tire, Greenberg, Hart, K-Mart, M-Stores, Metropolitan Stores, Rossy, Woolco et Zellers. Au début des années 1990, la concurrence dans le secteur de la vente au détail dans l'Est du Canada était féroce. En 1992, M-Stores a fait faillite. En 1994, Greenberg et Metropolitan Stores ont fait faillite à leur tour. En 1994, l'arrivée sur le marché canadien de Wal-Mart, qui a acquis de Woolworth Canada Inc. plus de 100 magasins du détaillant Woolco au Canada, a soumis les commerces de vente au détail à une concurrence encore plus forte.

7 Lionel Wise, the eldest of the three brothers and Wise's executive vice-president, had expressed an interest in acquiring the ailing Peoples chain from M & S as early as 1988. Initially, M & S did not share Wise's interest for the sale, but by late 1991, M & S plc., the British parent company of M & S, had decided to divest itself of all its Canadian operations. At this point, M & S incorporated each of its three Canadian divisions to facilitate the anticipated divestiture thereof.

Dès 1988, Lionel Wise, l'aîné des trois frères et le vice-président exécutif de Wise, s'était montré intéressé à acheter de M & S la chaîne Peoples dont les activités étaient en déclin. Au départ, M & S ne partageait pas l'intérêt de Wise pour la vente, mais à la fin de 1991, M & S plc., la société mère britannique de M & S, avait décidé de mettre fin à toutes ses activités commerciales au Canada. M & S a alors constitué ses trois divisions canadiennes en sociétés distinctes pour en faciliter la vente.

8 The new-found desire to sell coincided with Wise's previously expressed interest in acquiring its larger rival. Although M & S had initially hoped to sell Peoples for cash to a large firm in a solid financial condition, it was unable to do so. Consequently, negotiations got underway with representatives of Wise. A formal share purchase agreement was

Cette nouvelle volonté de vendre coïncide avec le désir manifesté auparavant par Wise d'acquérir sa grande rivale. Même si elle avait d'abord espéré vendre Peoples au comptant à une large entreprise jouissant d'une solide situation financière, M & S en est incapable. Par conséquent, elle amorce des négociations avec des représentants de Wise. Une

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drawn up in early 1992 and executed in June 1992, with July 16, 1992 as its closing date.

Wise incorporated a company, 2798832 Canada Inc., for the purpose of acquiring all of the issued and outstanding shares of Peoples from M & S. The $27-million share acquisition proceeded as a fully leveraged buyout. The portion of the purchase price attributable to inventory was discounted by 30 percent. The discount was designed to inject equity into Peoples in the fiscal year following the sale and to make use of some of the tax losses that had accumulated in prior years.

The amount of the down payment due to M & S at closing, $5 million, was borrowed from the Toronto Dominion Bank ("TD Bank"). According to the terms of the share purchase agreement, the $22-million balance of the purchase price would be carried by M & S and would be repaid over a period of eight years. Wise guaranteed all of 2798832 Canada Inc.'s obligations pursuant to the terms of the share purchase agreement.

To protect its interests, M & S took the assets of Peoples as security (subject to a priority in favour of the TD Bank) and negotiated strict covenants concerning the financial management and operation of the company. Among other requirements, 2798832 Canada Inc. and Wise were obligated to maintain specific financial ratios, and Peoples was not permitted to provide financial assistance to Wise. In addition, the agreement provided that Peoples could not be amalgamated with Wise until the purchase price had been paid. This prohibition was presumably intended to induce Wise to refinance and pay the remainder of the purchase price as early as possible in order to overcome the strict conditions imposed upon it under the share purchase agreement.

On January 31, 1993, 2798832 Canada Inc. was amalgamated with Peoples. The new entity retained Peoples' corporate name. Since 2798832 Canada Inc. had been a wholly-owned subsidiary of Wise, upon amalgamation the new Peoples became a subsidiary directly owned and controlled by Wise.

convention formelle d'achat d'actions est rédigée au début de 1992 et signée en juin 1992, la date limite d'exécution étant fixée au 16 juillet 1992.

9 Afin d'acheter de M & S toutes les actions émises et en circulation de Peoples, Wise constitue la société 2798832 Canada Inc. L'acquisition des actions, pour une somme de 27 millions de dollars, est faite entièrement par emprunt. Une réduction de 30 pour 100 est accordée à l'égard de la partie du prix d'achat attribuable au coût des stocks. La réduction a pour but de permettre l'injection de capitaux dans Peoples au cours de l'exercice financier suivant la vente et d'utiliser certaines des pertes fiscales accumulées au cours des années précédentes.

10 Le versement initial dû à M & S à la signature, soit 5 millions de dollars, est emprunté à la Banque Toronto Dominion (« Banque TD »). Suivant les modalités de la convention d'achat d'actions, le reliquat de 22 millions de dollars du prix d'achat est dû à M & S et son remboursement échelonné sur une période de huit ans. Aux termes de la convention d'achat d'actions, Wise garantit solidairement toutes les obligations de 2798832 Canada Inc.

11 Afin de protéger ses intérêts, M & S prend les actifs de Peoples en garantie (sous réserve d'une priorité de rang en faveur de la Banque TD) et négocie des conditions strictes concernant la gestion financière et l'exploitation de la société. Notamment, 2798832 Canada Inc. et Wise ont l'obligation de maintenir des ratios financiers précis et Peoples n'est pas autorisée à fournir d'aide financière à Wise. De plus, la convention prévoit que Peoples ne peut fusionner avec Wise avant le paiement intégral du prix d'achat. Cette interdiction a vraisemblablement pour but d'inciter Wise à se refinancer et à payer le plus tôt possible le reliquat du prix d'achat afin d'écarter les conditions strictes qui lui sont imposées dans la convention d'achat d'actions.

12 Le 31 janvier 1993, 2798832 Canada Inc. est fusionnée avec Peoples. La nouvelle entité conserve la dénomination sociale de Peoples. Comme 2798832 Canada Inc. était une filiale à part entière de Wise au moment de la fusion, la nouvelle entité Peoples devient une filiale de Wise qui en a aussi le

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The three Wise brothers were Peoples' only directors.

13 Following the acquisition, Wise had attempted to rationalize its operations by consolidating the overlapping corporate functions of Wise and Peoples, and operating as a group. The consolidation of the administration, accounting, advertising and purchasing departments of the two corporations was completed by the fall of 1993. As a consequence of the changes, many of Wise's employees worked for both firms but were paid solely by Wise. The evidence at trial was that because of the tax losses carried-forward by Peoples, it was advantageous for the group to have more expenses incurred by Wise, which, if the group was profitable as a whole, would increase its after-tax profits. Almost from the outset, the joint operation of Wise and Peoples did not function smoothly. Instead of the expected synergies, the consolidation resulted in dissonance.

14 After the acquisition, the total number of buyers for the two companies was nearly halved. The procurement policy at that point required buyers to deal simultaneously with suppliers on behalf of both Peoples and Wise. For the buyers, this nearly doubled their administrative work. Separate invoices were required for purchases made on behalf of Wise and Peoples. These invoices had to be separately entered into the system, tracked and paid.

15 Inventory, too, was separately recorded and tracked in the system. However, the inventory of each company was handled and stored, often unsegregated, in shared warehouse facilities. The main warehouse for Peoples, on Cousens Street in Ville St-Laurent, was maintained for and used by both firms. The Cousens warehouse saw considerable activity, as it was the central distribution hub for both chains. The facility was open 18 hours a day and employed 150 people on two shifts who handled a total of approximately 30,000 cartons daily through 20 loading docks. It was abuzz with activity.

contrôle. Les trois frères Wise sont les seuls administrateurs de Peoples.

Après l'acquisition, Wise avait tenté de rationaliser ses opérations en regroupant les diverses opérations de Wise et de Peoples qui se chevauchaient et en exploitant les deux entreprises comme un seul groupe. Le regroupement des services de la gestion, de la comptabilité, de la publicité et des achats des deux sociétés a été achevé à l'automne 1993. En raison de ces changements, de nombreux employés de Wise travaillaient pour les deux entreprises mais étaient payés par Wise uniquement. La preuve en première instance a démontré qu'en raison des pertes fiscales reportées de Peoples, il était avantageux pour le groupe que Wise engage davantage de dépenses, ce qui permettrait, si le groupe était rentable dans l'ensemble, d'augmenter ses bénéfices après impôt. Presque dès le début, l'exploitation en commun de Wise et de Peoples s'est avérée difficile. Au lieu de la synergie attendue, la consolidation a engendré la confusion.

Après l'acquisition, le nombre total d'acheteurs des deux sociétés est diminué d'environ la moitié. La politique d'approvisionnement oblige alors les acheteurs à traiter simultanément avec les fournisseurs pour le compte de Peoples et de Wise, ce qui double presque leurs tâches administratives. Des factures distinctes sont nécessaires pour les achats faits au nom de Wise et ceux faits au nom de Peoples. Ces factures doivent être inscrites séparément et faire l'objet d'un suivi et d'un paiement distincts.

Les stocks font aussi l'objet d'une inscription et d'un suivi distincts dans le système. Toutefois, les stocks de chacune des sociétés sont manipulés et entreposés, souvent sans être séparés, dans des entrepôts communs. L'entrepôt principal de Peoples, situé rue Cousens à Ville St-Laurent, a été conservé et utilisé par les deux entreprises. Il y a beaucoup d'activité à l'entrepôt Cousens parce qu'il s'agit du principal centre de distribution par les deux chaînes. L'entrepôt est ouvert 18 heures par jour et 150 personnes, y travaillant sur deux quarts, s'occupent de la manutention d'environ 30 000 boîtes quotidiennement sur 20 quais de chargement. L'activité y est intense.

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Before long, the parallel bookkeeping combined with the shared warehousing arrangements caused serious problems for both Wise and Peoples. The actual situation in the warehouse often did not mirror the reported state of the inventory in the system. The goods of one company were often inextricably commingled and confused with the goods of the other. As a result, the inventory records of both companies were increasingly incorrect. A physical inventory count was conducted to try to rectify the situation, to little avail. Both Wise and Peoples stores experienced numerous shipping disruptions and delays. The situation, already unsustainable, was worsening.

16 Rapidement, la tenue d'une comptabilité parallèle, conjuguée à l'entreposage en commun des marchandises, crée de graves problèmes tant pour Wise que pour Peoples. L'emplacement des marchandises dans l'entrepôt ne reflète pas toujours l'état des stocks indiqué dans le système. Les marchandises d'une société sont souvent mêlées aux marchandises de l'autre et confondues avec celle-ci. En conséquence, les fiches de stocks des deux sociétés sont de plus en plus inexactes. Un inventaire manuel des marchandises est effectué pour essayer de corriger la situation, sans grand succès. Les livraisons aux magasins de Wise et de Peoples sont souvent perturbées et en retard. La situation, déjà intolérable, empire.

In October 1993, Lionel Wise consulted David Clément, Wise's (and, after the acquisition, Peoples') vice-president of administration and finance, in an attempt to find a solution. In January 1994, Clément recommended and the three Wise brothers agreed that they would implement a joint inventory procurement policy ("new policy") whereby the two firms would divide responsibility for purchasing. Peoples would make all purchases from North American suppliers and Wise would, in turn, make all purchases from overseas suppliers. Peoples would then transfer to Wise what it had purchased for Wise, charging Wise accordingly, and vice versa. The new policy was implemented on February 1, 1994. It was this arrangement that was later criticized by certain creditors and by the trial judge.

17 En octobre 1993, Lionel Wise consulte David Clément, vice-président à l'administration et aux finances de Wise (et, après l'acquisition, de Peoples) pour tenter de trouver une solution. Au mois de janvier 1994, Clément recommande aux trois frères Wise, qui acceptent, de mettre en œuvre une politique d'approvisionnement commun (« nouvelle politique ») en vertu de laquelle les deux entreprises se partageront la responsabilité des achats. Peoples s'occupera de tous les achats auprès de fournisseurs en Amérique du Nord et Wise, pour sa part, se chargera de tous les achats faits outre-mer. Peoples transférera ensuite à Wise les marchandises achetées pour Wise et lui en réclamera le prix, et vice versa. La nouvelle politique entre en vigueur le 1er février 1994. C'est cet arrangement qui fera plus tard l'objet de critiques de la part de certains créanciers et du juge de première instance.

Approximately 82 percent of the total inventory of Wise and Peoples was purchased from North American suppliers, which inevitably meant that Peoples would be extending a significant trade credit to Wise. The new policy was known to the directors, but was neither formally implemented in writing nor approved by a board meeting or resolution.

18 Environ 82 pour 100 de la totalité des marchandises de Wise et de Peoples sont achetées auprès de fournisseurs nord-américains, de sorte qu'inévitablement, Peoples doit consentir à Wise un important crédit commercial. La nouvelle politique est connue des administrateurs, mais elle n'est pas formellement consignée par écrit ni approuvée lors d'une réunion du conseil d'administration ou par une résolution de celui-ci.

On April 27, 1994, Lionel Wise outlined the details of the new policy at a meeting of Wise's audit committee. A partner of Coopers & Lybrand was

19 Le 27 avril 1994, Lionel Wise expose en détail la nouvelle politique lors d'une réunion du comité de vérification de Wise. Un associé principal de

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M & S's representative on Wise's board of directors and a member of the audit committee. He attended the April 27th meeting and raised no objection to the new policy when it was introduced.

20 By June 1994, financial statements prepared to reflect the financial position of Peoples as of April 30, 1994 revealed that Wise owed more than $18 million to Peoples. Approximately $14 million of this amount resulted from a notional transfer of inventory that was cancelled following the period's end. M & S was concerned about the situation and started an investigation, as a result of which M & S insisted that the new procurement policy be rescinded. Wise agreed to M & S's demand but took the position that the former procurement policy could not be reinstated immediately. An agreement was executed on September 27, 1994, effective July 21, 1994, and it provided that the new policy would be abandoned as of January 31, 1995. The agreement also specified that the inventory and records of the two companies would be kept separate, and that the amount owed to Peoples by Wise would not exceed $3 million.

21 Another result of the negotiations was that M & S accepted an increase in the amount of the TD Bank's priority to $15 million and a new repayment schedule for the balance of the purchase price owed to M & S. The parties agreed to revise the schedule to provide for 37 monthly payments beginning in July 1995. Each of the Wise brothers also provided a personal guarantee of $500,000 in favour of M & S.

22 In September 1994, in light of the fragile financial condition of the companies and the competitiveness of the retail market, the TD Bank announced its intention to cease doing business with Wise and Peoples as of the end of December 1994. Following negotiations, however, the bank extended its financial support until the end of July 1995. The Wise brothers promised to extend personal guarantees in favour of the TD Bank, but this did not occur.

23 In December 1994, three days after the Wise brothers presented financial statements showing

Coopers & Lybrand représente M & S au conseil d'administration de Wise et est aussi membre du comité de vérification. Il est présent à la réunion du 27 avril et ne s'oppose pas à la nouvelle politique lorsqu'elle est présentée.

En juin 1994, les états financiers préparés pour indiquer la situation financière de Peoples le 30 avril 1994 révèlent que Wise doit plus de 18 millions de dollars à Peoples. De cette somme, un montant d'environ 14 millions de dollars résulte d'un transfert fictif des stocks qui ont été retournés après la fin de la période. Inquiète de la situation, M & S amorce une enquête à l'issue de laquelle elle exige l'abandon de la nouvelle politique d'approvisionnement. Wise accepte de se plier à l'exigence de M & S, mais elle indique que l'ancienne politique d'approvisionnement ne peut pas être rétablie immédiatement. Une entente prévoyant que la nouvelle politique sera abandonnée le 31 janvier 1995 est signée le 27 septembre 1994, avec effet rétroactif au 21 juillet 1994. L'entente prévoit aussi que les stocks et les registres des deux sociétés seront séparés et que la somme due à Peoples par Wise ne dépassera pas 3 millions de dollars.

À l'issue des négociations, M & S accepte aussi que la somme à laquelle la Banque TD a droit en priorité soit portée à 15 millions de dollars et qu'un nouvel échéancier de remboursement du reliquat du prix d'achat dû à M & S soit établi. Les parties acceptent de revoir l'échéancier de façon à prévoir 37 versements mensuels à partir de juillet 1995. Chacun des frères Wise fournit aussi à M & S une garantie personnelle de 500 000 $.

En septembre 1994, constatant la situation financière précaire des sociétés et la compétitivité dans le secteur de la vente au détail, la Banque TD annonce son intention de cesser de faire affaire avec Wise et Peoples à la fin de décembre 1994. Toutefois, à la suite de négociations, elle prolonge son soutien financier jusqu'à la fin de juillet 1995. Les frères Wise s'engagent à fournir des garanties personnelles en faveur de la Banque TD, mais ils ne donnent pas suite à cet engagement.

En décembre 1994, trois jours après la présentation par les frères Wise d'états financiers indiquant

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disappointing results for Peoples in its third fiscal quarter, M & S initiated bankruptcy proceedings against both Wise and Peoples. A notice of intention to make a proposal was filed on behalf of Peoples the same day. Nonetheless, Peoples later consented to the petition by M & S, and both Wise and Peoples were declared bankrupt on January 13, 1995, effective December 9, 1994. The same day, M & S released each of the Wise brothers from their personal guarantees. M & S apparently preferred to proceed with an uncontested petition in bankruptcy rather than attempting to collect on the personal guarantees.

The assets of Wise and Peoples were sufficient to cover in full the outstanding debt owed to the TD Bank, satisfy the entire balance of the purchase price owed to M & S, and discharge almost all the landlords' lease claims. The bulk of the unsatisfied claims were those of trade creditors.

Following the bankruptcy, Peoples' trustee filed a petition against the Wise brothers. In the petition, the trustee claimed that they had favoured the interests of Wise over Peoples to the detriment of Peoples' creditors, in breach of their duties as directors under s. 122(1) of the CBCA. The trustee also claimed that the Wise brothers had, in the year preceding the bankruptcy, been privy to transactions in which property had been transferred for conspicuously less than fair market value within the meaning of s. 100 of the BIA.

Pursuant to art. 2501 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), the trustee named Chubb Insurance Company of Canada ("Chubb"), which had provided directors' insurance to Wise and its subsidiaries, as a defendant in addition to the Wise brothers.

The trial judge, Greenberg J., relying on decisions from the United Kingdom, Australia and New Zealand, held that the fiduciary duty and the duty of care under s. 122(1) of the CBCA extend to a company's creditors when a company is insolvent or in the vicinity of insolvency. Greenberg J. found that the implementation, by the Wise brothers *qua*

des résultats décevants pour le troisième trimestre de Peoples, M & S engage des procédures de faillite contre Wise et Peoples. Un avis d'intention de faire une proposition est déposé au nom de Peoples le même jour. Peoples accepte néanmoins plus tard la requête présentée par M & S, et Wise et Peoples sont déclarées en faillite le 13 janvier 1995, avec effet rétroactif au 9 décembre 1994. Le même jour, M & S accorde à chacun des frères Wise mainlevée de leurs garanties personnelles. Au lieu de tenter de réaliser les garanties personnelles, il semble que M & S préférait que la requête en faillite ne soit pas contestée.

24 Les biens de Wise et de Peoples sont suffisants pour rembourser entièrement la Banque TD, pour payer le reliquat du prix de vente dû à M & S et pour payer la presque totalité des créances des locateurs. La grande majorité des créances impayées sont celles de fournisseurs.

25 Après la faillite, le syndic de Peoples présente contre les frères Wise une requête dans laquelle il prétend que ces derniers ont privilégié les intérêts de Wise plutôt que ceux de Peoples au détriment des créanciers de Peoples, en contravention des obligations que le par. 122(1) de la LCSA leur imposait en tant qu'administrateurs. Le syndic soutient aussi que, au cours de l'année ayant précédé la faillite, les frères Wise étaient des parties intéressées aux transactions en vertu desquelles des biens avaient été transférés pour une contrepartie manifestement inférieure à la juste valeur du marché au sens de l'art. 100 de la LFI.

26 Se fondant sur l'art. 2501 du *Code civil du Québec*, L.Q. 1991, ch. 64 (« C.c.Q. »), le syndic désigne la Compagnie d'assurance Chubb du Canada (« Chubb »), qui avait assuré les administrateurs de Wise et de ses filiales, à titre de codéfenderesse des frères Wise.

27 Invoquant des décisions rendues au Royaume-Uni, en Australie et en Nouvelle-Zélande, le juge Greenberg statue en première instance que l'obligation fiduciaire et l'obligation de diligence énoncées au par. 122(1) de la LCSA s'imposaient aussi à l'égard des créanciers d'une société lorsque celle-ci est insolvable ou au bord de l'insolvabilité. Il

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directors of Peoples, of a corporate policy that affected both companies, had occurred while the corporation was in the vicinity of insolvency and was detrimental to the interests of the creditors of Peoples. The Wise brothers were therefore found liable and the trustee was awarded $4.44 million in damages. As Chubb had provided insurance coverage for directors, it was also held liable. Greenberg J. also considered the alternative grounds under the BIA advanced by the trustee and found the Wise brothers liable for the same $4.44 million amount on that ground as well. All the parties appealed.

28 The Quebec Court of Appeal, *per* Pelletier J.A., with Robert C.J.Q. and Nuss J.A. concurring, allowed the appeals by Chubb and the Wise brothers: [2003] R.J.Q. 796, [2003] Q.J. No. 505 (QL). The Court of Appeal expressed reluctance to follow Greenberg J. in equating the interests of creditors with the best interests of the corporation when the corporation was insolvent or in the vicinity of insolvency, stating that an innovation in the law such as this is a policy matter more appropriately dealt with by Parliament than the courts. In considering the trustee's claim under s. 100 of the BIA, Pelletier J.A. held that the trial judge had committed a palpable and overriding error in concluding that the amounts owed by Wise to Peoples in respect of inventory "were neither collected nor collectible" (para. 125 QL). He found that the consideration received for the transactions had been approximately 94 percent of fair market value, and he was not convinced that this disparity could be characterized as being "conspicuously" less than fair market value. Moreover, he did not accept the broad meaning the trial judge gave to the word "privy". Pelletier J.A. declined to exercise his discretion under s. 100(2) of the BIA to make an order in favour of the trustee. In view of his conclusion that the Wise brothers were not liable, Pelletier J.A. allowed the appeal with respect to Chubb.

conclut que c'est au moment où l'entreprise était au bord de l'insolvabilité que les frères Wise, en leur qualité d'administrateurs de Peoples, ont appliqué une politique corporative qui touchait les deux sociétés et qui était préjudiciable aux intérêts des créanciers de Peoples. Les frères Wise sont donc jugés responsables et des dommages-intérêts de 4,44 millions de dollars sont accordés au syndic. Comme elle avait assuré les administrateurs, Chubb est elle aussi jugée responsable. Le juge Greenberg examine également les moyens subsidiaires fondés sur la LFI qu'avait avancés le syndic et il conclut que les frères Wise doivent être tenus responsables du paiement de la somme de 4,44 millions de dollars sur le fondement de ces mêmes moyens. Toutes les parties interjettent appel.

La Cour d'appel du Québec, par la décision du juge Pelletier avec l'accord du juge en chef Robert et du juge Nuss, accueille les appels de Chubb et des frères Wise : [2003] R.J.Q. 796. La cour exprime sa réticence à assimiler, comme l'a fait le juge Greenberg, les intérêts des créanciers aux intérêts supérieurs de la société lorsque celle-ci est insolvable ou est au bord de l'insolvabilité, précisant que l'opportunité d'une telle innovation en droit est une question de politique générale qui doit être laissée à l'appréciation du législateur plutôt qu'à celle des tribunaux. Examinant la réclamation faite par le syndic en vertu de l'art. 100 de la LFI, le juge Pelletier statue que le juge de première instance a commis une erreur manifeste et dominante en concluant que les sommes dues par Wise à Peoples à l'égard des marchandises [TRADUCTION] « n'ont pas été recouvrées et n'étaient pas recouvrables » (par. 126). Il juge que la contrepartie des transactions effectuées représentait environ 94 pour 100 de la juste valeur du marché et il n'est pas convaincu que l'on puisse affirmer que cet écart était « manifestement » inférieur à la juste valeur du marché. De plus, il n'accepte pas le sens large donné par le juge de première instance aux termes « ayant intérêt ». Le juge Pelletier refuse d'exercer le pouvoir discrétionnaire que lui confère le par. 100(2) de la LFI et d'accorder un jugement favorable au syndic. Concluant que la responsabilité des frères Wise n'est pas engagée, il accueille l'appel en ce qui a trait à Chubb.

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III. Analysis

At the outset, it should be acknowledged that according to art. 300 C.C.Q. and s. 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, the civil law serves as a supplementary source of law to federal legislation such as the CBCA. Since the CBCA does not entitle creditors to sue directors directly for breach of their duties, it is appropriate to have recourse to the C.C.Q. to determine how rights grounded in a federal statute should be addressed in Quebec, and more specifically how s. 122(1) of the CBCA can be harmonized with the principles of civil liability: see R. Crête and S. Rousseau, *Droit des sociétés par actions: principes fondamentaux* (2002), at p. 58.

This case came before our Court on the issue of whether directors owe a duty to creditors. The creditors did not bring a derivative action or an oppression remedy application under the CBCA. Instead, the trustee, representing the interests of the creditors, sued the directors for an alleged breach of the duties imposed by s. 122(1) of the CBCA. The standing of the trustee to sue was not questioned.

The primary role of directors is described in s. 102(1) of the CBCA:

102. (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

As for officers, s. 121 of the CBCA provides that their powers are delegated to them by the directors:

121. Subject to the articles, the by-laws or any unanimous shareholder agreement,

(*a*) the directors may designate the offices of the corporation, appoint as officers persons 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 subsection 115(3);

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29 Il convient tout d'abord de reconnaître que, suivant l'art. 300 C.c.Q. et l'art. 8.1 de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, le droit civil constitue une source de droit complétant les lois fédérales comme la LCSA. Comme la LCSA n'autorise pas les créanciers à poursuivre directement les administrateurs pour manquement à leurs obligations, il faut se reporter au C.c.Q. pour déterminer la façon de mettre en œuvre au Québec les droits trouvant leur fondement dans une loi fédérale et, plus spécifiquement, la façon d'harmoniser le par. 122(1) de la LCSA et les principes de la responsabilité civile : voir R. Crête et S. Rousseau, *Droit des sociétés par actions : principes fondamentaux* (2002), p. 58.

30 En l'espèce, notre Cour est appelée à trancher la question de savoir si les administrateurs ont des obligations envers les créanciers. Les créanciers n'ont pas exercé leurs droits par voie d'une action oblique ni par voie d'une demande de redressement pour abus de droit fondée sur la LCSA. Le syndic, représentant les intérêts des créanciers, a plutôt poursuivi les administrateurs en alléguant un manquement aux obligations que leur impose le par. 122(1) de la LCSA. La qualité du syndic d'engager les poursuites n'a pas été remise en question.

31 La principale fonction des administrateurs est indiquée au par. 102(1) de la LCSA :

102. (1) Sous réserve de toute convention unanime des actionnaires, les administrateurs gèrent les affaires commerciales et les affaires internes de la société ou en surveillent la gestion.

Pour ce qui est des dirigeants, l'art. 121 de la LCSA prévoit que leurs pouvoirs leurs sont délégués par les administrateurs :

121. Sous réserve des statuts, des règlements administratifs ou de toute convention unanime des actionnaires, il est possible, au sein de la société :

a) pour les administrateurs, de créer des postes de dirigeants, d'y nommer des personnes pleinement capables, de préciser leurs fonctions et de leur déléguer le pouvoir de gérer les activités commerciales et les affaires internes de la société, sauf les exceptions prévues au paragraphe 115(3);

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

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

Although the shareholders are commonly said to own the corporation, in the absence of a unanimous shareholder agreement to the contrary, s. 102 of the CBCA provides that it is not the shareholders, but the directors elected by the shareholders, who are responsible for managing it. This clear demarcation between the respective roles of shareholders and directors long predates the 1975 enactment of the CBCA: see *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34 (C.A.); see also art. 311 C.C.Q.

32 Section 122(1) of the CBCA establishes two distinct duties to be discharged by directors and officers in managing, or supervising the management of, the corporation:

122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

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

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

The first duty has been referred to in this case as the "fiduciary duty". It is better described as the "duty of loyalty". We will use the expression "statutory fiduciary duty" for purposes of clarity when referring to the duty under the CBCA. This duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The second duty is commonly referred to as the "duty of care". Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs.

33 The trial judge did not apply or consider separately the two duties imposed on directors by s. 122(1). As the Court of Appeal observed, the trial

b) de nommer un administrateur à n'importe quel poste;

c) pour la même personne, d'occuper plusieurs postes.

Bien que l'on dise souvent que les actionnaires sont propriétaires de l'entreprise, l'art. 102 de la LCSA prévoit que, sous réserve d'une convention unanime des actionnaires, ce ne sont pas les actionnaires mais les administrateurs élus par les actionnaires qui sont chargés de sa gestion. Cette nette démarcation entre les rôles respectifs des actionnaires et des administrateurs est bien antérieure à l'adoption de la LCSA en 1975 : voir *Automatic Self-Cleansing Filter Syndicate Co. c. Cuninghame*, [1906] 2 Ch. 34 (C.A.); voir aussi l'art. 311 C.c.Q.

Le paragraphe 122(1) de la LCSA impose deux obligations distinctes aux administrateurs et aux dirigeants dans la gestion ou la surveillance de la gestion de l'entreprise :

122. (1) Les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir :

a) avec intégrité et de bonne foi au mieux des intérêts de la société;

b) avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

La première obligation a été, en l'espèce, appelée « obligation fiduciaire », une notion que décrit mieux l'expression « devoir de loyauté ». Pour éviter toute confusion, nous utiliserons parfois l'expression « obligation fiduciaire prévue par la loi » pour désigner l'obligation prévue à la LCSA. Cette obligation impose aux administrateurs et aux dirigeants le devoir d'agir avec intégrité et de bonne foi au mieux des intérêts de la société. La deuxième obligation est communément appelée « obligation de diligence ». De manière générale, elle impose aux administrateurs et aux dirigeants l'obligation légale de faire preuve de diligence dans la gestion et la surveillance de la gestion des affaires de la société.

Le juge de première instance n'a ni appliqué ni examiné séparément les deux obligations imposées aux administrateurs par le par. 122(1). Comme l'a

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judge appears to have confused the two duties. They are, in fact, distinct and are designed to secure different ends. For that reason, they will be addressed separately in these reasons.

A. *The Statutory Fiduciary Duty: Section 122(1)(a) of the CBCA*

Considerable power over the deployment and management of financial, human, and material resources is vested in the directors and officers of corporations. For the directors of CBCA corporations, this power originates in s. 102 of the Act. For officers, this power comes from the powers delegated to them by the directors. In deciding to invest in, lend to or otherwise deal with a corporation, shareholders and creditors transfer control over their assets to the corporation, and hence to the directors and officers, in the expectation that the directors and officers will use the corporation's resources to make reasonable business decisions that are to the corporation's advantage.

The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715.

The common law concept of fiduciary duty was considered in *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51. In that case, which involved the relationship between the government and foster children, a majority of this Court agreed

fait remarquer la Cour d'appel, le juge de première instance semble avoir confondu ces deux obligations. Il s'agit en réalité de deux obligations distinctes visant des fins différentes. C'est pourquoi nous les examinerons séparément dans les présents motifs.

A. *L'obligation fiduciaire prévue par la loi : l'al. 122(1)a) de la LCSA*

34 Les administrateurs et les dirigeants des sociétés sont investis d'un pouvoir considérable en matière de déploiement et de gestion des ressources financières, humaines et matérielles. Dans le cas des administrateurs de sociétés constituées en vertu de la LCSA, ce pouvoir trouve sa source à l'art. 102 de la Loi. Dans le cas des dirigeants, il s'agit des pouvoirs qui leur sont délégués par les administrateurs. Lorsqu'ils décident d'investir dans une société, de lui consentir un prêt ou de faire autrement affaire avec celle-ci, les actionnaires et les créanciers cèdent le contrôle de leurs actifs à la société et, par conséquent, à ses administrateurs et à ses dirigeants et s'attendent à ce qu'ils utilisent les ressources de la société pour prendre des décisions d'affaires raisonnables qui profiteront à la société.

35 En vertu de l'obligation fiduciaire prévue par la loi, les administrateurs et les dirigeants doivent agir avec intégrité et de bonne foi au mieux des intérêts de la société. Ils doivent respecter la confiance qui leur a été accordée et gérer les actifs qui leur sont confiés de manière à réaliser les objectifs de la société. Ils doivent éviter les conflits d'intérêts avec la société. Ils ne doivent pas profiter du poste qu'ils occupent pour tirer un avantage personnel. Ils doivent préserver la confidentialité des renseignements auxquels leurs fonctions leur donnent accès. Les administrateurs et les dirigeants doivent servir la société de manière désintéressée et avec loyauté et intégrité : voir K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), p. 715.

36 La notion d'obligation fiduciaire de la common law a été examinée dans l'arrêt *K.L.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 403, 2003 CSC 51. Dans cet arrêt concernant la relation entre l'État et des enfants en foyer d'accueil, notre Cour à la

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with McLachlin C.J. who stated, at paras. 40-41 and 49:

Fiduciary duties arise in a number of different contexts, including express trusts, relationships marked by discretionary power and trust, and the special responsibilities of the Crown in dealing with aboriginal interests. . . .

What . . . might the content of the fiduciary duty be if it is understood . . . as a private law duty arising simply from the relationship of discretionary power and trust between the Superintendent and the foster children? In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47, La Forest J. noted that there are certain common threads running through fiduciary duties that arise from relationships marked by discretionary power and trust, such as loyalty and "the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary". However, he also noted that "[t]he obligation imposed may vary in its specific substance depending on the relationship" (p. 646). . . .

. . .

. . . concern for the best interests of the child informs the parental fiduciary relationship, as La Forest J. noted in *M. (K.) v. M. (H.)*, *supra*, at p. 65. But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust. . . . The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse. The parent need not, as the Court of Appeal suggested in the case at bar, be consciously motivated by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. It is rather a question of disloyalty — of putting someone's interests ahead of the child's in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense. [Emphasis added.]

majorité a souscrit aux motifs de la juge en chef McLachlin qui a affirmé ce qui suit aux par. 40-41 et 49 :

Les obligations fiduciaires prennent naissance dans divers contextes, notamment dans le contexte des fiducies expresses, dans celui des relations caractérisées par un pouvoir discrétionnaire et par un lien de confiance, ainsi que dans celui des responsabilités particulières qui incombent à l'État concernant les droits des Autochtones. . .

Quel serait [. . .] le contenu de l'obligation fiduciaire si on devait [. . .] l'interpréter comme une obligation de droit privé découlant simplement de la relation entre le surintendant et les enfants en foyer d'accueil, caractérisée par un pouvoir discrétionnaire et par un lien de confiance? Dans l'arrêt *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, le juge La Forest a souligné aux p. 646-647 que certains éléments communs se dégageaient des obligations fiduciaires issues des relations caractérisées par un pouvoir discrétionnaire et par un lien de confiance, notamment la loyauté et « l'obligation d'éviter les conflits de devoirs ou d'intérêts et celle de ne pas faire de profits aux dépens du bénéficiaire ». Il a cependant fait remarquer que « [l]a nature particulière de cette obligation peut varier selon les rapports concernés » (p. 646). . .

. . .

Le souci de promouvoir l'intérêt supérieur de l'enfant se trouve à la base de la relation fiduciaire des parents, comme l'a souligné le juge La Forest dans *M. (K.) c. M. (H.)*, précité, p. 65. Mais l'obligation qui leur incombe est celle d'agir en toute loyauté et de ne pas faire passer leurs propres intérêts ou ceux d'autres personnes avant ceux de l'enfant, en abusant de sa confiance. [. . .] Le parent qui, recherchant son propre profit, abuse de son influence sur l'enfant relativement à des questions financières fait passer ses intérêts avant ceux de l'enfant, en abusant de sa confiance. Cela vaut également pour le parent qui exploite un enfant afin d'assouvir ses désirs sexuels ou pour celui qui, voulant préserver sa tranquillité et celle de la famille, ferme les yeux sur les abus commis par son conjoint. Comme la Cour d'appel l'a dit en l'espèce, il n'est pas nécessaire que le parent soit motivé consciemment par le désir de réaliser un bénéfice ou de tirer un avantage personnel; il n'est pas non plus nécessaire qu'il préfère ses intérêts, plutôt que ceux d'un tiers, à ceux de l'enfant. Il s'agit plutôt d'un manque de loyauté — de faire passer les intérêts d'autres personnes avant ceux de l'enfant, en abusant de sa confiance. La négligence, même grave, ne saurait engager la responsabilité fiduciaire des parents si elle n'implique pas d'abus de confiance en ce sens. [Nous soulignons.]

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The issue to be considered here is the "specific substance" of the fiduciary duty based on the relationship of directors to corporations under the CBCA.

It is settled law that the fiduciary duty owed by directors and officers imposes strict obligations: see *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, at pp. 609-10, *per* Laskin J. (as he then was), where it was decided that directors and officers may even have to account to the corporation for profits they make that do not come at the corporation's expense:

> The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of *Phipps v. Boardman* [[1967] 2 A.C. 46], which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is *Industrial Development Consultants Ltd. v. Cooley* [[1972] 2 All E.R. 162], a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention. [Emphasis added.]

A compelling argument for making directors accountable for profits made as a result of their position, though not at the corporation's expense, is presented by J. Brock, "The Propriety of Profitmaking:

37 L'élément qu'il convient d'examiner en l'espèce est la « nature particulière » de l'obligation fiduciaire découlant des rapports entre les administrateurs et les sociétés en vertu de la LCSA.

38 Il est bien établi en droit que l'obligation fiduciaire à laquelle sont tenus les administrateurs et les dirigeants leur impose des obligations strictes : voir *Canadian Aero Service Ltd. c. O'Malley*, [1974] R.C.S. 592, p. 609-610, le juge Laskin (plus tard Juge en chef), où il a été décidé que les administrateurs et les dirigeants peuvent même être tenus de rendre compte à la société des profits qu'ils ont réalisés sans que ce soit aux dépens de la société :

> Le fait qu'une personne retire un profit aux dépens d'une compagnie alors qu'elle en est un administrateur, constitue de toute évidence un motif valable sur lequel fonder une obligation de rendre compte. Et pourtant, il peut exister des situations où un profit doit être restitué, bien qu'il n'ait pas été acquis aux dépens de la compagnie, pour le motif qu'un administrateur ne doit pas avoir le droit de se servir de sa position comme telle aux fins de faire un profit, même si la compagnie n'avait pas la faculté, à cause, par exemple, d'une incapacité légale, de participer à l'opération. Une situation analogue, qui toutefois ne mettait pas en cause un administrateur, se retrouve à toutes fins utiles dans l'arrêt *Phipps v. Boardman* [[1967] 2 A.C. 46], où on a aussi souscrit à l'avis que l'obligation de rendre compte n'est pas subordonnée à la preuve d'un conflit réel d'intérêts et d'obligations. L'arrêt *Industrial Development Consultants Ltd. v. Cooley* [[1972] 2 All E.R. 162], un jugement émanant d'une cour de première instance, est un autre exemple assez récent d'une obligation de rendre compte lorsque la compagnie elle-même n'a pas réussi à obtenir un contrat d'affaires et ne pouvait donc pas être considérée comme ayant été privée d'une occasion d'affaires. Dans cette dernière affaire, l'administrateur délégué à l'exécutif, à qui on avait permis de démissionner parce qu'il s'était faussement déclaré malade, a par la suite obtenu le contrat en son nom personnel. Cette affaire-là met aussi en évidence la situation où un administrateur donne sa démission après avoir décidé de s'approprier le contrat d'affaires refusé à sa compagnie et où il fait effectivement accepter sa démission sans révéler son intention. [Nous soulignons.]

Dans « The Propriety of Profitmaking : Fiduciary Duty and Unjust Enrichment » (2000), 58 *R.D.U.T.* 185, p. 204-205, J. Brock présente des raisons convaincantes d'exiger que les administrateurs rendent

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Fiduciary Duty and Unjust Enrichment" (2000), 58 *U.T. Fac. L. Rev.* 185, at pp. 204-5.

39 However, it is not required that directors and officers in all cases avoid personal gain as a direct or indirect result of their honest and good faith supervision or management of the corporation. In many cases the interests of directors and officers will innocently and genuinely coincide with those of the corporation. If directors and officers are also shareholders, as is often the case, their lot will automatically improve as the corporation's financial condition improves. Another example is the compensation that directors and officers usually draw from the corporations they serve. This benefit, though paid by the corporation, does not, if reasonable, ordinarily place them in breach of their fiduciary duty. Therefore, all the circumstances may be scrutinized to determine whether the directors and officers have acted honestly and in good faith with a view to the best interests of the corporation.

40 In our opinion, the trial judge's determination that there was no fraud or dishonesty in the Wise brothers' attempts to solve the mounting inventory problems of Peoples and Wise stands in the way of a finding that they breached their fiduciary duty. Greenberg J. stated:

> We hasten to add that in the present case, the Wise Brothers derived no direct personal benefit from the new domestic inventory procurement policy, albeit that, as the controlling shareholders of Wise Stores, there was an indirect benefit to them. Moreover, as was conceded by the other parties herein, in deciding to implement the new domestic inventory procurement policy, there was no dishonesty or fraud on their part.

((1998), 23 C.B.R. (4th) 200, at para. 183)

The Court of Appeal relied heavily on this finding by the trial judge, as do we. At para. 83 QL, Pelletier J.A. stated that:

compte des profits qu'ils réalisent grâce au poste qu'ils occupent, même si ces profits n'ont pas été réalisés aux dépens de la société.

Cependant, il n'est pas obligatoire que les administrateurs et les dirigeants évitent dans tous les cas les gains personnels résultant directement ou indirectement de la surveillance ou de la gestion intègre et de bonne foi de la société. Dans bien des cas, les intérêts des administrateurs et des dirigeants coïncident par hasard mais légitimement avec ceux de la société. Si les administrateurs et les dirigeants sont aussi actionnaires, comme c'est souvent le cas, leur situation s'améliorera automatiquement en même temps que la situation financière de la société. Il en sera de même de la rémunération que les sociétés versent à leurs administrateurs et dirigeants. S'il est raisonnable, cet avantage, même s'il est versé par la société, n'entraîne habituellement pas la violation de leur obligation fiduciaire. Par conséquent, toutes les circonstances peuvent faire l'objet d'un examen minutieux pour déterminer si les administrateurs et les dirigeants ont agi avec intégrité et de bonne foi au mieux des intérêts de la société.

À notre avis, le juge de première instance ayant conclu qu'il n'y a eu ni fraude ni malhonnêteté de la part des frères Wise lorsqu'ils ont tenté de régler les problèmes d'approvisionnement de plus en plus graves de Peoples et de Wise, il est impossible de conclure qu'ils ont manqué à leur obligation fiduciaire. Le juge Greenberg a dit ce qui suit :

> [TRADUCTION] Nous nous empressons d'ajouter qu'en l'espèce, les frères Wise n'ont tiré aucun avantage personnel direct de la nouvelle politique d'approvisionnement commun même si, en tant qu'actionnaires majoritaires de Wise Stores, ils en ont tiré un avantage indirect. De plus, comme l'ont reconnu les autres parties à l'instance, il n'y a eu ni malhonnêteté ni fraude de leur part lorsqu'ils ont décidé d'appliquer la nouvelle politique d'approvisionnement.

((1998), 23 C.B.R. (4th) 200, par. 183)

La Cour d'appel s'est fortement appuyée sur cette conclusion du juge de première instance, tout comme nous d'ailleurs. Au paragraphe 84, le juge Pelletier a dit ce qui suit :

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[TRANSLATION] In regard to fiduciary duty, I would like to point out that the brothers were driven solely by the wish to resolve the problem of inventory procurement affecting both the operations of Peoples Inc. and those of Wise. [This is a] motivation that is in line with the pursuit of the interests of the corporation within the meaning of paragraph 122(1)(a) C.B.C.A. and that does not expose them to any justified criticism.

As explained above, there is no doubt that both Peoples and Wise were struggling with a serious inventory management problem. The Wise brothers considered the problem and implemented a policy they hoped would solve it. In the absence of evidence of a personal interest or improper purpose in the new policy, and in light of the evidence of a desire to make both Wise and Peoples "better" corporations, we find that the directors did not breach their fiduciary duty under s. 122(1)(*a*) of the CBCA. See *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (Ont. Ct. (Gen. Div.)) (aff'd (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.)), in which Farley J., at p. 171, correctly observes that in resolving a conflict between majority and minority shareholders, it is safe for directors and officers to act to make the corporation a "better corporation".

This appeal does not relate to the non-statutory duty directors owe to shareholders. It is concerned only with the statutory duties owed under the CBCA. Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation: see E. M. Iacobucci, "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003), 39 *Can. Bus. L.J.* 398, at pp. 400-1. However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation. For example, in *Teck Corp. v. Millar*

À l'égard du devoir de loyauté, je rappelle que les frères n'étaient animés que du désir de solutionner le problème de gestion des inventaires, qui affectait tout autant les opérations de Peoples Inc. que celles de Wise. Voilà donc une motivation qui s'inscrit dans la poursuite des intérêts de la société au sens de l'article 122(1)*a*) L.C.S.A. et qui ne prête le flanc à aucun reproche justifié.

41 Comme nous l'avons expliqué précédemment, il est indubitable que Peoples et Wise étaient aux prises avec un grave problème de gestion des stocks. Les frères Wise ont examiné le problème et ont mis en application une politique qui, espéraient-ils, permettrait de le régler. En l'absence d'éléments de preuve de l'existence d'un intérêt personnel ou d'une fin illégitime de la nouvelle politique, et compte tenu de la preuve d'une volonté de faire de Wise et de Peoples de « meilleures » entreprises, nous concluons que les administrateurs n'ont pas manqué à leur obligation fiduciaire énoncée à l'al. 122(1)*a*) de la LCSA. Voir la décision *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (C. Ont. (Div. gén.)) (conf. par (1991), 3 B.L.R. (2d) 113 (C. div. Ont.)), dans laquelle le juge Farley a fait remarquer à juste titre, à la p. 171, qu'en réglant un différend entre actionnaires majoritaires et actionnaires minoritaires, il est prudent pour les administrateurs et les dirigeants d'agir de manière à faire de la société une [TRADUCTION] « meilleure entreprise ».

42 Le présent pourvoi ne porte pas sur l'obligation non prévue par la loi qui incombe aux administrateurs à l'égard des actionnaires. Il concerne uniquement les obligations légales que leur impose la LCSA. Pour ce qui est de l'obligation fiduciaire prévue par la loi, il est évident qu'il ne faut pas interpréter l'expression « au mieux des intérêts de la société » comme si elle signifiait simplement « au mieux des intérêts des actionnaires ». D'un point de vue économique, l'expression « au mieux des intérêts de la société» s'entend de la maximisation de la valeur de l'entreprise : voir E. M. Iacobucci, « Directors' Duties in Insolvency : Clarifying What Is at Stake » (2003), 39 *Rev. can. dr. comm.* 398, p. 400-401. Les tribunaux reconnaissent toutefois depuis longtemps que divers autres facteurs peuvent servir à déterminer les

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(1972), 33 D.L.R. (3d) 288 (B.C.S.C.), Berger J. stated, at p. 314:

> A classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting *bona fide* in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered *bona fide* the interests of the shareholders.
>
> I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company's shareholders in order to confer a benefit on its employees: *Parke v. Daily News Ltd.*, [1962] Ch. 927. But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.

The case of *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.* (1986), 59 O.R. (2d) 254 (Div. Ct.), approved, at p. 271, the decision in *Teck*, *supra*. 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.

43 The various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(*a*) of the CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be

éléments dont les administrateurs devraient tenir compte dans une gestion judicieuse au mieux des intérêts de la société. Par exemple, dans l'affaire *Teck Corp. c. Millar* (1972), 33 D.L.R. (3d) 288 (C.S.C.-B.), le juge Berger a dit ce qui suit à la p. 314 :

> [TRADUCTION] Une théorie classique auparavant incontestable doit être abandonnée devant l'évidence des faits de la vie moderne. C'est effectivement ce qui s'est passé. Si, aujourd'hui, les administrateurs d'une société devaient tenir compte des intérêts de ses employés, nul n'alléguerait que, ce faisant, ils n'ont pas agi de bonne foi dans l'intérêt de la société elle-même. De même, si les administrateurs devaient tenir compte des répercussions pour la collectivité d'une politique que l'entreprise a l'intention d'appliquer et ne pouvaient, en conséquence, s'en tenir à cette politique, on ne saurait dire qu'ils n'ont pas tenu compte de bonne foi des intérêts des actionnaires.
>
> Je suis conscient que les administrateurs manqueraient à leur devoir s'ils faisaient totalement abstraction des intérêts des actionnaires d'une société afin de conférer un avantage à ses employés : *Parke c. Daily News Ltd.*, [1962] Ch. 927. Cependant, s'ils tiennent dûment compte des autres intérêts qui ne sont pas strictement ceux des actionnaires de la société, il ne sera pas possible, à mon avis, de les accuser d'avoir manqué à leur obligation fiduciaire envers la société.

Dans la décision *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.* (1986), 59 O.R. (2d) 254 (C. div.), la cour a approuvé à la p. 271 la décision *Teck*, précitée. 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.

Les changements qui se produisent naturellement dans les intérêts en cause en fonction des succès et des échecs d'une entreprise n'ont cependant aucune incidence sur le contenu de l'obligation fiduciaire énoncée à l'al. 122(1)*a*) de la LCSA. Les administrateurs et les dirigeants ont en tout temps leur

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confused with the interests of the creditors or those of any other stakeholders.

The interests of shareholders, those of the creditors and those of the corporation may and will be consistent with each other if the corporation is profitable and well capitalized and has strong prospects. However, this can change if the corporation starts to struggle financially. The residual rights of the shareholders will generally become worthless if a corporation is declared bankrupt. Upon bankruptcy, the directors of the corporation transfer control to a trustee, who administers the corporation's assets for the benefit of creditors.

Short of bankruptcy, as the corporation approaches what has been described as the "vicinity of insolvency", the residual claims of shareholders will be nearly exhausted. While shareholders might well prefer that the directors pursue high-risk alternatives with a high potential payoff to maximize the shareholders' expected residual claim, creditors in the same circumstances might prefer that the directors steer a safer course so as to maximize the value of their claims against the assets of the corporation.

The directors' fiduciary duty does not change when a corporation is in the nebulous "vicinity of insolvency". That phrase has not been defined; moreover, it is incapable of definition and has no legal meaning. What it is obviously intended to convey is a deterioration in the corporation's financial stability. In assessing the actions of directors it is evident that any honest and good faith attempt to redress the corporation's financial problems will, if successful, both retain value for shareholders and improve the position of creditors. If unsuccessful, it will not qualify as a breach of the statutory fiduciary duty.

For a discussion of the shifting interests and incentives of shareholders and creditors, see W. D. Gray,

obligation fiduciaire envers la société. Les intérêts de la société ne doivent pas se confondre avec ceux des actionnaires, avec ceux des créanciers ni avec ceux de toute autre partie intéressée.

44 Les intérêts des actionnaires, ceux des créanciers et ceux de la société peuvent concorder et vont concorder si l'entreprise est rentable, dispose de capitaux suffisants et a de bonnes perspectives de croissance. La situation pourra toutefois être différente si la société commence à avoir des difficultés financières. Les droits résiduels des actionnaires perdront généralement toute valeur si une société est déclarée en faillite. Au moment de la faillite, les administrateurs de la société en cèdent le contrôle à un syndic qui gère les actifs de la société au profit des créanciers.

45 En l'absence de faillite comme telle, lorsque la société approche ce qu'on appelle le « bord de l'insolvabilité », les droits résiduels des actionnaires seront presque épuisés. Alors que les actionnaires pourraient préférer que les administrateurs cherchent des solutions de rechange à risque et à potentiel de rendement très élevés afin de maximiser leurs droits résiduels éventuels, les créanciers, en de telles circonstances, pourraient préférer que les administrateurs adoptent une stratégie plus prudente afin de maximiser la valeur de leurs créances par rapport aux actifs de la société.

46 L'obligation fiduciaire des administrateurs reste la même lorsqu'une société se trouve dans la situation que décrit l'expression nébuleuse « au bord de l'insolvabilité ». Cette expression n'a pas été définie; elle ne peut être définie et n'a aucune signification en droit. Elle vise manifestement à illustrer une détérioration de la stabilité financière de la société. Dans l'évaluation des mesures prises par les administrateurs, il est évident que toute tentative faite avec intégrité et de bonne foi pour redresser la situation financière de la société aura, si elle réussit, conservé une valeur pour les actionnaires tout en améliorant la situation des créanciers. En cas d'échec, on ne pourra y voir un manquement à l'obligation fiduciaire prévue par la loi.

47 Pour une analyse des intérêts et de la motivation variables des actionnaires et des créanciers,

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"*Peoples v. Wise* and *Dylex*: Identifying Stakeholder Interests upon or near Corporate Insolvency — Stasis or Pragmatism?" (2003), 39 *Can. Bus. L.J.* 242, at p. 257; E. M. Iacobucci and K. E. Davis, "Reconciling Derivative Claims and the Oppression Remedy" (2000), 12 *S.C.L.R.* (2d) 87, at p. 114. In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders. If the stakeholders cannot avail themselves of the statutory fiduciary duty (the duty of loyalty, *supra*) to sue the directors for failing to take care of their interests, they have other means at their disposal.

48 The Canadian legal landscape with respect to stakeholders is unique. Creditors are only one set of stakeholders, but their interests are protected in a number of ways. Some are specific, as in the case of amalgamation: s. 185 of the CBCA. Others cover a broad range of situations. The oppression remedy of s. 241(2)(*c*) of the CBCA and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction: see D. Thomson, "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?" (2000), 58 *U.T. Fac. L. Rev.* 31, at p. 48. One commentator describes the oppression remedy as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world": S. M. Beck, "Minority Shareholders' Rights in the 1980s", in *Corporate Law in the 80s* (1982), 311, at p. 312. While Beck was concerned with shareholder remedies, his observation applies equally to those of creditors.

49 The fact that creditors' interests increase in relevancy as a corporation's finances deteriorate is apt to be relevant to, *inter alia*, the exercise of discretion

voir W. D. Gray, « *Peoples v. Wise* and *Dylex* : Identifying Stakeholder Interests upon or near Corporate Insolvency — Stasis or Pragmatism? » (2003), 39 *Rev. can. dr. comm.* 242, p. 257; E. M. Iacobucci et K. E. Davis, « Reconciling Derivative Claims and the Oppression Remedy » (2000), 12 *S.C.L.R.* (2d) 87, p. 114. Pour concilier ces intérêts opposés, il incombe aux administrateurs d'agir avec intégrité et de bonne foi au mieux des intérêts de la société. En utilisant leurs compétences au profit de la société lorsqu'elle a des difficultés financières, les administrateurs doivent essayer d'agir au mieux des intérêts de la société en créant une « meilleure » société, et éviter de favoriser les intérêts d'un groupe d'intéressés en particulier. Si les intéressés ne peuvent invoquer l'obligation fiduciaire prévue par la loi (le devoir de loyauté déjà mentionné) pour poursuivre les administrateurs qui auraient négligé leurs intérêts, d'autres moyens s'offrent à eux.

Le régime juridique applicable au Canada aux parties intéressées est unique en son genre. Les créanciers ne constituent qu'une catégorie de parties intéressées, mais leurs intérêts sont protégés de nombreuses manières. Certaines mesures sont particulières, par exemple en cas de fusion : art. 185 de la LCSA. D'autres visent un large éventail de situations. Le redressement prévu en cas d'abus de droit à l'al. 241(2)*c*) de la LCSA et les dispositions similaires des lois provinciales sur les sociétés accordent aux créanciers les droits les plus étendus dans tous les ressorts de common law : voir D. Thomson, « Directors, Creditors and Insolvency : A Fiduciary Duty or a Duty Not to Oppress? » (2000), 58 *R.D.U.T.* 31, p. 48. Un auteur considère que le recours en cas d'abus de droit est [TRADUCTION] « le recours le plus général, le plus complet et le plus vaste de tous les pays de common law qui soit offert aux actionnaires » : S. M. Beck, « Minority Shareholders' Rights in the 1980s », dans *Corporate Law in the 80s* (1982), 311, p. 312. Beck traitait alors des recours offerts aux actionnaires, mais ses observations s'appliquent également aux recours offerts aux créanciers.

Le fait que les intérêts des créanciers deviennent de plus en plus importants au fur et à mesure que les finances de la société se détériorent peut être

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by a court in granting standing to a party as a "complainant" under s. 238(*d*) of the CBCA as a "proper person" to bring a derivative action in the name of the corporation under ss. 239 and 240 of the CBCA, or to bring an oppression remedy claim under s. 241 of the CBCA.

Section 241(2)(*c*) authorizes a court to grant a remedy if

> (*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 . . . .

A person applying for the oppression remedy must, in the court's opinion, fall within the definition of "complainant" found in s. 238 of the CBCA:

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

Creditors, who are not security holders within the meaning of para. (*a*), may therefore apply for the oppression remedy under para. (*d*) by asking a court to exercise its discretion and grant them status as a "complainant".

Section 241 of the CBCA provides a possible mechanism for creditors to protect their interests from the prejudicial conduct of directors. In our view, the availability of such a broad oppression

valable et pertinent, par exemple, lorsqu'un tribunal exerce son pouvoir discrétionnaire d'accorder à une partie la qualité de « plaignant » en vertu de l'al. 238*d*) de la LCSA parce qu'elle est la personne qui « a qualité » pour présenter une action oblique au nom d'une société en vertu des art. 239 et 240 de la LCSA, ou pour présenter une demande de redressement pour abus de droit en vertu de l'art. 241 de la LCSA.

L'alinéa 241(2)*c*) autorise un tribunal à accorder un redressement si 50

> . . . la société ou l'une des personnes morales de son groupe [. . .] 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 :
>
> . . .
>
> *c*) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

La personne qui demande un redressement en cas d'abus de droit doit, de l'avis du tribunal, être visée par la définition de « plaignant » que l'on trouve à l'art. 238 de la LCSA :

> *a*) Le détenteur inscrit ou le véritable propriétaire, ancien ou actuel, de valeurs mobilières d'une société ou de personnes morales du même groupe;
>
> *b*) tout administrateur ou dirigeant, ancien ou actuel, d'une société ou de personnes morales du même groupe;
>
> *c*) le directeur;
>
> *d*) toute autre personne qui, d'après un tribunal, a qualité pour présenter les demandes visées à la présente partie.

Les créanciers qui ne sont pas détenteurs de valeurs mobilières au sens de l'al. *a*) peuvent donc solliciter un redressement en cas d'abus de droit en vertu de l'al. *d*) en demandant au tribunal d'exercer son pouvoir discrétionnaire pour leur conférer la qualité de « plaignant ».

L'article 241 de la LCSA prévoit un mécanisme qui permet aux créanciers d'obtenir la protection de leurs intérêts en cas de conduite préjudiciable des administrateurs. À notre avis, l'existence d'un 51

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remedy undermines any perceived need to extend the fiduciary duty imposed on directors by s. 122(1)(*a*) of the CBCA to include creditors.

52 The Court of Appeal, at paras. 98-99 QL, referred to *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, [2002] 4 S.C.R. 312, 2002 SCC 81, as an indication by this Court that the interests of creditors do not have any bearing on the assessment of the conduct of directors. However, the receiver in that case was representing the corporation's rights and not the creditors' rights; therefore, the case has no application in this appeal. *373409 Alberta* involved an action taken by the receiver on behalf of the corporation against a bank for the tort of conversion. The sole shareholder, director and officer of 373409 Alberta Ltd., who was also the sole shareholder, director and officer of another corporation, Legacy Holdings Ltd., had deposited a cheque payable to 373409 Alberta Ltd. into the account of Legacy. While it was recognized, at para. 22, that the diversion of money from 373409 Alberta Ltd. to Legacy "may very well have been wrongful *vis-à-vis* [373409 Alberta Ltd.]'s creditors" (none of whom were involved in the action), no fraud had been committed against the corporation itself and the bank, acting on proper authority, had not wrongfully interfered with the cheque by carrying out the deposit instructions. The statutory duties of the directors were not at issue, nor were they considered, and no assessment of the creditors' rights was made. With respect, Pelletier J.A.'s broad reading of *373409 Alberta* was misplaced.

53 In light of the availability both of the oppression remedy and of an action based on the duty of care, which will be discussed below, stakeholders have viable remedies at their disposal. There is no need to read the interests of creditors into the duty set out in s. 122(1)(*a*) of the CBCA. Moreover, in the circumstances of this case, the Wise brothers did not breach the statutory fiduciary duty owed to the corporation.

recours aussi général en cas d'abus de droit remet en cause l'utilité apparente d'étendre aux créanciers l'obligation fiduciaire imposée aux administrateurs par l'al. 122(1)*a*) de la LCSA.

La Cour d'appel a indiqué, aux par. 99 et 100, que selon l'arrêt *373409 Alberta Ltd. (Séquestre de) c. Banque de Montréal*, [2002] 4 R.C.S. 312, 2002 CSC 81, notre Cour considère que les intérêts des créanciers n'ont aucune incidence sur l'appréciation de la conduite des administrateurs. Cependant, dans cette affaire, le séquestre faisait valoir les droits de la société et non ceux des créanciers; par conséquent, cette décision ne s'applique pas au présent pourvoi. L'arrêt *373409 Alberta* concernait une action intentée par le séquestre au nom de la société contre une banque pour délit de détournement. L'unique actionnaire, administrateur et directeur de 373409 Alberta Ltd., qui était aussi l'unique actionnaire, administrateur et directeur d'une autre société, Legacy Holdings Ltd., avait déposé un chèque payable à l'ordre de 373409 Alberta Ltd. au compte de Legacy. Même s'il a été reconnu, au par. 22, que le détournement des fonds de 373409 Alberta Ltd. au bénéfice de Legacy « peut fort bien avoir été préjudiciable aux créanciers de [373409 Alberta Ltd.] » (dont aucun n'était partie à l'action), aucune fraude n'avait été commise envers la société elle-même et la banque, qui avait été dûment autorisée, n'avait pas détourné injustement le chèque en se conformant aux instructions données quant au dépôt. Les obligations que la loi impose aux administrateurs n'étaient pas en litige et n'ont pas été examinées, et aucune évaluation des droits des créanciers n'a été faite. Avec égards, l'interprétation large qu'a donnée le juge Pelletier à l'arrêt *373409 Alberta* n'était pas fondée.

Compte tenu de la possibilité d'un recours en cas d'abus de droit, en plus de l'action fondée sur l'obligation de diligence, qui est analysée ci-après, les parties intéressées peuvent exercer des recours efficaces. Il n'est pas nécessaire d'interpréter les intérêts des créanciers comme étant visés par l'obligation prévue à l'al. 122(1)*a*) de la LCSA. En outre, dans les circonstances du présent pourvoi, les frères Wise n'ont pas manqué à l'obligation fiduciaire que leur impose la loi envers la société.

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B. *The Statutory Duty of Care: Section 122(1)(b) of the CBCA*

As mentioned above, the CBCA does not provide for a direct remedy for creditors against directors for breach of their duties and the C.C.Q. is used as suppletive law.

In Quebec, directors have been held liable to creditors in respect of either contractual or extra-contractual obligations. Contractual liability arises where the director personally guarantees a contractual obligation of the company. Liability also arises where the director personally acts in a manner that triggers his or her extra-contractual liability. See P. Martel, "Le 'voile corporatif' — l'attitude des tribunaux face à l'article 317 du Code civil du Québec" (1998), 58 *R. du B.* 95, at pp. 135-36; *Brasserie Labatt ltée v. Lanoue*, [1999] Q.J. No. 1108 (QL) (C.A.), *per* Forget J.A., at para. 29. It is clear that the Wise brothers cannot be held contractually liable as they did not guarantee the debts at issue here. Extra-contractual liability is the remaining possibility.

To determine the applicability of extra-contractual liability in this appeal, it is necessary to refer to art. 1457 C.C.Q.:

> Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody. [Emphasis added.]

Three elements of art. 1457 C.C.Q. are relevant to the integration of the director's duty of care into the principles of extra-contractual liability: who has the duty ("every person"), to whom is the duty owed ("another") and what breach will trigger liability ("rules of conduct"). It is clear that directors and officers come within the expression "every

B. *L'obligation de diligence prévue par la loi : l'al. 122(1)b) de la LCSA*

54 Tel qu'indiqué précédemment, la LCSA n'offre aux créanciers aucun recours exprès contre les administrateurs pour manquement à leurs obligations, et le C.c.Q. est employé à titre de droit supplétif.

55 Au Québec, les administrateurs sont tenus responsables envers les créanciers de leurs obligations contractuelles ou extracontractuelles. Il y a responsabilité contractuelle lorsque l'administrateur garantit personnellement une obligation contractuelle de la société. Sa responsabilité est aussi retenue lorsque l'administrateur agit personnellement de manière à engager sa responsabilité extracontractuelle. Voir P. Martel, « Le "voile corporatif" — l'attitude des tribunaux face à l'article 317 du Code civil du Québec » (1998), 58 *R. du B.* 95, p. 135-136; *Brasserie Labatt ltée c. Lanoue*, [1999] J.Q. n^{o} 1108 (QL) (C.A.), le juge Forget, par. 29. Il est évident que les frères Wise ne peuvent être tenus responsables contractuellement puisqu'ils n'ont pas garanti les dettes en litige en l'espèce. Il reste à examiner la responsabilité extracontractuelle.

56 Pour déterminer s'il y a responsabilité extracontactuelle dans le présent pourvoi, il faut se reporter à l'art. 1457 C.c.Q. :

> Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
>
> Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.
>
> Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde. [Nous soulignons.]

Trois éléments de l'art. 1457 C.c.Q. sont pertinents à l'intégration, dans les principes de la responsabilité extracontractuelle, de l'obligation de diligence de l'administrateur : la personne à qui incombe l'obligation (« [t]oute personne »), le bénéficiaire de l'obligation (« autrui ») et le manquement qui engage la responsabilité (« règles de conduite »).

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person". It is equally clear that the word "another" can include the creditors. The reach of art. 1457 C.C.Q. is broad and it has been given an open and inclusive meaning. See *Regent Taxi & Transport Co. v. Congrégation des Petits Frères de Marie*, [1929] S.C.R. 650, *per* Anglin C.J., at p. 655 (rev'd on other grounds, [1932] 2 D.L.R. 70 (P.C.)):

> . . . to narrow the *prima facie* scope of art. 1053 C.C. [now art. 1457] is highly dangerous and would necessarily result in most meritorious claims being rejected; many a wrong would be without a remedy.

This liberal interpretation was also affirmed and treated as settled by this Court in *Lister v. McAnulty*, [1944] S.C.R. 317, and *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1978] 1 S.C.R. 605.

57 This interpretation can be harmoniously integrated with the wording of the CBCA. Indeed, unlike the statement of the fiduciary duty in s. 122(1)(*a*) of the CBCA, which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s. 122(1)(*b*) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. Instead, it provides that "[e]very director and officer of a corporation in exercising their powers and discharging their duties shall . . . exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Thus, the identity of the beneficiary of the duty of care is much more open-ended, and it appears obvious that it must include creditors. This result is clearly consistent with the civil law interpretation of the word "another". Therefore, if breach of the standard of care, causation and damages are established, creditors can resort to art. 1457 to have their rights vindicated. The only issue thus remaining is the determination of the "rules of conduct" likely to trigger extracontractual liability. On this issue, art. 1457 is explicit.

L'expression « [t]oute personne » englobe manifestement les administrateurs et les dirigeants. De même, le mot « autrui » peut comprendre les créanciers. L'article 1457 C.c.Q. a une portée étendue et on lui a donné un sens large et inclusif. Voir l'arrêt *Regent Taxi & Transport Co. c. Congrégation des Petits Frères de Marie*, [1929] R.C.S. 650, le juge en chef Anglin, p. 655 (infirmé pour d'autres motifs, [1932] 2 D.L.R. 70 (C.P.)) :

> [TRADUCTION] . . . il est très dangereux de restreindre la portée apparente de l'art. 1053 du C.c. [maintenant l'art. 1457] car cela pourrait inévitablement entraîner le rejet des demandes les mieux fondées; nombreux seraient les actes répréhensibles pour lesquels il n'existerait pas de recours.

Dans les arrêts *Lister c. McAnulty*, [1944] R.C.S. 317, et *Hôpital Notre-Dame de l'Espérance c. Laurent*, [1978] 1 R.C.S. 605, notre Cour a aussi confirmé cette interprétation large et a considéré qu'elle était constante.

Il est possible d'intégrer harmonieusement cette interprétation au texte de la LCSA. En fait, contrairement à l'énoncé de l'obligation fiduciaire prévue par l'al. 122(1)*a*) de la LCSA, qui précise que les administrateurs et les dirigeants doivent agir au mieux des intérêts de la société, l'énoncé de l'obligation de diligence figurant à l'al. 122(1)*b*) de la LCSA ne précise pas une personne identifiable qui serait bénéficiaire de l'obligation. L'alinéa prévoit plutôt que « [l]es administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir [. . .] avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente. » Ainsi, le bénéficiaire de l'obligation de diligence est identifié de façon beaucoup plus générale et il semble évident qu'il faut y inclure les créanciers. Cette solution est clairement conforme à l'interprétation que le droit civil donne au mot « autrui ». Par conséquent, si un bris de l'obligation de diligence, le lien de causalité et les dommages sont établis, les créanciers peuvent avoir recours à l'art. 1457 pour faire valoir leurs droits. La seule question qu'il reste maintenant à examiner est donc celle des « règles de conduite » susceptibles de mettre en cause la responsabilité extracontractuelle. Sur ce point, l'art. 1457 est clair.

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The first paragraph of art. 1457 does not set the standard of conduct. Instead, it incorporates by reference s. 122(1)(*b*) of the CBCA. The statutory duty of care is a "duty to abide by [a] rul[e] of conduct which lie[s] upon [them], according to the . . . law, so as not to cause injury to another". Thus, for the purpose of determining whether the Wise brothers can be held liable, only the CBCA is relevant. It is therefore necessary to outline the requirements of the duty of care embodied in s. 122(1)(*b*) of the CBCA.

58 Le premier paragraphe de l'art. 1457 n'énonce pas la norme de conduite. Il incorpore plutôt par renvoi l'al. 122(1)*b*) de la LCSA. L'obligation de diligence prévue par la loi est un « devoir de respecter [une] règl[e] de conduite qui, suivant [. . .] la loi, s'impos[e] à [eux], de manière à ne pas causer de préjudice à autrui ». Ainsi, pour déterminer si les frères Wise peuvent être tenus responsables, seule la LCSA est pertinente. Il est donc nécessaire de rappeler les exigences de l'obligation de diligence prévue à l'al. 122(1)*b*) de la LCSA.

That directors must satisfy a duty of care is a long-standing principle of the common law, although the duty of care has been reinforced by statute to become more demanding. Among the earliest English cases establishing the duty of care were *Dovey v. Cory*, [1901] A.C. 477 (H.L.); *In re Brazilian Rubber Plantations and Estates, Ltd.*, [1911] 1 Ch. 425; and *In re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407 (C.A.). In substance, these cases held that the standard of care was a reasonably relaxed, subjective standard. The common law required directors to avoid being grossly negligent with respect to the affairs of the corporation and judged them according to their own personal skills, knowledge, abilities and capacities. See McGuinness, *supra*, at p. 776: "Given the history of the case law in this area, and the prevailing standards of competence displayed in commerce generally, it is quite clear that directors were not expected at common law to have any particular business skill or judgment."

59 La common law reconnaît depuis longtemps le principe suivant lequel les administrateurs sont tenus à une obligation de diligence. Cette obligation est cependant plus exigeante depuis qu'elle est accentuée par la loi. Les arrêts *Dovey c. Cory*, [1901] A.C. 477 (H.L.), *In re Brazilian Rubber Plantations and Estates, Ltd.*, [1911] 1 Ch. 425, et *In re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407 (C.A.), comptent parmi les décisions anglaises les plus anciennes à l'origine de l'obligation de diligence. Essentiellement, selon ces décisions, la norme de diligence était une norme subjective plutôt souple. La common law exigeait que les administrateurs évitent les fautes grossières eu égard aux affaires de la société et prévoyait qu'ils devaient être jugés suivant leurs compétences, leurs connaissances et leurs aptitudes personnelles. Selon McGuinness, *op. cit.*, p. 776, [TRADUCTION] « [c]ompte tenu de la jurisprudence dans ce domaine et des principales normes de compétence dans le commerce en général, il est assez évident que la common law n'exigeait pas que les administrateurs possèdent des compétences spéciales en affaires ou un sens particulier des affaires. »

The 1971 report entitled *Proposals for a New Business Corporations Law for Canada* (1971) ("Dickerson Report") culminated the work of a committee headed by R. W. V. Dickerson which had been appointed by the federal government to study the need for new federal business corporations legislation. This report preceded the enactment of the CBCA by four years and influenced the eventual structure of the CBCA.

60 Le rapport de 1971 intitulé *Propositions pour un nouveau droit des corporations commerciales canadiennes* (1971) (« Rapport Dickerson ») fut l'aboutissement des travaux d'un comité présidé par R. W. V. Dickerson qui fut chargé, par le gouvernement fédéral, d'examiner s'il était nécessaire d'adopter une nouvelle loi fédérale sur les sociétés par actions. Ce rapport a précédé de quatre ans l'adoption de la LCSA et il a influencé la forme que celle-ci a finalement prise.

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61 The standard recommended by the Dickerson Report was objective, requiring directors and officers to meet the standard of a "reasonably prudent person" (vol. II, at p. 74):

9.19

(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall

. . .

(b) exercise the care, diligence and skill of a reasonably prudent person.

The report described how this proposed duty of care differed from the prevailing common law duty of care (vol. I, at p. 83):

242. The formulation of the duty of care, diligence and skill owed by directors represents an attempt to upgrade the standard presently required of them. The principal change here is that whereas at present the law seems to be that a director is only required to demonstrate the degree of care, skill and diligence that could reasonably be expected from him, having regard to his knowledge and experience — *Re City Equitable Fire Insurance Co.*, [1925] Ch. 425 — under s. 9.19(1)(b) he is required to conform to the standard of a reasonably prudent man. Recent experience has demonstrated how low the prevailing legal standard of care for directors is, and we have sought to raise it significantly. We are aware of the argument that raising the standard of conduct for directors may deter people from accepting directorships. The truth of that argument has not been demonstrated and we think it is specious. The duty of care imposed by s. 9.19(1)(b) is exactly the same as that which the common law imposes on every professional person, for example, and there is no evidence that this has dried up the supply of lawyers, accountants, architects, surgeons or anyone else. It is in any event cold comfort to a shareholder to know that there is a steady supply of marginally competent people available under present law to manage his investment. [Emphasis added.]

62 The statutory duty of care in s. 122(1)(*b*) of the CBCA emulates but does not replicate the language proposed by the Dickerson Report. The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the

La norme recommandée dans le Rapport Dickerson était objective, obligeant les administrateurs et les dirigeants à se conformer à la norme de la « personne raisonnablement prudente » (vol. II, p. 81) :

9.19

(1) Dans l'exercice de ses pouvoirs et l'accomplissement de ses obligations tout administrateur et tout fonctionnaire d'une corporation doit

. . .

b) exercer le soin, la diligence et de l'habileté d'une personne raisonnablement prudente.

Le rapport expliquait la distinction entre l'obligation de diligence proposée et l'obligation de diligence reconnue par la common law (vol. I, p. 92) :

242. La formulation de l'obligation de soin, de diligence et d'habileté à laquelle les administrateurs sont tenus, représente une tentative de hausser le standard de conduite présentement exigé d'eux. Le changement principal modifie la loi actuelle qui semble exiger que l'administrateur fasse preuve du degré de soin, de diligence et d'habileté auquel on pourrait raisonnablement s'attendre de lui, eu égard à sa connaissance et à son expérience (*Re City Equitable Fire Insurance Co.* (1925) Ch. 425). L'article 9.19(1)b) lui impose l'obligation de se comporter en homme raisonnablement prudent. L'expérience récente ayant démontré que le standard de conduite généralement reconnu par la loi pour des administrateurs est fort bas, nous avons songé à le rehausser considérablement. Nous sommes conscients du fait que hausser ces standards peut faire hésiter certaines personnes à accepter un poste d'administrateur. La justesse de cet argument n'a pas été démontrée et nous le croyons spécieux. L'obligation imposée par l'article 9.19(1)b) est exactement la même que celle imposée par la *common law* à tout professionnel. Il n'y a pourtant pas de signes que cela a tari la source des avocats, comptables, architectes, chirurgiens ou autres. De plus c'est de toute façon un bien piètre réconfort pour un actionnaire de savoir qu'il existe un vaste réservoir de personnes de compétence très moyenne qui, d'après la loi actuelle, ont la charge de gérer son investissement. [Nous soulignons.]

Le texte de l'al. 122(1)*b*) de la LCSA qui énonce l'obligation de diligence reprend presque mot à mot celui que propose le Rapport Dickerson. La principale différence réside dans le fait que la version qui a été adoptée comprend les mots « en pareilles

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statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care. It is clear that s. 122(1)(*b*) requires more of directors and officers than the traditional common law duty of care outlined in, for example, *Re City Equitable Fire Insurance*, *supra*.

The standard of care embodied in s. 122(1)(*b*) of the CBCA was described by Robertson J.A. of the Federal Court of Appeal in *Soper v. Canada*, [1998] 1 F.C. 124, at para. 41, as being "objective subjective". Although that case concerned the interpretation of a provision of the *Income Tax Act*, it is relevant here because the language of the provision establishing the standard of care was identical to that of s. 122(1)(*b*) of the CBCA. With respect, we feel that Robertson J.A.'s characterization of the standard as an "objective subjective" one could lead to confusion. We prefer to describe it as an objective standard. To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are important in the case of the s. 122(1)(*b*) duty of care, as opposed to the subjective motivation of the director or officer, which is the central focus of the statutory fiduciary duty of s. 122(1)(*a*) of the CBCA.

The contextual approach dictated by s.122(1)(*b*) of the CBCA not only emphasizes the primary facts but also permits prevailing socio-economic conditions to be taken into consideration. The emergence of stricter standards puts pressure on corporations to improve the quality of board decisions. The establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care. However, even with good corporate governance rules, directors' decisions can still be open to criticism from outsiders. Canadian courts, like their counterparts in the United States, the United Kingdom, Australia and New Zealand, have tended

circonstances », ce qui modifie la norme légale en exigeant qu'il soit tenu compte du contexte dans lequel une décision donnée a été prise. Le législateur n'a pas introduit un élément subjectif relatif à la compétence de l'administrateur, mais plutôt un élément contextuel dans la norme de diligence prévue par la loi. Il est clair que l'al. 122(1)*b*) est plus exigeant à l'égard des administrateurs et des dirigeants que la norme traditionnelle de diligence prévue par la common law et expliquée, par exemple, dans la décision *Re City Equitable Fire Insurance*, précitée.

63 Dans l'arrêt *Soper c. Canada*, [1998] 1 C.F. 124, par. 41, le juge Robertson de la Cour d'appel fédérale a décrit la norme de diligence énoncée à l'al. 122(1)*b*) de la LCSA comme étant une norme « objective subjective ». Même s'il portait sur l'interprétation d'une disposition de la *Loi de l'impôt sur le revenu*, cet arrêt est pertinent en l'espèce parce que le libellé de la disposition établissant la norme de diligence est identique à celui de l'al. 122(1)*b*) de la LCSA. Nous estimons pour notre part que le fait, pour le juge Robertson, de qualifier la norme par l'expression « objective subjective » peut semer la confusion. Nous préférons la décrire comme une norme objective. Ainsi, il devient évident que dans le cas de l'obligation de diligence prévue à l'al. 122(1)*b*), ce sont les éléments factuels du contexte dans lequel agissent l'administrateur ou le dirigeant qui sont importants, plutôt que les motifs subjectifs de ces derniers, qui sont l'objet essentiel de l'obligation fiduciaire prévue à l'al. 122(1)*a*) de la LCSA.

64 La méthode contextuelle dictée par l'al. 122(1)*b*) de la LCSA fait ressortir non seulement les faits primaires mais elle permet aussi qu'il soit tenu compte des conditions socio-économiques existantes. L'apparition de normes plus strictes force les sociétés à améliorer la qualité des décisions des conseils d'administration. L'établissement de règles de régie d'entreprise devrait servir de bouclier protégeant les administrateurs contre les allégations de manquement à leur obligation de diligence. Toutefois, même en présence de règles de régie d'entreprise, les décisions des administrateurs peuvent parfois prêter le flanc aux critiques de tiers. En ce qui concerne les mesures prises pour

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to take an approach with respect to the enforcement of the duty of care that respects the fact that directors and officers often have business expertise that courts do not. Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available *ex post facto*. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the "business judgment rule", adopting the American name for the rule.

65 In *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177, Weiler J.A. stated, at p. 192:

> The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a *reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the Board is known as the "business judgment rule". 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. [Emphasis added; italics in original; references omitted.]

assurer le respect de l'obligation de diligence, les tribunaux canadiens, tout comme ceux des États-Unis, du Royaume-Uni, de l'Australie et de la Nouvelle-Zélande, ont eu tendance à tenir compte du fait que les administrateurs et les dirigeants ont souvent, en matière commerciale, des connaissances que ne possèdent pas les tribunaux. De nombreuses décisions prises dans le cours des activités d'une entreprise sont raisonnables et justifiables au moment où elles sont prises, même si elles ont éventuellement conduit à un échec. Les décisions d'affaires doivent parfois être prises dans un contexte où les renseignements sont incomplets, les enjeux sont élevés et la situation est pressante. On pourrait être tenté de considérer à la lumière de renseignements qui deviennent disponibles ultérieurement que des décisions d'affaires qui n'ont pas abouti étaient déraisonnables ou imprudentes. En raison de ce risque d'examen a posteriori, les tribunaux canadiens ont élaboré à l'égard des décisions d'affaires une règle de retenue appelée, suivant la terminologie employée aux États-Unis, la « règle de l'appréciation commerciale ».

Dans l'arrêt *Maple Leaf Foods Inc. c. Schneider Corp.* (1998), 42 O.R. (3d) 177, la juge Weiler de la Cour d'appel de l'Ontario a dit ce qui suit, à la p. 192 :

> [TRADUCTION] Tels qu'ils ont évolué, le droit applicable en Ontario et celui applicable au Delaware ont une exigence commune, savoir que le tribunal doit être convaincu que les administrateurs ont agi de façon raisonnable et équitable. Le tribunal examine si les administrateurs ont pris une décision *raisonnable* et non pas *la meilleure* décision. Dès lors que la décision prise conserve un caractère raisonnable, le tribunal ne devrait pas substituer son avis à celui du conseil, même si les événements ultérieurs peuvent avoir jeté le doute sur la décision du conseil. Dans la mesure où les administrateurs ont choisi l'une des diverses solutions raisonnables qui s'offraient, la retenue est de mise à l'égard de la décision du conseil. Cette retenue à l'égard de la décision du conseil est ce qu'on appelle la « règle de l'appréciation commerciale ». 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. [Nous soulignons; italiques dans l'original; renvois omis.]

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In order for a plaintiff to succeed in challenging a business decision he or she has to establish that the directors acted (i) in breach of the duty of care and (ii) in a way that caused injury to the plaintiff: W. T. Allen, J. B. Jacobs and L. E. Strine, Jr., "Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law" (2001), 26 *Del. J. Corp. L.* 859, at p. 892.

66 Pour obtenir gain de cause lorsqu'il conteste une décision d'affaires, le demandeur doit établir que les administrateurs ont manqué à leur obligation de diligence et ce, d'une manière qui lui a causé un préjudice : W. T. Allen, J. B. Jacobs et L. E. Strine, Jr., « Function Over Form : A Reassessment of Standards of Review in Delaware Corporation Law » (2001), 26 *Del. J. Corp. L.* 859, p. 892.

Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(*b*) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

67 On ne considérera pas que les administrateurs et les dirigeants ont manqué à l'obligation de diligence énoncée à l'al. 122(1)*b*) de la LCSA s'ils ont agi avec prudence et en s'appuyant sur les renseignements dont ils disposaient. Les décisions prises doivent constituer des décisions d'affaires raisonnables compte tenu de ce qu'ils savaient ou auraient dû savoir. Lorsqu'il s'agit de déterminer si les administrateurs ont manqué à leur obligation de diligence, il convient de répéter que l'on n'exige pas d'eux la perfection. Les tribunaux ne doivent pas substituer leur opinion à celle des administrateurs qui ont utilisé leur expertise commerciale pour évaluer les considérations qui entrent dans la prise de décisions des sociétés. Ils sont toutefois en mesure d'établir, à partir des faits de chaque cas, si l'on a exercé le degré de prudence et de diligence nécessaire pour en arriver à ce qu'on prétend être une décision d'affaires raisonnable au moment où elle a été prise.

The trustee alleges that the Wise brothers breached their duty of care under s. 122(1)(*b*) of the CBCA by implementing the new procurement policy to the detriment of Peoples' creditors. After considering all the evidence, we agree with the Court of Appeal that the implementation of the new policy was a reasonable business decision that was made with a view to rectifying a serious and urgent business problem in circumstances in which no solution may have been possible. The trial judge's conclusion that the new policy led inexorably to Peoples' failure and bankruptcy was factually incorrect and constituted a palpable and overriding error.

68 Le syndic prétend que les frères Wise ont manqué à l'obligation de diligence que leur impose l'al. 122(1)*b*) de la LCSA en instaurant la nouvelle politique d'approvisionnement au détriment des créanciers de Peoples. Après avoir examiné l'ensemble de la preuve, nous convenons avec la Cour d'appel que l'instauration de la nouvelle politique était une décision d'affaires raisonnable qui a été prise en vue de corriger un problème d'ordre commercial grave et urgent dans un cas où il n'existait peut-être aucune solution. En concluant que la nouvelle politique avait inexorablement entraîné le déclin et la faillite de Peoples, le juge de première instance a mal interprété les faits et a commis une erreur manifeste et dominante.

In fact, as noted by Pelletier J.A., there were many factors other than the new policy that

69 Comme l'a fait remarquer le juge Pelletier, de nombreux facteurs, outre la nouvelle politique, ont

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contributed more directly to Peoples' bankruptcy. Peoples had lost $10 million annually while being operated by M & S. Wise, which was only marginally profitable and solvent with annual sales of $100 million (versus $160 million for Peoples), had hoped to improve the performance of its new acquisition. Given that the transaction was a fully leveraged buyout, for Wise and Peoples to succeed, Peoples' performance needed to improve dramatically. Unfortunately for both Wise and Peoples, the retail market in eastern Canada had become very competitive in the early 1990s, and this trend continued with the arrival of Wal-Mart in 1994. At paras. 152 and 154 QL, Pelletier J.A. stated:

[TRANSLATION] In reality, it was that particularly unfavourable financial situation in which the two corporations found themselves that caused their downfall, and it was M. & S. that, to protect its own interests, sounded the charge in December, rightly or wrongly judging that Peoples Inc.'s situation would only worsen over time. It is crystal-clear that the bankruptcy occurred at the most propitious time for M. & S.'s interests, when inventories were high and suppliers were unpaid. In fact, M. & S. recovered the entire balance due on the selling price and almost all of the other debts it was owed.

. . .

. . . the trial judge did not take into account the fact that the brothers derived no direct benefit from the transaction impugned, that they acted in good faith and that their true intention was to find a solution to the serious inventory management problem that each of the two corporations was facing. Because of an assessment error, he also ignored the fact that Peoples Inc. received a sizable consideration for the goods it delivered to Wise. Lastly, I note that the act for which the brothers were found liable, i.e. the adoption of a new joint inventory procurement policy, is not as serious as the trial judge made it out to be and that, in opposition to his view, the act was also not the true cause of the bankruptcy of Peoples Inc. [Emphasis added.]

70 The Wise brothers treated the implementation of the new policy as a decision made in the

contribué plus directement à la faillite de Peoples. Les pertes annuelles de Peoples, pendant qu'elle était exploitée par M & S, s'élevaient à 10 millions de dollars. Wise, qui était à peine rentable et à peine solvable avec des ventes annuelles de 100 millions de dollars (contre 160 millions de dollars pour Peoples), avait espéré accroître la rentabilité de sa nouvelle acquisition. Étant donné qu'il s'agissait d'une acquisition réalisée entièrement par emprunt, si Wise et Peoples voulaient que leurs efforts soient couronnés de succès, il devait y avoir une amélioration considérable de la rentabilité de Peoples. Malheureusement pour Wise et Peoples, la concurrence dans le marché de la vente au détail dans l'Est du Canada était devenue féroce au début des années 1990, une tendance qui s'est poursuivie avec l'arrivée de Wal-Mart en 1994. Aux paragraphes 153 et 155, le juge Pelletier a dit ce qui suit :

En réalité, c'est la présence de cette conjoncture financière particulièrement défavorable aux deux sociétés qui a provoqué leur chute et c'est M. & S. qui, pour la protection de ses intérêts propres, a sonné la charge en décembre, jugeant à tort ou à raison que la situation de Peoples Inc. ne pouvait qu'empirer avec le temps. Il saute aux yeux que la faillite est survenue au moment le plus propice aux intérêts de M. & S., lorsque les inventaires étaient élevés et les fournisseurs impayés. M. & S. a d'ailleurs récupéré la totalité du reliquat dû sur le prix de vente de même que la presque totalité de ses autres créances.

. . .

. . . le premier juge ne tient pas compte du fait que les frères n'ont retiré aucun avantage direct de la transaction attaquée, qu'ils étaient de bonne foi et que leur intention véritable consistait à rechercher une solution au sérieux problème de gestion d'inventaire auquel chacune des deux sociétés était confrontée. En raison d'une erreur d'appréciation, il ignore aussi que Peoples Inc. a reçu une contrepartie importante pour les biens qu'elle a livrés à Wise. Je note enfin que le geste à l'origine de la condamnation, en l'occurrence, l'adoption du nouveau système d'approvisionnement commun, n'a pas le caractère de gravité que lui attribue le premier juge et que, contrairement à la perception qu'il exprime, ce geste n'a pas non plus été la véritable cause de la faillite de Peoples Inc. [Nous soulignons.]

Les frères Wise ont traité la mise en œuvre de la nouvelle politique comme une décision prise

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ordinary course of business and, while no formal agreement evidenced the arrangement, a monthly record was made of the inventory transfers. Although this may appear to be a loose business practice, by the autumn of 1993, Wise had already consolidated several aspects of the operations of the two companies. Legally they were two separate entities. However, the financial fate of the two companies had become intertwined. In these circumstances, there was little or no economic incentive for the Wise brothers to jeopardize the interests of Peoples in favour of the interests of Wise. In fact, given the tax losses that Peoples had carried forward, the companies had every incentive to keep Peoples profitable in order to reduce their combined tax liabilities.

dans le cours normal des activités de l'entreprise et, même si aucune entente formelle ne constatait l'arrangement, les transferts des stocks étaient consignés mensuellement. Bien qu'on puisse penser qu'il s'agit d'une pratique commerciale peu rigoureuse, dès l'automne 1993, Wise avait déjà, en pratique, intégré plusieurs des services des deux sociétés. Légalement, il s'agissait de deux entités distinctes. Toutefois, l'avenir financier des deux sociétés était inextricablement lié. Dans les circonstances, les frères Wise n'avaient, au plan financier, aucun avantage à privilégier les intérêts de Wise au détriment de ceux de Peoples. En fait, vu les pertes fiscales que Peoples avait reportées, les deux sociétés avaient toutes les raisons de s'assurer de la rentabilité de Peoples afin de réduire leurs dettes fiscales combinées.

Arguably, the Wise brothers could have been more precise in pursuing a resolution to the intractable inventory management problems, having regard to all the troublesome circumstances involved at the time the new policy was implemented. But we, like the Court of Appeal, are not satisfied that the adoption of the new policy breached the duty of care under s. 122(1)(*b*) of the CBCA. The directors cannot be held liable for a breach of their duty of care in respect of the creditors of Peoples.

71 Les frères Wise auraient peut-être, compte tenu de la situation difficile à l'époque de l'instauration de la nouvelle politique, pu être plus minutieux dans leur recherche d'une solution aux épineux problèmes de gestion des stocks. Mais, comme la Cour d'appel, nous ne sommes pas convaincus que l'adoption de la nouvelle politique ait contrevenu à l'obligation de diligence énoncée à l'al. 122(1)*b*) de la LCSA. Les administrateurs ne peuvent pas être tenus responsables pour manquement à leur obligation de diligence à l'égard des créanciers de Peoples.

The Court of Appeal relied on two additional provisions of the CBCA that in its view could rescue the Wise brothers from a finding that they breached the duty of care: ss. 44(2) and 123(4).

72 La Cour d'appel s'est appuyée sur deux autres dispositions de la LCSA qui, selon elle, pourraient empêcher de conclure que les frères Wise ont manqué à leur obligation de diligence; il s'agit du par. 44(2) et du par. 123(4).

Section 44 of the CBCA, which was in force at the time of the impugned transactions but has since been repealed, permitted a wholly-owned subsidiary to give financial assistance to its holding body corporate:

73 L'article 44 de la LCSA, qui était en vigueur à l'époque des transactions contestées mais qui a été abrogé depuis, autorisait une filiale à part entière à fournir une aide financière à sa société mère :

44. (1) Subject to subsection (2), a corporation or any corporation with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise

44. (1) Sauf dans les limites prévues au paragraphe (2), il est interdit à la société ou aux sociétés de son groupe de fournir une aide financière même indirecte, notamment sous forme de prêt ou de caution :

. . . . . .

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(2) A corporation may give financial assistance by means of a loan, guarantee or otherwise

. . .

(*c*) to a holding body corporate if the corporation is a wholly-owned subsidiary of the holding body corporate;

(2) La société peut accorder une aide financière, notamment sous forme de prêt ou de caution :

. . .

c) à sa société mère, si elle lui appartient en toute propriété;

74 While s. 44(2) as it then read qualified the prohibition under s. 44(1), it did not serve to supplant the duties of the directors under s. 122(1) of the CBCA. The Court of Appeal erred in concluding that s. 44(2) served as a blanket legitimization of financial assistance given by wholly-owned subsidiaries to parent corporations. In our opinion, it is incumbent upon directors and officers to exercise their powers in conformity with the duties of s. 122(1).

Même s'il restreignait la portée de l'interdiction prévue au par. 44(1), l'ancien par. 44(2) ne faisait pas disparaître les obligations imposées aux administrateurs par le par. 122(1) de la LCSA. La Cour d'appel a conclu à tort que le par. 44(2) servait à légitimer de façon générale l'aide financière fournie par une filiale à part entière à sa société mère. À notre avis, il incombe aux administrateurs et aux dirigeants d'exercer leurs pouvoirs conformément aux obligations qu'impose le par. 122(1).

75 Although s. 44(2) authorized certain forms of financial assistance between corporations, this cannot exempt directors and officers from potential liability under s. 122(1) for any financial assistance given by subsidiaries to the parent corporation.

Bien qu'il autorisait certaines formules d'aide financière entre sociétés, le par. 44(2) ne permet pas de soustraire les administrateurs et les dirigeants à leur responsabilité éventuelle en vertu du par. 122(1) pour toute aide financière fournie par une filiale à sa société mère.

76 When faced with the serious inventory management problem, the Wise brothers sought the advice of the vice-president of finance, David Clément. The Wise brothers claimed as an additional argument that in adopting the solution proposed by Clément, they were relying in good faith on the judgment of a person whose profession lent credibility to his statement, in accordance with the defence provided for in s. 123(4)(*b*) (now s. 123(5)) of the CBCA. The Court of Appeal accepted the argument. We disagree.

Face au grave problème de gestion des stocks, les frères Wise ont demandé conseil au vice-président aux finances, David Clément. Ils ont fait valoir comme argument additionnel qu'en retenant la solution proposée par M. Clément, ils se sont fiés de bonne foi au jugement d'une personne dont la profession permettait d'accorder foi à sa déclaration, conformément au moyen de défense prévu à l'al. 123(4)*b*) (maintenant le par. 123(5)) de la LCSA. La Cour d'appel a retenu cet argument. Nous ne sommes pas d'accord avec celle-ci.

77 The reality that directors cannot be experts in all aspects of the corporations they manage or supervise shows the relevancy of a provision such as s. 123(4)(*b*). At the relevant time, the text of s. 123(4) read:

L'utilité d'une disposition telle que l'al. 123(4)*b*) tient à ce que les administrateurs ne peuvent connaître à fond toutes les facettes des entreprises qu'ils gèrent ou dont ils surveillent la gestion. À l'époque pertinente, le par. 123(4) prévoyait ce qui suit :

123. . . .

. . .

(4) A director is not liable under section 118, 119 or 122 if he relies in good faith on

123. . . .

. . .

(4) N'est pas engagée, en vertu des articles 118, 119 ou 122, la responsabilité de l'administrateur qui s'appuie de bonne foi sur :

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(*a*) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or

(*b*) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

Although Clément did have a bachelor's degree in commerce and 15 years of experience in administration and finance with Wise, this experience does not correspond to the level of professionalism required to allow the directors to rely on his advice as a bar to a suit under the duty of care. The named professional groups in s. 123(4)(*b*) were lawyers, accountants, engineers, and appraisers. Clément was not an accountant, was not subject to the regulatory overview of any professional organization and did not carry independent insurance coverage for professional negligence. The title of vice-president of finance should not automatically lead to a conclusion that Clément was a person "whose profession lends credibility to a statement made by him". It is noteworthy that the word "profession" is used, not "position". Clément was simply a non-professional employee of Wise. His judgment on the appropriateness of the solution to the inventory management problem must be regarded in that light. Although we might accept for the sake of argument that Clément was better equipped and positioned than the Wise brothers to devise a plan to solve the inventory management problems, this is not enough. Therefore, in our opinion, the Wise brothers cannot successfully invoke the defence provided by s. 123(4)(*b*) of the CBCA but must rely on the other defences raised.

a) des états financiers de la société reflétant équitablement sa situation, d'après l'un de ses dirigeants ou d'après le rapport écrit du vérificateur;

b) les rapports des personnes dont la profession permet d'accorder foi à leurs déclarations, notamment les avocats, comptables, ingénieurs ou estimateurs.

78 Même si M. Clément était titulaire d'un baccalauréat en commerce et qu'il avait 15 ans d'expérience en administration et en finance chez Wise, cette expérience ne correspond pas au degré de professionnalisme requis pour que les administrateurs puissent invoquer les conseils reçus de lui pour faire échec à une poursuite fondée sur l'obligation de diligence. Les groupes de professionnels désignés à l'al. 123(4)*b*) sont les avocats, les comptables, les ingénieurs et les estimateurs. Monsieur Clément n'était pas comptable, ses activités n'étaient pas réglementées par une organisation professionnelle et il n'avait pas lui-même souscrit à une police d'assurance-responsabilité professionnelle. On ne saurait conclure qu'en raison de son titre de vice-président aux finances, M. Clément était une personne « dont la profession permet d'accorder foi à [ses] déclarations ». Il convient de signaler que c'est le mot « profession » et non le mot « poste » qui est utilisé. Monsieur Clément était un simple employé non professionnel de Wise. C'est à la lumière de ces faits qu'il convient d'analyser son appréciation de l'opportunité de la solution proposée aux problèmes de gestion des stocks. Même si nous admettions, pour les fins de la discussion, que M. Clément était mieux en mesure que les frères Wise d'élaborer un plan destiné à régler les problèmes de gestion des stocks, cela ne suffirait pas. Par conséquent, nous estimons que les frères Wise ne peuvent faire valoir avec succès le moyen de défense prévu à l'al. 123(4)*b*) de la LCSA mais doivent s'appuyer sur les autres moyens de défense invoqués.

C. *The Claim Under Section 100 of the BIA*

The trustee also claimed against the Wise brothers under s. 100 of the BIA. That section reads:

100. (1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on

C. *La réclamation fondée sur l'art. 100 de la LFI*

79 Le syndic a également fondé sur l'art. 100 de la LFI sa réclamation contre les frères Wise. Selon cet article :

100. (1) Le tribunal peut, sur demande du syndic, enquêter pour déterminer si le failli qui a vendu, acheté, loué, engagé, fourni ou reçu des biens ou services au

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the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.

(2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.

80 The provision has two principal elements. First, subs. (1) requires the transaction to have been conducted within the year preceding the date of bankruptcy. Second, subs. (2) requires that the consideration given or received by the bankrupt be "conspicuously greater or less" than the fair market value of the property concerned.

81 The word "may" is found in both ss. 100(1) and 100(2) of the BIA with respect to the jurisdiction of the court. In *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1, a majority of the Ontario Court of Appeal held that, even if the necessary preconditions are present, the exercise of jurisdiction under s. 100(1) to inquire into the transaction, and under s. 100(2) to grant judgment, is discretionary. Equitable principles guide the exercise of discretion. We agree.

82 Referring to s. 100(2) of the BIA, in *Standard Trustco*, *supra*, at p. 23, Weiler J.A. explained that:

When a contextual approach is adopted it is apparent that although the conditions of the section have been satisfied the court is not obliged to grant judgment. The court has a residual discretion to exercise. The contextual approach indicates that the good faith of the parties, the intention with which the transaction took place, and

moyen d'une transaction révisable, au cours de la période allant du premier jour de l'année précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement, a donné ou reçu, selon le cas, une juste valeur du marché en contrepartie des biens ou services.

(2) Lorsque le tribunal, dans des instances en vertu du présent article, constate que la contrepartie donnée ou reçue par le failli dans la transaction révisable était manifestement supérieure ou inférieure à la juste valeur du marché des biens ou services sur lesquels portait la transaction, il peut accorder au syndic un jugement contre l'autre partie à la transaction ou contre toute autre personne ayant intérêt à la transaction avec le failli ou contre toutes ces personnes, pour la différence entre la contrepartie réellement donnée ou reçue par le failli et la juste valeur du marché, telle qu'elle est déterminée par le tribunal, des biens ou services sur lesquels porte la transaction.

Cette disposition comporte deux éléments principaux. Premièrement, le par. (1) exige que la transaction soit effectuée au cours de l'année précédant la date de la faillite. Deuxièmement, le par. (2) exige que la contrepartie donnée ou reçue par le failli soit « manifestement supérieure ou inférieure » à la juste valeur marchande des biens en cause.

Le mot « peut » est utilisé tant au par. 100(1) qu'au par. 100(2) de la LFI relativement à la compétence du tribunal. Dans *Standard Trustco Ltd. (Trustee of) c. Standard Trust Co.* (1995), 26 O.R. (3d) 1, la Cour d'appel de l'Ontario a statué à la majorité que, même si les conditions préalables nécessaires sont remplies, l'exercice du pouvoir d'enquêter sur la transaction prévu au par. 100(1) et du pouvoir d'accorder un jugement prévu au par. 100(2) est discrétionnaire. Les principes d'équité encadrent l'exercice de ce pouvoir discrétionnaire. Nous souscrivons à cette décision.

Au sujet du par. 100(2) de la LFI, dans *Standard Trustco*, précité, p. 23, la juge Weiler a donné les explications suivantes :

[TRADUCTION] Lorsque la méthode contextuelle est retenue, il est évident que, même si les conditions prévues par l'article sont remplies, le tribunal n'est pas tenu d'accorder un jugement. Le tribunal exerce un pouvoir discrétionnaire résiduel. Suivant la méthode contextuelle, la bonne foi des parties, le but de la transaction et l'échange

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whether fair value was given and received in the transaction are important considerations as to whether that discretion should be exercised.

We agree with Weiler J.A. and adopt her position; however, this appeal does not turn on the discretion to ultimately impose liability. In our view, the Court of Appeal did not interfere with the trial judge's exercise of discretion in reviewing the facts and finding a palpable and overriding error.

Within the year preceding the date of bankruptcy, Peoples had transferred inventory to Wise for which the trustee claimed Peoples had not received fair market value in consideration. The relevant transactions involved, for the most part, transfers completed in anticipation of the busy holiday season. Given the non-arm's length relationship between Wise and its wholly-owned subsidiary Peoples, there is no question that these inventory transfers could have constituted reviewable transactions.

We share the view of the Court of Appeal that it is not only the final transfers that should be considered. In fairness, the inventory transactions should be considered over the entire period from February to December 1994, which was the period when the new policy was in effect.

In *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.* (1989), 37 B.C.L.R. (2d) 88 (C.A.), the test for determining whether the difference in consideration is "conspicuously greater or less" was held to be not whether it is conspicuous to the parties at the time of the transaction, but whether it is conspicuous to the court having regard to all the relevant factors. This is a sound approach. In that case, a difference of $1.18 million between fair market value and the consideration received by the bankrupt was seen as conspicuous, where the fair market value was $6.6 million, leaving a discrepancy of more than 17 percent. While there is no particular percentage that definitively sets the threshold for a conspicuous difference, the percentage difference is a factor.

d'une contrepartie représentant la juste valeur du marché sont des éléments importants pour déterminer s'il y a lieu d'exercer ce pouvoir discrétionnaire.

Nous sommes d'accord avec la juge Weiler et nous adoptons sa position; toutefois, le présent pourvoi ne porte pas sur le pouvoir discrétionnaire d'imposer ultimement une responsabilité. À notre avis, la Cour d'appel ne s'est pas ingérée dans l'exercice du pouvoir discrétionnaire du juge de première instance en examinant les faits et en concluant à l'existence d'une erreur manifeste et dominante.

83 Au cours de l'année qui a précédé la faillite, Peoples a transféré à Wise des marchandises pour lesquelles, selon le syndic, Peoples n'a pas reçu de contrepartie représentant la juste valeur du marché. Les transactions en cause concernaient principalement les transferts effectués en prévision de la période occupée que constitue le temps des Fêtes. Vu le lien de dépendance entre Wise et Peoples, sa filiale à part entière, il n'y a aucun doute que ces transferts de stocks auraient pu constituer des transactions révisables.

84 Nous estimons comme la Cour d'appel qu'il ne faut pas se contenter d'examiner les derniers transferts. En toute équité, il convient d'analyser les transactions effectuées au cours de toute la période de février à décembre 1994, soit la période pendant laquelle la nouvelle politique était appliquée.

85 Selon l'arrêt *Skalbania (Trustee of) c. Wedgewood Village Estates Ltd.* (1989), 37 B.C.L.R. (2d) 88 (C.A.), le critère permettant de déterminer si la différence entre la contrepartie et sa juste valeur marchande est « manifestement supérieure ou inférieure » n'est pas de savoir si la différence est manifeste pour les parties au moment de la transaction, mais plutôt si elle l'est pour le tribunal eu égard à tous les facteurs pertinents. Il s'agit d'une méthode judicieuse. Dans cette affaire, une différence de 1,18 million de dollars entre la juste valeur du marché et la contrepartie reçue par le failli a été jugée manifeste, la juste valeur du marché étant de 6,6 millions de dollars, ce qui laissait un écart de plus de 17 pour 100. Bien qu'aucun pourcentage particulier ne soit fixé pour déterminer ce qui constitue une différence manifeste, le pourcentage de différence constitue un facteur.

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86 As for the factors that would be relevant to this determination, the court might consider, *inter alia*: evidence of the margin of error in valuing the types of assets in question; any appraisals made of the assets in question and evidence of the parties' honestly held beliefs regarding the value of the assets in question; and other circumstances adduced in evidence by the parties to explain the difference between the consideration received and fair market value: see L. W. Houlden and G. B. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 2, at p. 4-114.1.

87 Over the lifespan of the new policy, Peoples transferred to Wise inventory valued at $71.54 million. As of the date of bankruptcy, it had received $59.50 million in property or money from Wise. As explained earlier, the trial judge adjusted the outstanding difference down to a balance of $4.44 million after taking into account, *inter alia*, the reallocation of general and administrative expenses, and adjustments necessitated by imported inventory transferred from Wise to Peoples. Neither party disputed these figures before this Court. We agree with the Court of Appeal's observation that these findings directly conflict with the trial judge's assertion that Peoples had received no consideration for the inventory transfers on the basis that the outstanding accounts were "neither collected nor collectible" from Wise. Like Pelletier J.A., we conclude that the trial judge's finding in this regard was a palpable and overriding error, and we adopt the view of the Court of Appeal.

88 We are not satisfied that, with regard to all the circumstances of this case, a disparity of slightly more than 6 percent between fair market value and the consideration received constitutes a "conspicuous" difference within the meaning of s. 100(2) of the BIA. Accordingly, we hold that the trustee's claim under the BIA also fails.

Pour ce qui est des autres facteurs qui seraient pertinents à cette décision, le tribunal peut examiner notamment les facteurs suivants : la preuve de la marge d'erreur dans l'évaluation du type de biens en cause; les évaluations qui ont été faites des biens en cause et la preuve de la croyance sincère des parties en ce qui a trait à la valeur de ces biens; les autres éléments présentés en preuve par les parties pour expliquer la différence entre la contrepartie obtenue et la juste valeur du marché : voir L. W. Houlden et G. B. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3e éd. (feuilles mobiles)), vol. 2, p. 4-114.1.

Pendant la période d'application de la nouvelle politique, Peoples a transféré à Wise des stocks d'une valeur de 71,54 millions de dollars. À la date de la faillite, elle avait reçu de Wise des biens ou des sommes s'élevant à 59,5 millions de dollars. Comme nous l'avons expliqué précédemment, le juge de première instance a ramené la différence à un solde de 4,44 millions de dollars après avoir tenu compte, notamment, de la nouvelle répartition des frais généraux et administratifs et des rajustements nécessaires découlant des transferts par Wise à Peoples des stocks importés. Aucune des parties n'a contesté ces chiffres devant notre Cour. Nous sommes d'accord avec la Cour d'appel qui a fait remarquer que ces conclusions contredisent directement ce qu'a dit le juge de première instance, savoir que Peoples n'avait reçu aucune contrepartie pour les transferts de stocks puisque les comptes recevables [TRADUCTION] « n'ont pas été recouvrés et n'étaient pas recouvrables » de Wise. Comme le juge Pelletier, nous estimons que la conclusion du juge de première instance à cet égard était une erreur manifeste et dominante et nous souscrivons au point de vue de la Cour d'appel.

Nous ne sommes pas convaincus que, compte tenu de toutes les circonstances de la présente espèce, un écart d'un peu plus de 6 pour 100 entre la juste valeur du marché et la contrepartie reçue constitue une différence « manifeste » au sens du par. 100(2) de la LFI. Par conséquent, nous statuons que la réclamation du syndic fondée sur la LFI échoue également.

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In addition to permitting the court to give judgment against the other party to the transaction, s. 100(2) of the BIA also permits it to give judgment against someone who was not a party but was "privy" to the transaction. Given our finding that the consideration for the impugned transactions was not "conspicuously less" than fair market value, there is no need to consider whether the Wise brothers would have been "privy" to the transaction for the purpose of holding them liable under s. 100(2). Nonetheless, the disagreement between the trial judge and the Court of Appeal on the interpretation of "privy" in s. 100(2) of the BIA warrants the following observations.

The trial judge in this appeal had little difficulty finding that the Wise brothers were privy to the transaction within the meaning of s. 100(2). Pelletier J.A., however, preferred a narrow construction in finding that the Wise brothers were not privy to the transactions. He held, at para. 135 QL, that:

> [TRANSLATION] . . . the legislator wanted to provide for the case in which a person other than the co-contracting party of the bankrupt actually received all or part of the benefit resulting from the lack of equality between the respective considerations.

To support this direct benefit requirement, Pelletier J.A. also referred to the French version which uses the term *ayant intérêt*. While he conceded that the respondent brothers received an indirect benefit from the inventory transfers as shareholders of Wise, Pelletier J.A. found this too remote to be considered "privy" to the transactions (paras. 139-40 QL).

The primary purpose of s. 100 of the BIA is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person. It makes sense to adopt a more inclusive understanding of the word "privy" to prevent someone who might receive indirect benefits to the detriment of a bankrupt's unsatisfied creditors from frustrating the provision's remedial purpose. The word "privy" should be given a broad reading to include those who benefit directly or indirectly from and have knowledge of a transaction occurring for less than fair market value. In our opinion, this rationale is particularly apt when

89 Le paragraphe 100(2) de la LFI autorise le tribunal à accorder un jugement non seulement contre l'autre partie à la transaction, mais aussi contre une partie non contractante « ayant intérêt » à la transaction. Comme nous avons conclu que la contrepartie reçue dans les transactions contestées n'était pas « manifestement inférieure » à la juste valeur du marché, il est inutile d'examiner si les frères Wise auraient eu un « intérêt » à la transaction qui permettrait de conclure à leur responsabilité en vertu du par. 100(2). Quoi qu'il en soit, le désaccord entre le juge de première instance et la Cour d'appel sur l'interprétation des mots « ayant intérêt » au par. 100(2) de la LFI justifie les observations suivantes.

90 En l'espèce, le juge de première instance n'a pas hésité à conclure que les frères Wise avaient un intérêt à la transaction au sens du par. 100(2). Cependant, le juge Pelletier a privilégié une interprétation stricte en concluant que les frères Wise n'avaient pas intérêt aux transactions. Il a dit ce qui suit au par. 136 :

> Le législateur me semble avoir voulu prévoir le cas où c'est une personne autre que le cocontractant du failli qui, en réalité, encaisse tout ou partie du bénéfice résultant de l'absence d'équivalence entre les contreparties respectives.

Pour justifier cette exigence d'un avantage direct, le juge Pelletier a mentionné le texte français où l'on utilise l'expression « ayant intérêt ». Même s'il a admis que les frères intimés ont, en leur qualité d'actionnaires de Wise, tiré un avantage indirect des transferts de stocks, le juge Pelletier a conclu que cet avantage était trop éloigné pour qu'ils aient eu un « intérêt » aux transactions (par. 140-141).

91 L'article 100 de la LFI a principalement pour objet d'annuler les effets d'une transaction qui a diminué la valeur des actifs d'un failli. Il est logique d'adopter une conception plus large des termes « ayant intérêt » pour éviter qu'une personne qui pourrait tirer un avantage indirect au détriment des créanciers du failli puisse contrecarrer l'objet réparateur de cette disposition. Il convient de donner aux termes « ayant intérêt » un sens large afin qu'ils s'appliquent aux personnes qui tirent un avantage direct ou indirect d'une transaction tout en sachant que la contrepartie est inférieure à la juste valeur du

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those who benefit are the controlling minds behind the transaction.

92 A finding that a person was "privy" to a reviewable transaction does not of course necessarily mean that the court will exercise its discretion to make a remedial order against that person. For liability to be imposed, it must be established that the transaction occurred: (a) within the past year; (b) for consideration conspicuously greater or less than fair market value; (c) with the person's knowledge; and (d) in a way that directly or indirectly benefited the person. In addition, after having considered the context and all the above factors, the judge must conclude that the case is a proper one for holding the person liable. In light of these conditions and of the discretion exercised by the judge, we find that a broad reading of "privy" is appropriate.

IV. Disposition

93 For the foregoing reasons, we would dismiss the appeal with costs to the respondents.

Appeal dismissed with costs.

Solicitors for the appellant: Kugler Kandestin, Montréal.

Solicitors for the respondents Lionel Wise, Ralph Wise and Harold Wise: de Grandpré Chait, Montréal.

Solicitors for the respondent Chubb Insurance Company of Canada: Lavery, de Billy, Montréal.

marché. À notre avis, ce raisonnement est particulièrement pertinent lorsque les personnes qui touchent un avantage sont les instigatrices de la transaction.

Conclure qu'une personne a « intérêt » à la transaction révisable ne signifie évidemment pas que le tribunal exercera son pouvoir discrétionnaire pour rendre une ordonnance réparatrice contre cette personne. Pour conclure à la responsabilité de cette personne, il doit être démontré que la transaction est effectuée a) au cours de l'année précédente, b) en échange d'une contrepartie manifestement supérieure ou inférieure à la juste valeur du marché, c) au su de la personne en cause, et d) d'une manière qui a permis à la personne de tirer un avantage direct ou indirect. De plus, après avoir examiné le contexte et tous les facteurs ci-dessus, le juge doit conclure qu'il y a lieu dans ce cas d'imposer une responsabilité à la personne. Compte tenu de ces conditions et du pouvoir discrétionnaire exercé par le juge, nous concluons qu'une interprétation large des termes « ayant intérêt » s'impose.

IV. Dispositif

Pour les motifs qui précèdent, nous sommes d'avis de rejeter le pourvoi avec dépens en faveur des intimés.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Kugler Kandestin, Montréal.

Procureurs des intimés Lionel Wise, Ralph Wise et Harold Wise : de Grandpré Chait, Montréal.

Procureurs de l'intimée Chubb du Canada, Compagnie d'assurance : Lavery, de Billy, Montréal.

2004 SCC 68 (CanLII)

BOA COMPEER001110

In the Court of Appeal of Alberta

Citation: Repsol Canada Energy Partnership v Delphi Energy Corp, 2020 ABCA 364

Date: 20201015
Docket: 2001-0193-AC
Registry: Calgary

2020 ABCA 364 (CanLII)

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Delphi Energy Corp. and Delphi Energy (Alberta) Limited

Between:

Repsol Canada Energy Partnership and Repsol Oil & Gas Canada Inc.

Applicants

- and -

Delphi Energy Corp. and Delphi Energy (Alberta) Limited

Respondents

- and -

PricewaterhouseCoopers Inc. and Luminus Management LLC

Interested Parties

Reasons for Decision of The Honourable Madam Justice Marina Paperny

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Application for Leave to Appeal

2020 ABCA 364 (CanLII)

Reasons for Decision of
The Honourable Madam Justice Marina Paperny

2020 ABCA 364 (CanLII)

[1] The applicants, Repsol Canada Energy Partnership and Repsol Oil & Gas Inc. (collectively, Repsol), seek leave to appeal certain provisions of a Sanction Order granted by the supervising judge under the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 (*CCAA*).

[2] The Sanction Order relates to a plan of compromise and arrangement under the *CCAA* (the Plan) of the respondents, Delphi Energy (Alberta) Limited and Delphi Energy Partnership (collectively, Delphi). The background of the Plan is more thoroughly dealt with in the companion decision of *Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363, and is briefly summarized below.

[3] Delphi and Repsol are both oil and gas producers and hold certain petroleum and natural gas rights jointly. Delphi is the operator pursuant to the Joint Operating Agreement, which is governed by the CAPL operating procedure. Between December 2019 and March 2020, Delphi undertook independent operations to drill three wells on the joint lands, with respect to which Repsol elected not to participate.

[4] The combination of the collapse of oil prices and the COVID-19 pandemic led to Delphi's financial wherewithal becoming seriously imperiled. As a result, on April 14, 2020, Delphi filed for and received an order for protection pursuant to the *CCAA* (the Filing Date). Shortly thereafter, numerous builders' liens were filed against the joint lands respecting work on Delphi's independent operations completed before the Filing Date.

[5] The Plan provides for a compromise and release of all "Affected Claims" as against Delphi, and was approved by the requisite majorities on September 9, 2020. On September 10, the day before the hearing to sanction the Plan, Repsol served materials opposing paragraph 33(i) of the Sanction Order, arguing it "improperly impacts the post-filing rights of Repsol's Unaffected Claims" under the Plan. The issue was whether Repsol's potential indemnity claim against Delphi arising from the builders' liens, and under the Joint Operating Agreement and CAPL operating procedures, is a pre-filing claim for purposes of the *CCAA*. If the potential indemnity claim is a pre-filing claim as defined in s.19 of the *CCAA*, then it is an "Affected Claim" under the Plan.

[6] The supervising judge determined the indemnity claim against Delphi arising from the builders' liens was a pre-filing claim and therefore an Affected Claim.

[7] Repsol seeks leave to appeal the Sanction Order. It submits that the paragraph of the Sanction Order that extinguishes the claims of joint interest owners arising from the builders' lien claims renders useless the indemnity provisions in the CAPL operating procedures. At the very

least, the decision of the supervising judge creates uncertainty for the ability of joint interest owners to rely on the provisions in their Joint Operating Agreement.

[8] The test for leave to appeal is well known. It requires "serious and arguable grounds that are of real and significant interest to the parties", which can be assessed by considering four factors (see *Liberty Oil & Gas Ltd (Re)*, 2003 ABCA 158 at paras 15-16, 44 CBR (4th) 96; *Bellatrix Exploration Ltd v BP Canada Energy Group ULC*, 2020 ABCA 178 at para 16):

1. whether the point on appeal is of significance to the practice;
2. whether the point raised is of significance to the action itself;
3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
4. whether an appeal will unduly hinder the progress of the action.

[9] In considering whether to grant leave to appeal, appellate courts must appreciate that decisions of a supervising judge are accorded considerable deference and will be interfered with only if the judge acted unreasonably, erred in principle, or made a manifest error: *Uti Energy Corp v Fracmaster Ltd*, 1999 ABCA 178 at para 3, 244 AR 93; *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 53.

[10] The first aspect of the test for leave requires consideration of whether the issue is of importance to the practice, or in this case the industry, which here includes insolvency practitioners and those in the oil and gas business. The question raised on this appeal is important, but, as is discussed further below, whether it warrants an appeal to this court depends on the extent to which there is no binding or guiding precedent on the point at issue.

[11] The second factor concerns whether the point is significant to the action. In a *CCAA* context, the answer to this question is generally "yes", as issues raised on appeal often will have important consequences to the *CCAA* plan in question and to all stakeholders involved. In this case, whether the claim to indemnity is a pre- or post-filing claim impacts the entirety of the Plan.

[12] The third inquiry, whether the appeal is *prima facie* meritorious, is in this case directly related to the first factor. The third factor involves consideration of whether there appears to be an error in principle of law, or a palpable and overriding error of fact, or an improper exercise of discretion, for example by taking into consideration irrelevant factors or failing to consider relevant factors: *Liberty Oil &* Gas at para 19. The key point in this case is whether the issue is one of settled or unsettled law.

[13] Repsol submits that the determination of when its claim for indemnity arises ought to be guided by the terms of the indemnity agreement, and not by when a claim arises under the *Builders' Lien Act*, RSA 2000, c B-7. Repsol relies on *Dean v Kociniak*, 2001 ABQB 412 and *Condominium Plan No 95121180 v Prairie Land Corporation*, 2008 ABQB 269, decisions from the Court of Queen's Bench that deal with when a contractual claim for contribution and indemnity arises for purposes of the *Limitations Act*, RSA 2000, c L-12.

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[14] With respect, I cannot agree. Section 19(1) of the CCAA defines pre-filing claims as:

> 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).
>
> [emphasis added]

[15] Delphi submits, and I agree, that the section provides that any claim that relates to a debt or liability to which a company may become subject by reason of an obligation incurred by the company prior to the *CCAA* filing date is a pre-filing claim, regardless of when the damage was suffered or the claim itself arose. The section is clear and is directed at facilitating a plan of arrangement.

[16] In determining whether something is a pre-filing claim under the *CCAA*, regard must be had to the wording of the *CCAA* itself. Analysis of the issue in the context of the *Limitations Act* of a particular jurisdiction, while interesting, cannot provide guidance if it is directly in contradiction to what the *CCAA* provides. The specific provisions of s 19 were designed to capture claims that are broader than crystallized causes of action. Those claims include present and future liabilities to ensure that all stakeholders understand the contingent or unliquidated claims that might arise so they can determine their position on the plan and, in particular, whether the plan is fair and reasonable having regard to all the circumstances. Not the least of those circumstances is the viability of the company post-arrangement.

[17] This purposive interpretation accords with the analysis of Romaine J in *Re: SemCanada Crude Company (Celtic Exploration Ltd. #2)*, 2012 ABQB 489, leave to appeal denied 2012 ABCA 313, where she held at para 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

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> 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).

[18] As was noted by Romaine J at para 25 of *SemCanada*, a "claim" for the purpose of the *CCAA* includes any "indebtedness, liability or obligation that would be provable under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3". Section 121(1) of the BIA defines "provable claims" as "all debts and liabilities, present and future, to which the bankrupt is subject... , or to which the bankrupt may become subject... by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt..."; s 121(2) of the BIA makes clear that this includes contingent or unliquidated claims: *SemCanada* at paras 25-26.

[19] The Supreme Court of Canada has confirmed that a claim may be provable in bankruptcy even if it is a contingent claim: see *AbitibiBowater Inc., Re,* 2012 SCC 67 at para 28; *Orphan Well Association v Grant Thornton Ltd.,* 2019 SCC 5 at para 36. "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'"": *Orphan Well Association*, citing *Peters v Remington*, 2004 ABCA 5 at para 23.

[20] More recently, the Quebec Court of Appeal commented that "post-debts are only those incurred after and also resulting from an obligation originating after Determination", and that "an obligation can be contingent, unliquidated, or not exigible as at the day of Determination, but existing and able to give rise to a claim if a court decision 'deems it provable'": *Arrangement relatif à Kitco Metals Inc*, 2017 QCCA 268 at para 77-78 [unofficial English translation].

[21] In light of the plain language of s 19, and the authorities interpreting that provision and conducting a similar analysis under the *Bankruptcy and Insolvency Act*, I am not satisfied that the issue raised is sufficiently meritorious to warrant an appeal. Accordingly, the application for leave to appeal is dismissed.

Application heard on October 7, 2020

Reasons filed at Calgary, Alberta
this 15th day of October, 2020

Paperny J.A.

2020 ABCA 364 (CanLII)

Appearances:

J.W. Reid
for the Applicants

R.S. Van de Mosseler
T. Sandler
for the Respondents

J.G.A. Kruger, Q.C.
for PricewaterhouseCoopers Inc.

J.L. Oliver
J.W. Hocher
J.J. Bellissimo
for Luminus Management LLC

2020 ABCA 364 (CanLII)

Sattva Capital Corporation (formerly Sattva Capital Inc.) *Appellant*

v.

Creston Moly Corporation (formerly Georgia Ventures Inc.) *Respondent*

and

Attorney General of British Columbia and BCICAC Foundation *Interveners*

Sattva Capital Corporation (anciennement Sattva Capital Inc.) *Appelante*

c.

Creston Moly Corporation (anciennement Georgia Ventures Inc.) *Intimée*

et

Procureur général de la Colombie-Britannique et BCICAC Foundation *Intervenants*

2014 SCC 53 (CanLII)

Indexed as: Sattva Capital Corp. *v.* Creston Moly Corp.

2014 SCC 53

File No.: 35026.

2013: December 12; 2014: August 1.

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

Répertorié : Sattva Capital Corp. *c.* Creston Moly Corp.

2014 CSC 53

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1er août.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Arbitration — Appeals — Commercial arbitration awards — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price shares for payment of finder's fee and entering into arbitration — Leave to appeal arbitral award sought pursuant to s. 31(2) of the Arbitration Act — Leave to appeal denied but granted on appeal to Court of Appeal — Appeal of award dismissed but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in granting leave to appeal — What is appropriate standard of review to be applied to commercial arbitral decisions made under Arbitration Act — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31(2).

Contracts — Interpretation — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price the shares for payment of finder's fee and entering into arbitration — Whether arbitrator reasonably construed contract

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

Arbitrage — Appels — Sentences arbitrales commerciales — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation et recours à l'arbitrage — Autorisation d'appel de la sentence arbitrale demandée en application de l'art. 31(2) de l'Arbitration Act — Rejet initial de la demande d'autorisation d'appel, qui est accueillie à l'issue d'un appel devant la Cour d'appel — Rejet de l'appel interjeté de la sentence infirmé par la Cour d'appel — La Cour d'appel a-t-elle accordé à tort l'autorisation d'appel? — Quelle est la norme de contrôle applicable aux sentences arbitrales commerciales rendues sous le régime de l'Arbitration Act? — Arbitration Act, R.S.B.C. 1996, ch. 55, art. 31(2).

Contrats — Interprétation — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation

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as a whole — Whether contractual interpretation is question of law or of mixed fact and law.

S and C entered into an agreement that required C to pay S a finder's fee in relation to the acquisition of a molybdenum mining property by C. The parties agreed that under this agreement, S was entitled to a finder's fee of US$1.5 million and was entitled to be paid this fee in shares of C. However, they disagreed on which date should be used to price the shares and therefore the number of shares to which S was entitled. S argued that the share price was dictated by the date set out in the Market Price definition in the agreement and therefore that it should receive approximately 11,460,000 shares priced at $0.15. C claimed that the agreement's "maximum amount" proviso prevented S from receiving shares valued at more than US$1.5 million on the date the fee was payable, and therefore that S should receive approximately 2,454,000 shares priced at $0.70. The parties entered into arbitration pursuant to the B.C. *Arbitration Act* and the arbitrator found in favour of S. C sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *Arbitration Act*, but leave was denied on the basis that the question on appeal was not a question of law. The Court of Appeal reversed the decision and granted C's application for leave to appeal, finding that the arbitrator's failure to address the meaning of the agreement's "maximum amount" proviso raised a question of law. The superior court judge on appeal dismissed C's appeal, holding that the arbitrator's interpretation of the agreement was correct. The Court of Appeal allowed C's appeal, finding that the arbitrator reached an absurd result. S appeals the decisions of the Court of Appeal that granted leave and that allowed the appeal.

Held: The appeal should be allowed and the arbitrator's award reinstated.

Appeals from commercial arbitration decisions are narrowly circumscribed under the *Arbitration Act*. Under s. 31(1), they are limited to questions of law, and leave to appeal is required if the parties do not consent to the appeal. Section 31(2)(a) sets out the requirements for leave at issue in the present case: the court may grant leave if it determines that the result is important to the parties and

et recours à l'arbitrage — L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble? — L'interprétation contractuelle constitue-t-elle une question de droit ou une question mixte de fait et de droit?

S et C ont conclu une entente selon laquelle C devait payer à S des honoraires d'intermédiation relativement à l'acquisition d'une propriété minière de molybdène par C. Les parties reconnaissaient qu'en vertu de l'entente, S a droit à des honoraires d'intermédiation de 1,5 million $US, versés en actions de C. Cependant, elles ne s'entendaient pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que S doit recevoir. S prétendait que la valeur de l'action était dictée par la date établie dans la définition du cours prévue dans l'entente et, par conséquent, qu'elle devait recevoir environ 11 460 000 actions, à raison de 0,15 $ l'unité. C prétendait que la stipulation relative au « plafond », qui figure dans l'entente, empêchait S de recevoir des actions d'une valeur supérieure à 1,5 million $US à la date du versement des honoraires et donc que S devait obtenir environ 2 454 000 actions, à raison de 0,70 $ l'unité. Les parties ont soumis le différend à l'arbitrage conformément à l'*Arbitration Act* de la Colombie-Britannique et l'arbitre a statué en faveur de S. C a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*Arbitration Act*. La demande a été rejetée au motif que la question soulevée n'était pas une question de droit. La Cour d'appel a infirmé la décision et accueilli la demande, présentée par C, en autorisation d'interjeter appel, jugeant que l'omission par l'arbitre d'examiner la signification de la stipulation de l'entente relative au « plafond » soulevait une question de droit. Le juge de la cour supérieure saisi de l'appel a rejeté l'appel de C et conclu que l'interprétation de l'entente par l'arbitre était correcte. La Cour d'appel a accueilli l'appel de C, concluant que l'interprétation de l'arbitre menait à un résultat absurde. S interjette appel des décisions de la Cour d'appel ayant accordé l'autorisation d'appel et ayant accueilli l'appel.

Arrêt : Le pourvoi est accueilli et la sentence arbitrale est rétablie.

L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*Arbitration Act*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit, et l'autorisation d'appel est requise lorsque les parties ne consentent pas à l'appel. L'alinéa 31(2)(a) énonce les critères d'autorisation sur lesquels porte le présent litige, à savoir que le tribunal peut accorder

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the determination of the point of law may prevent a miscarriage of justice.

In the case at bar, the Court of Appeal erred in finding that the construction of the finder's fee agreement constituted a question of law. Such an exercise raises a question of mixed fact and law, and therefore, the Court of Appeal erred in granting leave to appeal.

The historical approach according to which determining the legal rights and obligations of the parties under a written contract was considered a question of law should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract.

It may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law; however, the close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. The goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. Accordingly, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Legal errors made in the course of contractual interpretation include the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. Concluding that C's application for leave to appeal raised no question of law is sufficient to dispose of this appeal; however, the Court found it salutary to continue with its analysis.

In order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a), an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

l'autorisation s'il estime que, selon le cas, l'issue est importante pour les parties et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire.

En l'espèce, la Cour d'appel a assimilé à tort l'interprétation de l'entente relative aux honoraires d'intermédiation à une question de droit. Un tel exercice soulève une question mixte de fait et de droit, et la Cour d'appel a donc commis une erreur en accueillant la demande d'autorisation d'appel.

Il faut rompre avec l'approche historique selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit ressortit à une question de droit. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel de ce dernier.

Il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit, mais le rapport étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. Le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Par conséquent, le tribunal doit faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. L'interprétation contractuelle peut occasionner des erreurs de droit, notamment appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent. Conclure que la demande d'autorisation d'appel présentée par C ne soulevait aucune question de droit suffit à trancher le présent pourvoi; toutefois, la Cour juge salutaire de poursuivre l'analyse.

Pour que l'erreur de droit reprochée soit une erreur judiciaire pour l'application de l'al. 31(2)(a), elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat. Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

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At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law by the leave court is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case. The appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit, meaning that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law.

Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the standard of review. The leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal.

The words "may grant leave" in s. 31(2) of the *Arbitration Act* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met. Discretionary factors to consider in a leave application under s. 31(2)(a) include: conduct of the parties, existence of alternative remedies, undue delay and the urgent need for a final answer. These considerations could be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria have been met. However, courts should exercise such discretion with caution.

Appellate review of commercial arbitration awards is different from judicial review of a decision of a statutory tribunal, thus the standard of review framework developed for judicial review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. As a result, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, le tribunal saisi de la demande d'autorisation doit procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier l'issue du litige. Ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable, à savoir que l'argument soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit.

L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet cette norme. Le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire à l'égard de la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel.

Les termes « peut accorder l'autorisation » figurant au par. 31(2) de l'*Arbitration Act* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés. Les facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) comprennent : la conduite des parties, l'existence d'autres recours, un retard indu et le besoin urgent d'obtenir un règlement définitif. Ces facteurs pourraient justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères légaux. Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire.

L'examen en appel des sentences arbitrales commerciales diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif, de sorte que le cadre relatif à la norme de contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Par conséquent, certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences arbitrales commerciales.

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In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise. The question at issue here does not fall into one of those categories and thus the standard of review in this case is reasonableness.

In the present case, the arbitrator reasonably construed the contract as a whole in determining that S is entitled to be paid its finder's fee in shares priced at $0.15. The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both that definition and the "maximum amount" proviso and reconciles them in a manner that cannot be said to be unreasonable. The arbitrator's reasoning meets the reasonableness threshold of justifiability, transparency and intelligibility.

A court considering whether leave should be granted is not adjudicating the merits of the case. It decides only whether the matter warrants granting leave, not whether the appeal will be successful, even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. For this reason, comments by a leave court regarding the merits cannot bind or limit the powers of the court hearing the actual appeal.

Cases Cited

Referred to: *British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122; *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945; *Prenn v. Simmonds*, [1971] 3 All E.R. 237; *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570; *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII); *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221; *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78; *WCI Waste Conversion Inc. v. ADI International Inc.*,

En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou les questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur. La question dont nous sommes saisis n'appartient pas à l'une ou l'autre de ces catégories; la norme de la décision raisonnable s'applique donc à la présente affaire.

En l'espèce, l'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble en déterminant que S était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 $ l'action. La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond » en les conciliant d'une manière qui ne peut être considérée comme déraisonnable. Le raisonnement de l'arbitre satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité.

Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond. Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli, même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. C'est pourquoi les remarques sur le bien-fondé de l'affaire formulées par le tribunal saisi de la demande d'autorisation ne sauraient lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs.

Jurisprudence

Arrêts mentionnés : *British Columbia Institute of Technology (Student Assn.) c. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122; *King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Thorner c. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945; *Prenn c. Simmonds*, [1971] 3 All E.R. 237; *Reardon Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570; *Jiro Enterprises Ltd. c. Spencer*, 2008 ABCA 87 (CanLII); *QK Investments Inc. c. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84; *Dow Chemical Canada Inc. c. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221; *Canada c. Costco Wholesale Canada Ltd.*, 2012 CAF 160 (CanLII); *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309

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2011 PECA 14, 309 Nfld. & P.E.I.R. 1; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300; *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98; *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63; *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262; *R. v. Fedossenko*, 2013 ABCA 164 (CanLII); *Enns v. Hansey*, 2013 MBCA 23 (CanLII); *R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174; *R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Homex Realty and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, leave to appeal refused, [2013] 3 S.C.R. viii; *Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566.

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, ss. 58, 59.
Arbitration Act, R.S.B.C. 1996, c. 55 [formerly *Commercial Arbitration Act*], s. 31.
Civil Code of Québec.

Nfld. & P.E.I.R. 1; *269893 Alberta Ltd. c. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Bell Canada c. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Jesuit Fathers of Upper Canada c. Cie d'assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744; *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69; *Moore Realty Inc. c. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300; *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98; *Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Eli Lilly & Co. c. Novopharm Ltd.*, [1998] 2 R.C.S. 129; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *Gutierrez c. Tropic International Ltd.* (2002), 63 O.R. (3d) 63; *Domtar Inc. c. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257; *Quan c. Cusson*, 2009 CSC 62, [2009] 3 R.C.S. 712; *Quick Auto Lease Inc. c. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262; *R. c. Fedossenko*, 2013 ABCA 164 (CanLII); *Enns c. Hansey*, 2013 MBCA 23 (CanLII); *R. c. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174; *R. c. Will*, 2013 SKCA 4, 405 Sask. R. 270; *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708; *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326; *Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010] 1 R.C.S. 6; *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *Homex Realty and Development Co. c. Corporation of the Village of Wyoming*, [1980] 2 R.C.S. 1011; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Pacifica Mortgage Investment Corp. c. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, autorisation d'appel refusée, [2013] 3 R.C.S. viii; *Tamil Co-operative Homes Inc. c. Arulappah* (2000), 49 O.R. (3d) 566.

Lois et règlements cités

Administrative Tribunals Act, S.B.C. 2004, ch. 45, art. 58, 59.
Arbitration Act, R.S.B.C. 1996, ch. 55 [auparavant *Commercial Arbitration Act*], art. 31.
Code civil du Québec.

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Authors Cited

Brown, Donald J. M., and John M. Evans, with the assistance of Christine E. Deacon. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf updated May 2014, release 1).

Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart, 1997, 279.

Hall, Geoff R. *Canadian Contractual Interpretation Law*, 2nd ed. Markham, Ont.: LexisNexis, 2012.

Lewison, Kim. *The Interpretation of Contracts*, 5th ed. London: Sweet & Maxwell, 2011 & Supp. 2013.

McCamus, John D. *The Law of Contracts*, 2nd ed. Toronto: Irwin Law, 2012.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Low and Levine JJ.A.), 2010 BCCA 239, 7 B.C.L.R. (5th) 227, 319 D.L.R. (4th) 219, [2010] B.C.J. No. 891 (QL), 2010 CarswellBC 1210, setting aside a decision of Greyell J., 2009 BCSC 1079, [2009] B.C.J. No. 1597 (QL), 2009 CarswellBC 2096, and from a subsequent judgment of the British Columbia Court of Appeal (Kirkpatrick, Neilson and Bennett JJ.A.), 2012 BCCA 329, 36 B.C.L.R. (5th) 71, 326 B.C.A.C. 114, 554 W.A.C. 114, 2 B.L.R. (5th) 1, [2012] B.C.J. No. 1631 (QL), 2012 CarswellBC 2327, setting aside a decision of Armstrong J., 2011 BCSC 597, 84 B.L.R. (4th) 102, [2011] B.C.J. No. 861 (QL), 2011 CarswellBC 1124. Appeal allowed.

Michael A. Feder and *Tammy Shoranick*, for the appellant.

Darrell W. Roberts, *Q.C.*, and *David Mitchell*, for the respondent.

Jonathan Eades and *Micah Weintraub*, for the intervener the Attorney General of British Columbia.

David Wotherspoon and *Gavin R. Cameron*, for the intervener the BCICAC Foundation.

Doctrine et autres documents cités

Brown, Donald J. M., and John M. Evans, with the assistance of Christine E. Deacon. *Judicial Review of Administrative Action in Canada*. Toronto : Canvasback, 1998 (loose-leaf updated May 2014, release 1).

Dyzenhaus, David. « The Politics of Deference : Judicial Review and Democracy », in Michael Taggart, ed., *The Province of Administrative Law*. Oxford : Hart, 1997, 279.

Hall, Geoff R. *Canadian Contractual Interpretation Law*, 2nd ed. Markham, Ont. : LexisNexis, 2012.

Lewison, Kim. *The Interpretation of Contracts*, 5th ed. London : Sweet & Maxwell, 2011 & Supp. 2013.

McCamus, John D. *The Law of Contracts*, 2nd ed. Toronto : Irwin Law, 2012.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Low et Levine), 2010 BCCA 239, 7 B.C.L.R. (5th) 227, 319 D.L.R. (4th) 219, [2010] B.C.J. No. 891 (QL), 2010 CarswellBC 1210, qui a infirmé une décision du juge Greyell, 2009 BCSC 1079, [2009] B.C.J. No. 1597 (QL), 2009 CarswellBC 2096, et contre un arrêt subséquent de la Cour d'appel de la Colombie-Britannique (les juges Kirkpatrick, Neilson et Bennett), 2012 BCCA 329, 36 B.C.L.R. (5th) 71, 326 B.C.A.C. 114, 554 W.A.C. 114, 2 B.L.R. (5th) 1, [2012] B.C.J. No. 1631 (QL), 2012 CarswellBC 2327, qui a infirmé une décision du juge Armstrong, 2011 BCSC 597, 84 B.L.R. (4th) 102, [2011] B.C.J. No. 861 (QL), 2011 CarswellBC 1124. Pourvoi accueilli.

Michael A. Feder et *Tammy Shoranick*, pour l'appelante.

Darrell W. Roberts, *c.r.*, et *David Mitchell*, pour l'intimée.

Jonathan Eades et *Micah Weintraub*, pour l'intervenant le procureur général de la Colombie-Britannique.

David Wotherspoon et *Gavin R. Cameron*, pour l'intervenante BCICAC Foundation.

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APPENDIX I

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APPENDIX II

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

APPENDIX III

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

The judgment of the Court was delivered by

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

I. Facts

[2] The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital

E. *La formation saisie de l'appel n'est pas liée par les observations formulées par la formation saisie de la demande d'autorisation sur le bien-fondé de l'appel*.....120

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ANNEXE I

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ANNEXE II

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ANNEXE III

Commercial Arbitration Act, R.S.B.C. 1996, ch. 55 (dans sa version du 12 janvier 2007) (maintenant l'*Arbitration Act*)

Version française du jugement de la Cour rendu par

[1] Le juge Rothstein — Dans quelles circonstances l'interprétation contractuelle est-elle une question mixte de fait et de droit et dans quelles circonstances est-elle une question de droit? Comment établir l'équilibre entre le caractère révisable et l'irrévocabilité des sentences arbitrales commerciales prononcées sous le régime de la *Commercial Arbitration Act*, R.S.B.C. 1996, ch. 55 (maintenant l'*Arbitration Act*, ci-après l'« *AA* »)? Les conclusions relatives au bien-fondé de l'appel tirées par le tribunal qui autorise l'appel peuvent-elles lier celui qui est appelé à trancher l'appel? Voilà trois questions qui sont soulevées dans le présent pourvoi.

I. Faits

[2] Les questions soulevées dans le présent pourvoi découlent de l'obligation de Creston Moly Corporation (anciennement Georgia Ventures Inc.) de

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

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

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

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

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

payer des honoraires d'intermédiation à Sattva Capital Corporation (anciennement Sattva Capital Inc.). Les parties reconnaissent que Sattva a droit à des honoraires d'intermédiation de 1,5 million $US, qui peuvent lui être versés en argent, en actions de Creston, ou en argent et en actions. Elles ne s'entendent pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que Sattva recevra.

[3] M. Hai Van Le, un directeur de Sattva, a fait part à Creston de la possibilité d'acquérir une propriété minière de molybdène au Mexique. Le 12 janvier 2007, les parties ont conclu une entente (l'« entente »), selon laquelle Creston devait payer à Sattva des honoraires d'intermédiation relativement à l'acquisition de cette propriété. Les dispositions pertinentes de l'entente sont énoncées à l'annexe I.

[4] Le 30 janvier 2007, Creston a conclu une convention d'achat de la propriété, le prix étant fixé à 30 millions $US. Le 31 janvier 2007, Creston a demandé que la négociation de ses actions à la Bourse de croissance TSX (la « Bourse ») soit suspendue afin d'empêcher la spéculation le temps d'achever le contrôle diligent préalable à l'achat. Le 26 mars 2007, Creston a annoncé qu'elle avait l'intention de conclure l'achat, et la négociation à la bourse a repris le lendemain.

[5] Aux termes de l'entente, Sattva doit recevoir des honoraires d'intermédiation correspondant au plafond autorisé par le point 3.3 de la politique 5.1 qui se trouve dans le Guide du financement des sociétés de la Bourse. Le point 3.3 est incorporé par renvoi à l'entente, à l'art. 3.1, et il est reproduit à l'annexe II des présents motifs. Dans le cas qui nous occupe, le plafond autorisé au point 3.3 de la politique 5.1 est de 1,5 million $US.

[6] Aux termes de l'entente, à moins d'indication contraire, les honoraires sont payés sous forme d'actions de Creston. Ils ne seraient versés en argent ou en argent et en actions que si Sattva avait indiqué avoir fait tel choix, ce qu'elle n'a pas fait. Ses honoraires devaient donc lui être versés sous forme d'actions au plus tard cinq jours ouvrables après la conclusion de l'achat de la propriété minière de molybdène.

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

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

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

[10] The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC

[7] Le différend qui oppose les parties porte sur la date à retenir pour fixer le cours de l'action de Creston et, par conséquent, le nombre d'actions auquel Sattva a droit. Cette dernière prétend que la valeur de l'action est dictée par la définition du « cours », à l'art. 2 de l'entente, c.-à-d. la valeur de l'action [TRADUCTION] « le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition ». Le communiqué de presse a été publié le 26 mars 2007. Avant la suspension de la négociation des actions le 31 janvier 2007, le dernier cours de clôture de l'action de Creston s'établissait à 0,15 $. Suivant cette interprétation, Sattva recevrait environ 11 460 000 actions (selon le calcul effectué en fonction des honoraires d'intermédiation de 1,5 million $US).

[8] Creston prétend que la stipulation relative au « plafond », qui figure dans l'entente, a pour effet de limiter à 1,5 million $US la somme d'argent ou la valeur des actions que peut recevoir Sattva à la date de versement des honoraires. Les actions devaient être cédées au plus tard cinq jours après le 17 mai 2007, date de conclusion de l'achat. À ce moment-là, l'action de Creston valait 0,70 $, selon les calculs effectués par une société bancaire d'investissement en vue d'un placement privé par voie de prise ferme le 17 avril 2007. Suivant cette interprétation, Sattva recevrait environ 2 454 000 actions, soit environ 9 millions d'actions de moins que si chacune valait 0,15 $.

[9] Les parties ont soumis le différend à l'arbitrage conformément à l'*AA*. L'arbitre a statué en faveur de Sattva. Creston a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*AA*. La Cour suprême de la Colombie-Britannique a refusé l'autorisation (2009 BCSC 1079 (CanLII) (« formation de la CS saisie de la demande d'autorisation »)). Creston a appelé de cette décision et obtenu l'autorisation de la Cour d'appel de la Colombie-Britannique d'interjeter appel de la sentence arbitrale (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (« formation de la CA saisie de la demande d'autorisation »)).

[10] Le juge de la Cour suprême de la Colombie-Britannique chargé de statuer sur le bien-fondé de

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

II. Arbitral Award

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

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

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

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

[14] As previously noted, by default, the finder's fee would be paid in shares unless Sattva made an election otherwise. The arbitrator found that

l'appel (2011 BCSC 597, 84 B.L.R. (4th) 102 (« formation de la CS saisie de l'appel ») a confirmé la sentence arbitrale. Creston a interjeté appel de cette décision devant la Cour d'appel de la Colombie-Britannique (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (« formation de la CA saisie de l'appel »)), laquelle a infirmé la décision de la formation de la CS saisie de l'appel et a donné gain de cause à Creston. Sattva interjette appel des décisions des deux formations de la CA, soit celle saisie de la demande d'autorisation et celle saisie de l'appel, devant la Cour.

II. Sentence arbitrale

[11] L'arbitre, Leon Getz, c.r., a donné gain de cause à Sattva, concluant qu'elle était en droit de recevoir des honoraires d'intermédiation de 1,5 million $US en actions, à raison de 0,15 $ l'action.

[12] L'arbitre a fondé sa décision sur la définition du « cours » figurant dans l'entente :

> [TRADUCTION] Qu'était donc le « cours » au sens de l'entente? Le communiqué de presse pertinent est celui qui a été publié le 26 mars [. . .] Il n'y avait pas de cours de clôture le 25 mars (la négociation des actions était suspendue à cette date). Par conséquent, le « dernier cours de clôture », au sens où cette expression est employée dans la définition, était de 0,15 $, soit le cours de clôture des actions de [Creston] le 30 janvier, le jour précédant la suspension des opérations « jusqu'à nouvel ordre » [. . .] Cette conclusion ne nécessite aucune extension de sens des mots employés dans la définition qui figure au contrat. Au contraire, elle concorde littéralement avec la définition. [par. 22]

[13] L'entente et les honoraires d'intermédiation devaient être approuvés par la Bourse. Creston était chargée d'obtenir cette approbation. L'arbitre a conclu qu'il était implicitement ou expressément prévu dans l'entente que Creston ferait de son mieux pour obtenir l'approbation de la Bourse. Selon lui, Creston n'avait pas fait de son mieux pour y arriver.

[14] Comme nous l'avons expliqué, les honoraires d'intermédiation se payaient en actions à moins d'avis contraire de la part de Sattva. L'arbitre a

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

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

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

[17] The arbitrator found that Sattva could have sold its Creston shares after a four-month holding period at between $0.40 and $0.44 per share, netting proceeds of between $4,583,914 and $5,156,934.

conclu que Sattva n'avait pas manifesté de choix. Malgré cela, Creston a déclaré à la Bourse que les honoraires d'intermédiation seraient versés en argent. La Bourse a donc approuvé conditionnellement le versement d'une somme de 1,5 million $US en argent. Sattva a appris qu'un versement en argent de ses honoraires avait été approuvé au début du mois de juin 2007. Quand Sattva a abordé ce point avec Creston, cette dernière a répondu que Sattva avait le choix de percevoir ses honoraires en argent ou en actions, à raison de 0,70 $ l'action.

[15] Sattva a soutenu qu'elle avait droit au versement des honoraires d'intermédiation en actions, à raison de 0,15 $ l'action. Creston a demandé à ses avocats de communiquer avec la Bourse afin qu'elle indique la valeur minimale de l'action qu'elle approuverait pour le versement des honoraires d'intermédiation. La Bourse a confirmé, par téléphone le 7 juin 2007 et par courriel le 9 août de la même année, qu'un cours minimal de 0,70 $ l'action s'appliquait aux fins du calcul des honoraires d'intermédiation. Selon l'arbitre, Creston [TRADUCTION] « a constamment fait des déclarations inexactes quant à l'obligation qu'elle avait contractée envers Sattva ou, à tout le moins, omis d'en divulguer complètement la nature » (par. 56(k)) et qu'« à moins que Sattva n'en décide autrement, elle a le droit aux termes de l'entente de percevoir ces honoraires sous forme d'actions, à raison de 0,15 $ l'action » (par. 56(g)). Selon l'arbitre, la position de Sattva a été véritablement présentée à la Bourse pour la première fois dans la lettre de l'avocat de celle-ci datée du 9 octobre 2007.

[16] L'arbitre était d'avis que si Creston avait fait de son mieux, la Bourse aurait pu approuver le versement des honoraires d'intermédiation sous forme d'actions, à 0,15 $ l'action, et qu'une telle décision aurait été conforme à ses politiques. Il a affirmé que [TRADUCTION] « [la Bourse] aurait fort probablement donné son approbation » (par. 81) et il a évalué cette probabilité à 85 p. 100.

[17] Selon l'arbitre, Sattva aurait pu vendre ses actions de Creston après quatre mois à un prix variant entre 0,40 et 0,44 $ l'unité, ce qui aurait représenté un produit net situé dans une fourchette de

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The arbitrator took the average of those two amounts, which came to $4,870,424, and then assessed damages at 85 percent of that number, which came to $4,139,860, and rounded it to $4,140,000 plus costs.

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

III. Judicial History

A. *British Columbia Supreme Court — Leave to Appeal Decision, 2009 BCSC 1079*

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

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

4 583 914 $ à 5 156 934 $. Établissant la moyenne de ces deux sommes d'argent à 4 870 424 $, l'arbitre a ensuite évalué les dommages-intérêts à 85 p. 100 de ce nombre, soit 4 139 860 $, qu'il a ensuite arrondis à la hausse, pour obtenir 4 140 000 $, plus les dépens.

[18] Après le prononcé de cette sentence arbitrale, Creston a versé 1,5 million $US (ou l'équivalent en dollars canadiens) à Sattva. Le solde des dommages-intérêts accordés par l'arbitre a été placé dans le compte en fiducie des avocats de Sattva.

III. Historique judiciaire

A. *Cour suprême de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2009 BCSC 1079*

[19] La Cour suprême de la Colombie-Britannique a rejeté la demande d'autorisation d'appel parce qu'elle était d'avis que la question soulevée n'était pas une question de droit, un critère prévu à l'art. 31 de l'*AA*. Selon le juge, il s'agissait d'une question mixte de fait et de droit puisque l'arbitre avait appuyé sa conclusion sur le [TRADUCTION] « fondement factuel ». Plus précisément, pour déterminer sous quelle forme les honoraires d'intermédiation devaient être versés, il fallait examiner « les politiques de la TSX se rapportant au plafond applicable aux honoraires d'intermédiation, ainsi que les pouvoirs discrétionnaires dont dispose la Bourse pour déterminer le montant des honoraires » (par. 35).

[20] Le juge a conclu que, même s'il avait été d'avis que le litige soulevait une question de droit, il aurait exercé son pouvoir discrétionnaire pour refuser l'autorisation d'appel en raison des déclarations inexactes faites par Creston à propos des honoraires d'intermédiation à la Bourse et à Sattva, et par égard pour le [TRADUCTION] « principe selon lequel l'[*AA*] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41).

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B. *British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239*

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

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

C. *British Columbia Supreme Court — Appeal Decision, 2011 BCSC 597*

[23] Armstrong J. reviewed the arbitrator's decision on a correctness standard. He dismissed the

B. *Cour d'appel de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2010 BCCA 239*

[21] La Cour d'appel a infirmé la décision de la Cour suprême et a accueilli la demande, présentée par Creston, en autorisation d'interjeter appel de la sentence arbitrale. Selon elle, la Cour suprême avait [TRADUCTION] « commis une erreur en ne reconnaissant pas que l'omission par l'arbitre d'examiner la signification de l'art. 3.1 de l'entente (et plus particulièrement de la stipulation relative au "plafond") soulevait une question de droit » (par. 23). La Cour d'appel a conclu que l'interprétation de l'art. 3.1 de l'entente, et plus particulièrement de la stipulation relative au « plafond », constituait une question de droit parce qu'elle ne reposait pas sur les faits de l'affaire, à savoir les renseignements communiqués à la Bourse et la décision de cette dernière.

[22] La Cour d'appel a reconnu que Creston s'était montrée [TRADUCTION] « moins que franche dans ses démarches auprès de M. Le et de [la Bourse] », mais a déclaré que « ces faits n'intéressent pas directement la question de droit qu'elle soulève en appel » (par. 27). Au sujet de la remarque sur la préservation de l'intégrité du système d'arbitrage formulée par la formation de la CS saisie de la demande d'autorisation d'appel, la formation de la CA saisie de la demande d'autorisation a dit que les parties, quand elles ont choisi de soumettre leur différend à l'arbitrage en vertu de l'*AA*, savaient que l'appel d'une question de droit était possible. De plus, bien que l'irrévocabilité de la sentence arbitrale constitue un facteur important dans l'exercice du pouvoir discrétionnaire, lorsqu'« une question de droit importante est soulevée et qu'il y a risque d'erreur judiciaire en cas d'impossibilité d'interjeter appel, l'intégrité du processus exige, du moins dans les circonstances de l'espèce, que le droit d'appel conféré par la loi soit respecté » (par. 29).

C. *Cour suprême de la Colombie-Britannique — décision sur l'appel, 2011 BCSC 597*

[23] Le juge Armstrong a contrôlé la sentence arbitrale selon la norme de la décision correcte. Il

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appeal, holding the arbitrator's interpretation of the Agreement was correct.

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

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

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

[27] In response to Creston's argument that the arbitrator did not consider s. 3.1 of the Agreement

a rejeté l'appel et conclu que l'interprétation de l'entente proposée par l'arbitre était correcte.

[24] Le juge Armstrong estimait que, selon le sens ordinaire de l'entente, les honoraires de 1,5 million $US devaient être versés en actions, à raison de 0,15 $ l'unité. Il n'estimait pas une telle interprétation absurde du simple fait que le cours de l'action à la date du versement des honoraires était supérieur à celui déterminé suivant la définition du cours. Selon lui, avec le temps, la fluctuation des cours est inévitable, et dès lors qu'elles ont prévu la possibilité du versement des honoraires en actions, les parties, des entreprises averties, devaient raisonnablement s'attendre à la fluctuation du marché. De l'avis du juge Armstrong, c'est d'ailleurs à cause de cette fluctuation qu'il faut indiquer une date précise qui servira à déterminer la valeur de l'action avant le versement. Il est arrivé à la conclusion que pour ce faire, le « cours » était défini dans l'entente et que le montant des honoraires demeurait 1,5 million $US, à payer sous forme d'actions à raison de 0,15 $ l'unité, cette valeur étant établie suivant la définition du cours, sans égard à la valeur de l'action à la date du versement des honoraires.

[25] Selon le juge Armstrong, il était prévisible que le cours de l'action à la date du versement soit supérieur à celui établi conformément à la définition du cours et il s'agissait là d'une [TRADUCTION] « conséquence naturelle de l'entente relative aux honoraires d'intermédiation » (par. 62). Il était d'avis que le risque était assumé par Sattva, puisque le prix de l'action pouvait certes augmenter, mais il pouvait aussi diminuer, de sorte que Sattva aurait alors reçu un portefeuille d'actions d'une valeur inférieure au montant des honoraires (1,5 million $US) qui avait été convenu.

[26] Le juge Armstrong était d'avis que l'interprétation de l'arbitre, laquelle donnait effet à la définition du cours et à la stipulation relative au « plafond », était préférable à celle de Creston, qui faisait fi de la définition du cours.

[27] En réponse à l'argument de Creston selon lequel l'arbitre n'avait pas examiné l'art. 3.1 de

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which contains the "maximum amount" proviso, Armstrong J. noted that the arbitrator explicitly addressed the "maximum amount" proviso at para. 23 of his decision.

D. *British Columbia Court of Appeal — Appeal Decision, 2012 BCCA 329*

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

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

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

IV. Issues

[31] The following issues arise in this appeal:

l'entente, qui contient la stipulation relative au « plafond », le juge Armstrong a souligné que l'arbitre avait fait expressément référence à cette stipulation au par. 23 de la sentence arbitrale.

D. *Cour d'appel de la Colombie-Britannique — décision sur l'appel, 2012 BCCA 329*

[28] La Cour d'appel a accueilli l'appel de Creston et a statué que la somme de 1,5 million $US versée par Creston en faveur de Sattva en exécution de la sentence arbitrale constituait le paiement intégral des honoraires d'intermédiation. La cour a contrôlé la sentence arbitrale suivant la norme de la décision correcte.

[29] La formation de la CA saisie de l'appel s'estimait liée, de même que la Cour suprême, par deux conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir : 1º il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million $US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions $ et 2º l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente.

[30] Selon la Cour d'appel, conclure que Sattva avait droit à des honoraires d'intermédiation de 8 millions $ menait à un résultat absurde, étant donné la stipulation de l'entente relative au « plafond », qui limite le montant de tels honoraires à 1,5 million $US. La cour était d'avis qu'il faudrait donner l'effet prépondérant à cette stipulation qui limite à 1,5 million $US les honoraires [TRADUCTION] « à la date de leur versement » (par. 47). Elle était d'avis que donner effet à la définition du cours ne saurait avoir été l'intention des parties, et ce n'était pas non plus une décision sensée sur le plan commercial.

IV. Questions en litige

[31] Les questions suivantes sont soulevées dans le présent pourvoi :

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

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

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

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

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

V. Analysis

A. *The Leave Issue Is Properly Before This Court*

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

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

a) La Cour a-t-elle été saisie à bon droit de la question de savoir si la Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'*AA*?

b) La Cour d'appel a-t-elle commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'*AA*?

c) Si l'autorisation a été accordée à bon droit, quelle norme de contrôle convient-il d'appliquer aux sentences arbitrales commerciales rendues sous le régime de l'*AA*?

d) L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble?

e) La Cour d'appel a-t-elle commis une erreur en s'estimant liée par les remarques formulées par la formation de la CA saisie de la demande d'autorisation au sujet du bien-fondé de l'appel?

V. Analyse

A. *Notre Cour est saisie à bon droit de la question de l'autorisation*

[32] Sattva prétend notamment que la Cour d'appel a commis une erreur en accordant l'autorisation d'interjeter appel de la sentence arbitrale. Selon elle, la Cour d'appel n'a cerné aucune question de droit, alors que l'autorisation est subordonnée à l'existence d'une telle question, aux termes du par. 31(2) de l'*AA*. Creston soutient que la Cour n'est pas saisie à bon droit de cette question et avance deux arguments à l'appui de sa position.

[33] Premièrement, Creston fait valoir que cette question n'était pas soulevée dans la demande d'autorisation d'appel que Sattva a présentée à la Cour. Cet argument ne saurait tenir. À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale ». Par conséquent, l'appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation. La Cour peut toutefois exercer son pouvoir discrétionnaire et refuser de trancher une question qui n'a pas été abordée par les tribunaux d'instance inférieure, s'il en résulte un préjudice pour l'intimé, ou si, pour toute autre raison, elle juge opportun de ne pas la trancher.

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

[35] Second, Creston argues that the issue of whether the CA Leave Court identified a question of law is not properly before this Court because Sattva did not contest this decision before all of the lower courts. Specifically, Creston states that Sattva did not argue that the question on appeal was one of mixed fact and law before the SC Appeal Court and that it conceded the issue on appeal was a question of law before the CA Appeal Court. This argument must also fail. At the SC Appeal Court, it was not open to Sattva to reargue the question of whether leave should have been granted. The SC Appeal Court was bound by the CA Leave Court's finding that leave should have been granted, including the determination that a question of law had been identified. Accordingly, Sattva could hardly be expected to reargue before the SC Appeal Court a question that had been determined by the CA Leave Court. There is nothing in the *AA* to indicate that Sattva could have appealed the leave decision made by a panel of the Court of Appeal to another panel of the same court. The fact that Sattva did not reargue the issue before the SC Appeal Court or CA Appeal Court does not prevent it from raising the issue before this Court, particularly since Sattva was also granted leave to appeal the CA Leave Court decision by this Court.

[34] En l'espèce, l'ordonnance accordant l'autorisation d'interjeter appel des deux décisions de la Cour d'appel, sur la demande d'autorisation d'appel et sur l'appel, ne comportait aucune restriction (2013 CanLII 11315). La question — à savoir si l'appel proposé soulevait une question de droit — a été expressément débattue devant les formations de la CS et de la CA saisies de la demande d'autorisation, qui l'ont tranchée. Rien n'empêche Sattva de soulever cette question en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour.

[35] Deuxièmement, Creston soutient que la Cour n'a pas été saisie à bon droit de la question de savoir si la formation de la CA saisie de la demande d'autorisation a cerné une question de droit parce que Sattva n'a pas contesté la décision rendue à ce sujet devant tous les tribunaux d'instance inférieure. Plus précisément, aux dires de Creston, Sattva n'aurait pas fait valoir devant la formation de la CS saisie de l'appel que l'appel soulevait une question mixte de fait et de droit et aurait reconnu devant la Cour d'appel que l'appel soulevait une question de droit. Un tel argument ne tient pas. Devant la formation de la CS saisie de l'appel, il n'était pas possible pour Sattva de débattre à nouveau de la question de savoir si l'autorisation aurait dû être accordée. La formation de la CS saisie de l'appel était liée par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir que l'autorisation était opportune et qu'une question de droit avait été cernée. Ainsi, Sattva ne pouvait guère plaider devant la formation de la CS saisie de l'appel un point sur lequel la formation de la CA saisie de la demande d'autorisation s'était déjà prononcée. Rien dans l'*AA* n'habilite Sattva à interjeter appel de la décision sur la demande d'autorisation d'appel rendue par une formation de la Cour d'appel à une autre formation de la même cour. Ce n'est pas parce que Sattva n'a pas plaidé à nouveau le point devant la formation de la CS saisie de l'appel ou devant la formation de la CA saisie de l'appel qu'elle ne peut le soulever devant notre Cour, tout particulièrement étant donné que Sattva a obtenu de notre Cour l'autorisation d'appeler de la décision rendue par la formation de la CA saisie de la demande d'autorisation.

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

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

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

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

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

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

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

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

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

[36] Ainsi, la Cour peut certes refuser l'autorisation si la question que l'on cherche à soulever devant elle n'a pas été plaidée devant les tribunaux d'instance inférieure, mais ce n'est pas le cas en l'espèce. En l'occurrence, les arguments sur le fondement de la demande d'autorisation d'appel de la sentence arbitrale présentée par Creston — à savoir si elle soulevait une question de droit ou une question mixte de fait et de droit — avaient été plaidés devant les formations saisies des demandes d'autorisation.

[37] Par conséquent, la Cour est saisie à bon droit de la question de savoir si la formation de la CA qui a accueilli la demande d'autorisation a conclu à tort que l'appel soulevait une question de droit.

B. *La Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'AA*

(1) Facteurs qui entrent en ligne de compte dans l'analyse de la demande d'autorisation d'appel présentée au titre de l'*AA*

[38] L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*AA*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit dans le cas où les parties consentent à l'appel ou, en l'absence de consentement, dans les cas où l'autorisation d'appel est accordée. Le paragraphe 31(2) de l'*AA*, reproduit intégralement à l'annexe III, énonce les critères d'autorisation :

[TRADUCTION]

(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :

(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,

(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,

(c) la question de droit est d'importance publique.

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

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

(2) The Result Is Important to the Parties

[41] In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether

[39] De l'avis des tribunaux de la C.-B., l'expression [TRADUCTION] « peut accorder l'autorisation » qui figure au par. 31(2) de l'*AA* confère au tribunal un pouvoir discrétionnaire qui l'habilite à refuser l'autorisation même lorsque les critères légaux sont respectés (*British Columbia Institute of Technology (Student Assn.) c. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (« *BCIT* »), par. 25-26). L'appel d'une sentence arbitrale n'est donc entendu que si les critères du par. 31(2) sont remplis et que le tribunal saisi de la demande d'autorisation ne refuse pas néanmoins l'autorisation en vertu de son pouvoir discrétionnaire résiduel.

[40] Bien que Creston ait présenté une demande d'autorisation à la Cour suprême sur le fondement des al. 31(2)(a), (b) et (c), il semble que les arguments invoqués devant elle et au cours des autres instances portaient sur l'al. 31(2)(a). La décision de la Cour suprême sur la demande d'autorisation reprend un long passage tiré de l'affaire *BCIT* axé sur les éléments de l'al. 31(2)(a). La Cour suprême y souligne que les deux parties reconnaissent qu'il est satisfait au premier élément de l'al. 31(2)(a), c'est-à-dire que la question est importante pour les parties. Dans sa décision sur la demande d'autorisation d'appel, la Cour d'appel a dit craindre que refuser l'autorisation ne donne lieu à une erreur judiciaire — un critère prévu seulement à l'al. 31(2)(a). Enfin, ni les décisions sur les demandes d'autorisation des tribunaux d'instance inférieure ni les arguments soulevés devant notre Cour ne traitent des autres critères, à savoir que la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie (al. 31(2)(b)) ou est d'importance publique (al. 31(2)(c)). Par conséquent, l'analyse qui suit porte principalement sur l'al. 31(2)(a).

(2) L'issue est importante pour les parties

[41] L'autorisation d'interjeter appel d'une sentence arbitrale commerciale est subordonnée au respect d'un critère minimal : l'appel doit porter sur une question de droit. Toutefois, avant d'aborder ce sujet, il convient d'examiner sommairement un autre élément requis par l'al. 31(2)(a) et sur lequel

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the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be "sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

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

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

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

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

s'entendent les parties, à savoir que l'importance de l'issue de l'arbitrage pour les parties doit justifier l'intervention du tribunal. Selon l'explication donnée par la juge Saunders de ce critère dans *BCIT*, il faut que l'issue de l'arbitrage soit [TRADUCTION] « suffisamment importante » aux yeux des parties, pour le principe ou les sommes d'argent en jeu, pour justifier le coût et la longueur d'une instance (par. 27). Les parties en l'espèce ont convenu que l'issue de l'arbitrage revêt de l'importance pour chacune. Étant donné la somme relativement considérable en litige et compte tenu du fait que les parties s'entendent pour dire que l'issue est importante pour elles, je conviens que l'importance de l'issue de l'arbitrage pour les parties justifie l'intervention du tribunal. Cette condition prévue à l'al. 31(2)(a) est remplie.

(3) La question soulevée n'est pas une question de droit

a) *Dans quelles circonstances l'interprétation contractuelle est-elle une question de droit?*

[42] Aux termes de l'art. 31 de l'*AA*, la demande d'autorisation d'appel doit porter sur une question de droit. Pour déterminer la norme de contrôle applicable ou, comme c'est le cas en l'espèce, pour déterminer si les critères d'autorisation sont respectés, le tribunal siégeant en révision est régulièrement appelé à décider si une question tranchée en première instance est une question de droit, une question de fait ou une question mixte de fait et de droit.

[43] Autrefois, la détermination des droits et obligations juridiques des parties à un contrat écrit ressortissait à une question de droit (*King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, par. 20, la juge Steel; K. Lewison, *The Interpretation of Contracts* (5e éd. 2011 et suppl. 2013), p. 173-176; G. R. Hall, *Canadian Contractual Interpretation Law* (2e éd. 2012), p. 125-126). Cette règle a pris naissance en Angleterre, à une époque où les procès civils devant jury étaient fréquents et l'analphabétisme courant. Dans de telles circonstances, l'interprétation des documents écrits devait être assimilée à une question de droit parce que le juge était le seul dont on

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assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

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

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

[46] The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract

pouvait être certain qu'il savait lire et écrire et, par conséquent, qu'il était en mesure de prendre connaissance du contrat (Hall, p. 126; Lewison, p. 173-174).

[44] Cette justification historique ne s'applique plus. Néanmoins, pour les tribunaux du Royaume-Uni, l'interprétation d'un contrat écrit ressortit toujours à une question de droit (*Thorner c. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, par. 58 et 82-83; Lewison, p. 173-177), et ce, même s'ils tiennent compte des circonstances — un concept que nous aborderons — dans l'interprétation du contrat écrit (*Prenn c. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Reardon Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] Au Canada, l'approche historique n'a pas perdu tous ses adeptes. Voir par exemple *Jiro Enterprises Ltd. c. Spencer*, 2008 ABCA 87 (CanLII), par. 10; *QK Investments Inc. c. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, par. 26; *Dow Chemical Canada Inc. c. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, par. 11-12; *Canada c. Costco Wholesale Canada Ltd.*, 2012 CAF 160 (CanLII), par. 34. Or, des tribunaux canadiens ont délaissé l'approche historique au profit d'une nouvelle démarche qui conçoit l'interprétation des contrats écrits soit comme une question de droit soit comme une question mixte de fait et de droit. Voir par exemple *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, par. 11; *269893 Alberta Ltd. c. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, par. 13; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, par. 44; *Bell Canada c. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, par. 22-23 (les juges majoritaires, sous la plume du juge Blair) et par. 133-135 (la juge Gillese, dissidente, mais pas sur ce point); *King*, par. 20-23.

[46] La tendance à délaisser l'approche historique au Canada semble s'expliquer par deux changements. Le premier est l'adoption d'une méthode d'interprétation contractuelle qui oblige le tribunal à tenir compte des circonstances — que l'on appelle

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— often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.

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

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

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

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc.*

souvent le fondement factuel — dans l'interprétation d'un contrat écrit (Hall, p. 13, 21-25 et 127; J. D. McCamus, *The Law of Contracts* (2e éd. 2012), p. 749-751). Le deuxième découle des explications formulées dans les arrêts *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35, et *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26 et 31-36, sur ce qui distingue la question de droit de la question mixte de fait et de droit.

[47] Relativement au premier changement, l'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente » (*Jesuit Fathers of Upper Canada c. Cie d'assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744, par. 27, le juge LeBel; voir aussi *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69, par. 64-65, le juge Cromwell). Pour ce faire, le décideur doit interpréter le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s'harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat. Par l'examen des circonstances, on reconnaît qu'il peut être difficile de déterminer l'intention contractuelle à partir des seuls mots, car les mots en soi n'ont pas un sens immuable ou absolu :

> [TRADUCTION] Aucun contrat n'est conclu dans l'abstrait : les contrats s'inscrivent toujours dans un contexte. [. . .] Lorsqu'un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d'autre part une connaissance de l'origine de l'opération, de l'historique, du contexte, du marché dans lequel les parties exercent leurs activités.

(*Reardon Smith Line*, p. 574, le lord Wilberforce)

[48] Le sens des mots est souvent déterminé par un certain nombre de facteurs contextuels, y compris l'objet de l'entente et la nature des rapports créés par celle-ci (voir *Moore Realty Inc. c. Manitoba*

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v. Manitoba Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

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

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

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

[51] The purpose of the distinction between questions of law and those of mixed fact and law further

Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, par. 15, la juge Hamilton; voir aussi Hall, p. 22; McCamus, p. 749-750). Pour reprendre les propos du lord Hoffmann dans *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) :

> [TRADUCTION] Le sens d'un document (ou toute autre déclaration) qui est transmis à la personne raisonnable n'équivaut pas au sens des mots qui le composent. Le sens des mots fait intervenir les dictionnaires et les grammaires; le sens du document représente ce qu'il est raisonnable de croire que les parties, en employant ces mots compte tenu du contexte pertinent, ont voulu exprimer. [p. 115]

[49] Relativement au deuxième changement, l'approche historique de l'interprétation contractuelle ne cadre pas bien avec la définition de la pure question de droit formulée dans les arrêts *Housen* et *Southam*. Les questions de droit « concernent la détermination du critère juridique applicable » (*Southam*, par. 35). Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties — un but axé sur les faits — par l'application des principes juridiques d'interprétation. Il me semble que cela se rapproche plutôt de la question mixte de fait et de droit, définie dans l'arrêt *Housen* comme supposant « l'application d'une norme juridique à un ensemble de faits » (par. 26; voir aussi *Southam*, par. 35). Toutefois, certains tribunaux ont émis des doutes sur l'application directe de cette définition, qui avait été établie à l'égard d'une action intentée pour négligence, à des questions d'interprétation contractuelle et laissent entendre que cette dernière est d'abord et avant tout une affaire de droit (voir par exemple *Bell Canada*, par. 25).

[50] Avec tout le respect que je dois aux tenants de l'opinion contraire, à mon avis, il faut rompre avec l'approche historique. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

[51] Cette conclusion est étayée par les raisons qui sous-tendent la distinction établie entre la

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

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

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

question de droit et la question mixte de fait et de droit. En distinguant ces deux catégories, on visait principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Ainsi, le rôle des cours d'appel, qui consiste à assurer la cohérence du droit, et non à offrir aux parties une nouvelle tribune leur permettant de poursuivre leur litige privé, est préservé. C'est pourquoi la Cour dans l'arrêt *Southam* reconnaît le degré de généralité (ou « la valeur comme précédents ») comme la principale différence entre la question de droit et la question mixte de fait et de droit. Plus la règle est stricte, moins l'intervention de la cour d'appel sera utile :

> Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir. [par. 37]

[52] De même, la Cour dans l'arrêt *Housen* conclut que la retenue à l'égard du juge des faits contribue à réduire le nombre, la durée et le coût des appels tout en favorisant l'autonomie du procès et son intégrité (par. 16-17). Ces principes militent également en faveur de la déférence à l'endroit des décideurs de première instance en matière d'interprétation contractuelle. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère aux tribunaux de première instance appuie la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

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

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

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

[55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of

[53] Néanmoins, il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit (*Housen*, par. 31 et 34-35). L'interprétation contractuelle peut occasionner des erreurs de droit, notamment [TRADUCTION] « appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent » (*King*, par. 21). En outre, il est indubitable que nombre d'autres questions se posant en droit des contrats mettent en jeu des règles de droit substantiel : les critères de formation du contrat, la capacité des parties, l'obligation que soient constatés par écrit certains types de contrat, etc.

[54] Le tribunal doit cependant faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. Compte tenu de l'obligation, prévue au par. 31(2) de l'*AA*, que la demande d'autorisation soulève une question de droit, le demandeur et son représentant chercheront à qualifier de question de droit toute erreur qu'ils invoquent. Toutefois, le législateur a pris des mesures visant à limiter ce genre d'appels, et les tribunaux doivent examiner soigneusement le motif d'appel proposé pour déterminer s'il est bien caractérisé. La mise en garde exprimée dans *Housen* qui appelle à la prudence lorsqu'il s'agit d'isoler une question de droit s'applique dans le cas présent :

> Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit » . . . [par. 36]

[55] Certes, cette mise en garde a été formulée dans le contexte d'une action pour négligence, mais elle s'applique également à mon avis à l'interprétation contractuelle. Comme je le mentionne précédemment, le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Le rapport

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contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

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

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

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

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*,

étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. En l'absence d'une erreur de droit du genre de celles décrites plus haut, aucun droit d'appel de l'interprétation par un arbitre d'un contrat n'est prévu à l'*AA*.

b) *Le rôle et la nature des « circonstances »*

[56] Abordons le rôle des circonstances dans l'interprétation du contrat et la nature des éléments admis à l'examen. La présente analyse ne traite que de la démarche d'interprétation contractuelle fondée sur la common law; elle ne se veut ni une application ni une modification du droit relatif à l'interprétation contractuelle régi par le *Code civil du Québec*.

[57] Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (*Hayes Forest Services*, par. 14; Hall, p. 30). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (Hall, p. 15 et 30-32). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (*Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (*King*, par. 66 et 70), c'est-à-dire, les renseignements qui

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at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

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

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

[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts

appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle d'exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances », pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (*Investors Compensation Scheme*, p. 114). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

c) *Tenir compte des circonstances n'est pas contraire à la règle d'exclusion de la preuve extrinsèque*

[59] Quelques mots sur l'examen des circonstances et la règle d'exclusion de la preuve extrinsèque s'imposent. Cette règle empêche l'admission d'éléments de preuve autres que les termes du contrat écrit qui auraient pour effet de modifier ou de contredire un contrat qui a été entièrement consigné par écrit, ou d'y ajouter de nouvelles clauses ou d'en supprimer (*King*, par. 35; Hall, p. 53). À cette fin, la règle interdit notamment les éléments de preuve concernant les intentions subjectives des parties (Hall, p. 64-65; *Eli Lilly & Co. c. Novopharm Ltd.*, [1998] 2 R.C.S. 129, par. 54-59, le juge Iacobucci). La règle vise, premièrement, à donner un caractère définitif et certain aux obligations contractuelles et, deuxièmement, à empêcher qu'une partie puisse utiliser des éléments de preuve fabriqués ou douteux pour attaquer un contrat écrit (*Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 341-342, le juge Sopinka).

[60] La règle d'exclusion de la preuve extrinsèque n'interdit pas au tribunal de tenir compte des circonstances entourant le contrat. Cette preuve est compatible avec les objectifs relatifs au caractère définitif et certain puisqu'elle sert d'outil d'interprétation qui vient éclairer le sens des mots du contrat choisis par les parties, et non le changer ou s'y substituer. Les circonstances sont des faits connus

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that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

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

(d) *Application to the Present Case*

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

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

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

[65] However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed,

ou qui auraient raisonnablement dû l'être des deux parties à la date de signature du contrat ou avant celle-ci; par conséquent, le risque que des éléments d'une fiabilité douteuse soient invoqués ne se pose pas.

[61] Selon une certaine jurisprudence et des auteurs, la règle d'exclusion de la preuve extrinsèque serait un anachronisme ou, à tout le moins, d'application restreinte vu la myriade d'exceptions dont elle est assortie (voir par exemple *Gutierrez c. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), par. 19-20; Hall, p. 53-64). Dans le cadre du présent pourvoi, il suffit de dire que la règle d'exclusion de la preuve extrinsèque ne s'oppose pas à la présentation d'une preuve des circonstances entourant le contrat pour l'interprétation de ce dernier.

d) *Application au présent pourvoi*

[62] En l'espèce, la Cour d'appel a accordé l'autorisation d'appel relativement à la question suivante : [TRADUCTION] « L'arbitre a-t-il commis une erreur de droit en n'interprétant pas l'entente relative aux honoraires d'intermédiation dans son ensemble . . . ? » (d.a., vol. I, p. 62)

[63] Comme nous le verrons, l'obligation d'interpréter le contrat dans son ensemble est une question de droit susceptible, si on pouvait l'isoler, de satisfaire au critère minimal exigé à l'art. 31 de l'*AA*. À mon avis, cette question n'a pas été isolée comme il se doit en l'espèce.

[64] Je reconnais qu'il est un principe fondamental de l'interprétation contractuelle selon lequel le contrat doit être interprété dans son ensemble (McCamus, p. 761-762; Hall, p. 15). Si l'arbitre n'a pas tenu compte de la stipulation relative au « plafond », comme le prétend Creston, il n'a alors pas interprété l'entente dans son ensemble, car il en a négligé une clause précise et pertinente. Voilà une question de droit qui pourrait être isolée de la conclusion mixte de fait et de droit.

[65] Or, il semble que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

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

En effet, selon la formation de la CA saisie de la demande d'autorisation, l'arbitre a examiné la stipulation, puisqu'elle signale qu'il a envisagé le plafond de 1,5 million $US, un nombre auquel il ne peut être arrivé que s'il a consulté la politique de la Bourse à laquelle renvoie la stipulation relative au « plafond » à l'art. 3.1 de l'entente. À la lumière de ses motifs, j'estime que la formation de la CA saisie de la demande d'autorisation, au lieu de se demander si l'arbitre a négligé la stipulation relative au plafond — ce que Creston prétend devant la Cour —, a axé sa décision sur l'interprétation qu'a donnée l'arbitre de l'art. 3.1 de l'entente, qui contient cette stipulation (par. 25-26). Par exemple, la formation de la CA saisie de la demande d'autorisation s'est dite préoccupée que l'arbitre n'ait pas abordé l'[TRADUCTION] « absurdité » de la variation « considérable » dans la valeur des honoraires selon qu'ils étaient versés en argent ou en actions (par. 25).

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

[66] Avec tout le respect que je lui dois, j'estime que la formation de la CA saisie de la demande d'autorisation a assimilé à tort l'interprétation de l'art. 3.1 de l'entente à une question de droit. Comme l'explique le juge Armstrong dans la décision de la CS sur l'appel, pour interpréter l'art. 3.1 et tenir compte de la stipulation, il fallait examiner les circonstances pertinentes, y compris le fait que les parties étaient des parties avisées, la fluctuation du cours de l'action et la nature du risque qu'une partie assume quand elle opte pour le versement de ses honoraires en actions plutôt qu'en argent. Un tel exercice soulève une question mixte de fait et de droit. Comme aucune question de droit ne peut être isolée de la question mixte de fait et de droit qui porte sur l'interprétation de l'art. 3.1 et de la stipulation, la Cour d'appel a commis une erreur en accueillant la demande d'autorisation d'appel.

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

[67] Conclure que la demande d'autorisation d'appel présentée par Creston ne soulevait aucune question de droit suffirait à trancher le présent pourvoi. Toutefois, puisque la Cour a rarement l'occasion de se pencher sur l'appel d'une sentence arbitrale, il est à mon avis utile d'expliquer que même si la formation de la CA saisie de la demande d'autorisation avait conclu à bon droit que l'interprétation de l'art. 3.1 de l'entente constituait une question de

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

droit, elle devait néanmoins rejeter la demande, car il n'était pas satisfait aux autres volets de l'analyse des demandes d'autorisation que requiert l'al. 31(2)(a) de l'*AA*, qui concernent l'erreur judiciaire et le pouvoir discrétionnaire résiduel.

(4) May Prevent a Miscarriage of Justice

(4) Le règlement de la question de droit peut permettre d'éviter une erreur judiciaire

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

a) *L'erreur judiciaire pour l'application de l'al. 31(2)(a) de l'AA*

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

[68] Une fois qu'il a cerné une question de droit, le tribunal doit être convaincu que le fait de statuer sur cette dernière [TRADUCTION] « peut permettre d'éviter une erreur judiciaire » avant d'accorder l'autorisation d'appel en vertu de l'al. 31(2)(a) de l'*AA*. La première étape de l'analyse consiste donc à définir l'erreur judiciaire pour l'application de cette disposition.

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

[69] Dans *BCIT*, la juge Saunders traite du critère concernant l'erreur judiciaire prévu à l'al. 31(2)(a). Elle confirme la définition énoncée dans l'affaire *Domtar Inc. c. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (C.A.), selon laquelle l'erreur de droit doit toucher une question importante de sorte qu'une conclusion différente aurait abouti à un résultat différent : [TRADUCTION] « . . . si le point de droit avait été tranché différemment, l'arbitre aurait rendu une décision différente. Autrement dit, l'erreur de droit invoquée a-t-elle eu un effet déterminant sur la décision; touche-t-elle au cœur de la décision? » (*BCIT*, par. 28). Voir également l'arrêt *Quan c. Cusson*, 2009 CSC 62, [2009] 3 R.C.S. 712, où la Cour analyse le critère qui sert à déterminer s'il y a « préjudice grave ou [. . .] erreur judiciaire » dans le contexte des procès civils avec jury (par. 43).

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

[70] Compte tenu des arrêts *BCIT* et *Quan*, je suis d'avis que, pour que l'erreur de droit reprochée soit une erreur judiciaire au sens où il faut l'entendre pour l'application de l'al. 31(2)(a) de l'*AA*, elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat.

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

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

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

[74] In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and "credible

[71] Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

[72] Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, il faut procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier le résultat du litige.

[73] Selon l'arrêt *BCIT*, le demandeur doit établir [TRADUCTION] « plus qu'un argument défendable » (par. 30) lors de cet examen préliminaire de l'appel. Pourtant, une fois un argument défendable soulevé, que faudrait-il démontrer de plus pour qu'il soit satisfait à cette norme? Vraisemblablement, le juge saisi de la demande d'autorisation devrait alors examiner les arguments se rapportant à la question de droit soulevée en appel de plus près que ce qui serait indiqué à cette étape pour trouver *plus* qu'un argument défendable. À mon humble avis, exiger un examen plus approfondi du point de droit brouille les rôles respectifs de la formation saisie de la demande d'autorisation et de celle saisie de l'appel.

[74] Selon moi, ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable. Ce critère s'applique souvent à l'étape de l'autorisation, pour établir sommairement le bien-fondé de l'appel (voir par exemple *Quick Auto Lease Inc. c. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, par. 5; *R. c. Fedossenko*, 2013 ABCA 164 (CanLII), par. 7). Il est bien connu et a été exprimé de diverses façons : [TRADUCTION] « une possibilité raisonnable d'être accueilli » (*a reasonable prospect of success*) (*Quick Auto Lease*, par. 5; *Enns c. Hansey*, 2013 MBCA 23 (CanLII), par. 2); une « certaine chance de succès » (*some hope of success*) et un « fondement suffisant » (*sufficient merit*) (*R. c. Hubley*, 2009 PECA

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argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270, at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

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

21, 289 Nfld. & P.E.I.R. 174, par. 11); un « argument plausible » (*credible argument*) (*R. c. Will*, 2013 SKCA 4, 405 Sask. R. 270, par. 8). À mon avis, les diverses appellations qui désignent le fondement défendable présentent un élément commun : l'argument soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit. Pour déterminer s'il faut annuler la sentence arbitrale, un examen approfondi est nécessaire, et c'est au tribunal saisi de l'appel qu'il incombe, une fois l'autorisation accordée.

[75] L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet la norme applicable. Comme nous le verrons, la norme de la décision raisonnable s'appliquera presque toujours aux arbitrages commerciaux régis par l'*AA*, sauf dans les rares circonstances où l'application de la norme de la décision correcte s'imposera, notamment lorsqu'il s'agit d'une question constitutionnelle ou d'une question de droit qui revêt une importance capitale pour le système juridique dans son ensemble et qui est étrangère au domaine d'expertise du décideur administratif. Par conséquent, dans le cadre de l'examen préalable à l'autorisation le tribunal s'interrogera ordinairement quant à savoir si la prétention — selon laquelle la sentence arbitrale sur la question en litige était déraisonnable — a un fondement défendable, compte tenu du fait que le décideur n'est pas tenu de faire référence à tous les arguments, dispositions ou précédents ni de tirer une conclusion précise sur chaque élément constitutif du raisonnement pour que sa décision soit raisonnable (*Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, par. 16). Certes, le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire ayant pour objet la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel. Ainsi, il ne faudrait pas considérer qu'il s'agit d'une invitation à se perdre en analyses ou en arguments poussés à propos de la norme de contrôle à l'étape de la demande d'autorisation.

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

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

[77] I acknowledge the consistency rationale. However, in my respectful opinion, the desire for a consistent approach to s. 31(2)(a), (b) and (c) cannot override the text of the legislation. Unlike s. 31(2)(b) and (c), s. 31(2)(a) requires an assessment to determine whether allowing leave to appeal "may prevent a miscarriage of justice". It is my opinion that a preliminary assessment of the question of law is an implicit component in a determination of whether allowing leave "may prevent a miscarriage of justice".

[78] However, in an application for leave to appeal pursuant to s. 31(2)(b) or (c), neither of which contain a miscarriage of justice requirement, I agree with Justice Saunders in *BCIT* that a preliminary

[76] Dans *BCIT*, la juge Saunders s'interroge sur l'étape à laquelle il convient d'examiner le bien-fondé de l'appel dans le cadre de l'analyse requise par l'al. 31(2)(a) de l'*AA*. Contrairement à ce que prétendait une partie, soit que l'évaluation du bien-fondé se rapporte au critère de l'erreur judiciaire, la juge détermine que cet examen se rattache plutôt à l'exercice du pouvoir discrétionnaire. Ses motifs révèlent que sa décision découle de sa volonté d'adopter une approche uniforme à l'égard des al. 31(2)(a), (b) et (c) :

> [TRADUCTION] À quel moment, le cas échéant, faut-il alors examiner le bien-fondé de l'appel? M. Roberts, qui représente l'Association étudiante, prétend qu'il convient de procéder à cet examen lorsqu'on se demande si une erreur judiciaire risque d'être commise, c'est-à-dire, à la deuxième étape. Je ne suis pas d'accord. À mon avis, l'appréciation du bien-fondé ou de l'absence de fondement apparent de l'appel s'inscrit dans l'exercice du pouvoir discrétionnaire résiduel et s'applique également aux trois alinéas, de (*a*) à (*c*). Tout comme un appel manifestement dénué de fondement ne devrait pas être autorisé en vertu de l'al. (*b*) (revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie) ou de l'al. (*c*) (est d'importance publique), un tel appel ne devrait pas non plus être autorisé en vertu de l'al. (*a*). Dans un but d'uniformité à l'égard de l'article entier, l'appréciation du bien-fondé devrait être intégrée à l'exercice du pouvoir discrétionnaire résiduel. [par. 29]

[77] Je reconnais la validité du raisonnement axé sur l'uniformité. Cependant, à mon humble avis, cette volonté d'adopter une démarche semblable au regard des al. 31(2)(a), (b) et (c) ne saurait l'emporter sur le libellé de la disposition. Contrairement aux al. 31(2)(b) et (c), l'al. 31(2)(a) exige que le tribunal détermine si le fait d'autoriser l'appel « peut permettre d'éviter une erreur judiciaire ». J'estime qu'un examen préliminaire de la question de droit s'inscrit implicitement dans l'examen qui vise à déterminer si l'autorisation « peut permettre d'éviter une erreur judiciaire ».

[78] Cependant, lorsqu'il s'agit d'une demande d'autorisation d'appel présentée en vertu des al. 31(2)(b) ou (c) — puisque ces dispositions ne prévoient pas le risque d'erreur judiciaire comme

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examination of the merits of the question of law should be assessed at the residual discretion stage of the analysis as considering the merits of the proposed appeal will always be relevant when deciding whether to grant leave to appeal under s. 31.

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

(b) *Application to the Present Case*

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

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

critère —, je souscris aux commentaires formulés par la juge Saunders dans *BCIT* selon lesquels l'examen préliminaire du bien-fondé de la question de droit devrait intervenir à l'étape de l'exercice du pouvoir discrétionnaire résiduel dans l'analyse, puisque l'examen du bien-fondé de l'appel proposé demeure pertinent dans la décision d'accorder ou non l'autorisation d'appel en vertu de l'art. 31.

[79] Bref, afin d'établir que l'intervention du tribunal est justifiée [TRADUCTION] « et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire » pour l'application de l'al. 31(2)(a) de l'*AA*, le demandeur doit prouver que le point de droit en appel aura une incidence sur le résultat final et qu'il est défendable.

b) *Application au présent pourvoi*

[80] La formation de la CA saisie de la demande d'autorisation a conclu à la possibilité d'une erreur de droit par l'arbitre qui n'aurait pas interprété l'entente dans son ensemble et, plus particulièrement, aurait fait fi de la stipulation relative au « plafond ». Admettons cette prétention comme question de droit uniquement pour les besoins de la cause. Le règlement de la question est déterminant parce qu'il pourrait avoir pour effet de modifier la sentence de l'arbitre, lequel a accordé 4,14 millions $ en dommages-intérêts au motif qu'il évaluait à 85 p. 100 la probabilité que la Bourse approuve des honoraires d'intermédiation payés en actions, à raison de 0,15 $ l'unité. Si l'argument invoqué par Creston est correct et que le cours de l'action ne peut s'établir à 0,15 $ en raison de la stipulation relative au « plafond », les dommages-intérêts seraient réduits à 1,5 million $US, une amputation considérable de la somme initiale accordée.

[81] Comme l'al. 31(2)(a) de l'*AA* est la disposition pertinente en l'espèce, il doit être procédé à un examen préliminaire de la question de droit pour déterminer le risque qu'une erreur judiciaire découle du rejet de la demande d'autorisation d'appel présentée par Creston. Cette dernière soutient que le fait que Sattva reçoive un portefeuille d'actions dont la valeur est très supérieure au plafond de 1,5 million $US en exécution de la sentence arbitrale

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evidence of the arbitrator's failure to consider that proviso.

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

> In summary, then, as of March 27, 2007 it was clear and beyond argument that under the Agreement:
>
> (a) Sattva was entitled to a fee equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange – section 3.1. It is common ground that the quantum of this fee is US$1,500,000.
>
> (b) The fee was payable in shares based on the Market Price, as defined in the Agreement, unless Sattva elected to take it in cash or a combination of cash and shares.
>
> (c) The Market Price, as defined in the Agreement, was $0.15. [Emphasis added.]

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

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

prouve que l'arbitre n'a pas tenu compte de la stipulation relative au « plafond ».

[82] Or, l'arbitre renvoie effectivement à l'art. 3.1, la stipulation relative au « plafond », à deux reprises dans sa décision, soit aux par. 18 et 23(a). Par exemple, il affirme ce qui suit au par. 23 :

> [TRADUCTION]
>
> Bref, à partir du 27 mars 2007, il était clair et incontestable qu'aux termes de l'entente :
>
> (a) Sattva avait le droit de recevoir des honoraires équivalant au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX – article 3.1. Les parties conviennent que le montant des honoraires s'établit à 1 500 000 $US.
>
> (b) La commission était payable en actions, en fonction du cours, tel qu'il est défini dans l'entente, à moins que Sattva n'opte pour le versement des honoraires en argent ou en argent et en actions.
>
> (c) Le cours de l'action, tel qu'il est défini dans l'entente, s'établissait à 0,15 $. [Je souligne.]

[83] Ainsi, même si l'arbitre n'indique pas expressément avoir examiné le jeu de la stipulation relative au « plafond » et de la définition du cours, cet examen ressort implicitement de sa sentence. La seule clause de l'entente qui prévoit le montant des honoraires, soit 1,5 million $US, est la stipulation relative au « plafond », qui renvoie au point 3.3 de la politique 5.1 de la Bourse. Reconnaissant que le montant des honoraires s'élève à 1,5 million $US, l'arbitre a accordé à Sattva pareille somme, payable en actions, à raison de 0,15 $ l'unité. Contrairement à l'argument avancé par Creston, selon qui l'arbitre aurait négligé la stipulation dans son interprétation de l'entente, il ressort de l'examen préliminaire de la question que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

[84] Par conséquent, même si la Cour d'appel avait cerné à juste titre une question de droit, elle aurait dû rejeter la demande d'autorisation. Il n'était pas satisfait au critère qui exige que le caractère déraisonnable de la sentence arbitrale ait un fondement défendable, ni à celui de l'erreur judiciaire.

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(5) Residual Discretion to Deny Leave

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

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

1. "the apparent merits of the appeal";

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

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

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

5. "the conduct of the parties";

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

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

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

(5) Le pouvoir discrétionnaire résiduel qui habilite à refuser l'autorisation

a) *Éléments à examiner dans l'exercice du pouvoir discrétionnaire résiduel à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a)*

[85] Les tribunaux de la C.-B. ont conclu que les termes [TRADUCTION] « peut accorder l'autorisation » figurant au par. 31(2) de l'*AA* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés (*BCIT*, par. 9 et 26). Dans *BCIT*, la juge Saunders énumère des facteurs à considérer dans l'exercice de ce pouvoir discrétionnaire (par. 31) :

1. [TRADUCTION] « le bien-fondé apparent de l'appel »;

2. « l'importance de la question pour les parties, les tiers et la société en général »;

3. « les circonstances qui sont à l'origine du différend et de l'arbitrage, y compris le besoin urgent d'obtenir un règlement définitif »;

4. « d'autres considérations temporelles, y compris la possibilité pour l'une ou l'autre des parties de remédier autrement aux conséquences »;

5. « la conduite des parties »;

6. « l'étape à laquelle la décision qui a été portée en appel avait été prise »;

7. « le respect du choix des parties d'avoir recours à l'arbitrage pour résoudre leurs différends »;

8. « la reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends, spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage ».

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

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

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

[89] As discussed above, in s. 31(2)(a), a preliminary assessment of the merits of the question of law at issue in the leave application is to be considered in determining the miscarriage of justice question. The degree of significance of the issue to the parties is covered by the "importance of the result of the arbitration to the parties" criterion in s. 31(2)(a). The degree of significance of the issue to third parties and to the community at large should not be considered under s. 31(2)(a) as the *AA* sets these out as separate grounds for granting leave to appeal under s. 31(2)(b) and (c). Furthermore, respect for the forum of arbitration chosen by the parties is a consideration that animates the legislation itself and

[86] Je conviens avec la juge Saunders pour dire qu'il n'est pas opportun de dresser ce qu'elle appelle une [TRADUCTION] « liste immuable » de facteurs à considérer dans l'exercice du pouvoir discrétionnaire prévu au par. 31(2) (*BCIT*, par. 32). Cependant, je ne peux convenir que tous les facteurs qui figurent sur la liste qu'elle a dressée sont applicables à cette étape de l'analyse.

[87] Dans l'exercice du pouvoir discrétionnaire que lui confère l'al. 31(2)(a) et qui l'habilite à rejeter la demande d'autorisation, le tribunal devrait examiner les motifs traditionnels justifiant le refus d'une réparation discrétionnaire : la conduite des parties, l'existence d'autres recours et tout retard indu (*Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326, p. 364-367). L'exercice du pouvoir discrétionnaire qui permet de refuser une réparation fait intervenir des considérations relatives à la prépondérance des inconvénients (*Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010] 1 R.C.S. 6, par. 52). Parmi celles-ci se trouve le besoin urgent d'obtenir un règlement définitif.

[88] Quant aux autres facteurs mentionnés dans la liste et dont je traite successivement ci-après, j'estime qu'ils ont déjà été examinés dans le cadre de l'analyse fondée sur l'al. 31(2)(a) ou qu'il conviendrait mieux de les examiner à un autre volet du critère énoncé au par. 31(2). Une fois examinés, ces facteurs ne devraient pas être réexaminés par le tribunal au moment de l'exercice de son pouvoir discrétionnaire résiduel.

[89] Je le rappelle, dans l'analyse fondée sur l'al. 31(2)(a), il faut procéder à l'examen préliminaire du bien-fondé de la question de droit soulevée dans la demande d'autorisation pour déterminer s'il y a risque d'erreur judiciaire. La question de l'importance pour les parties se règle à l'al. 31(2)(a) : [TRADUCTION] « l'importance de l'issue de l'arbitrage pour les parties ». L'importance de la question pour les tiers et pour la société en général ne doit pas être examinée à l'al. 31(2)(a), car l'*AA* prévoit ces motifs à des dispositions distinctes, soit les al. 31(2)(b) et (c). En outre, le respect du choix des parties d'avoir recours à l'arbitrage sous-tend la loi elle-même, ce dont témoigne le seuil élevé auquel l'autorisation

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can be seen in the high threshold to obtain leave under s. 31(2)(a). Recognition that arbitration is often chosen as a means to obtain a fast and final resolution tailor-made for the issues is already reflected in the urgent need for a final answer.

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

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

- conduct of the parties;
- existence of alternative remedies;
- undue delay; and
- the urgent need for a final answer.

[92] These considerations could, where applicable, be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria of s. 31(2)(a) have been met. However, courts should

est subordonnée aux termes de l'al. 31(2)(a). La reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends et spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage s'inscrit dans le besoin urgent d'obtenir un règlement définitif.

[90] Quant à l'étape du processus à laquelle la décision dont on veut faire appel a été rendue, ce n'est pas un facteur pertinent pour l'exercice par le tribunal du pouvoir discrétionnaire résiduel conféré par l'al. 31(2)(a) qui lui permet de refuser l'autorisation. Ce facteur a été défini en réponse à des préoccupations selon lesquelles l'autorisation d'appeler d'une décision interlocutoire risque d'être prématurée et d'entraîner des retards indus ainsi qu'une fragmentation inutile du processus judiciaire (D. J. M. Brown et J. M. Evans, avec la collaboration de C. E. Deacon, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), p. 3-67 à 3-76). Or, ces préoccupations auront été dissipées par la formation saisie de la demande d'autorisation lorsqu'elle se sera penchée sur le risque d'erreur judiciaire, et, plus précisément, sur la possibilité que la question interlocutoire ait une incidence sur le résultat final. Ainsi, les préoccupations mentionnées précédemment ne devraient donc pas être réexaminées.

[91] En résumé, une liste non exhaustive des facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) de l'*AA* comprendrait :

- la conduite des parties;
- l'existence d'autres recours;
- un retard indu;
- le besoin urgent d'obtenir un règlement définitif.

[92] Ces facteurs pourraient, le cas échéant, justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères prévus à

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exercise such discretion with caution. Having found an error of law and, at least with respect to s. 31(2)(a), a potential miscarriage of justice, these discretionary factors must be weighed carefully before an otherwise eligible appeal is rejected on discretionary grounds.

(b) *Application to the Present Case*

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

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

[95] However, conduct of the parties is a valid consideration in the exercise of the court's residual discretion under s. 31(2)(a). A discretionary decision to deny leave is to be reviewed with deference by an appellate court. A discretionary decision should not be interfered with merely because an appellate court would have exercised the discretion differently (*R. v. Bellusci*, 2012 SCC 44, [2012]

l'al. 31(2)(a). Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire. Après avoir conclu à l'existence d'une erreur de droit et, au moins en ce qui concerne l'al. 31(2)(a), d'un risque d'erreur judiciaire, le tribunal doit soupeser ces facteurs avec soin avant de décider s'il va rejeter ou non pour des motifs discrétionnaires une demande par ailleurs admissible.

b) *Application au présent pourvoi*

[93] Le juge de la CS saisi de la demande d'autorisation a rejeté cette dernière au motif qu'elle ne soulevait aucune question de droit. Il a indiqué que, même s'il avait conclu à l'existence d'une telle question, il aurait refusé l'autorisation en vertu de son pouvoir discrétionnaire résiduel, et ce, pour deux raisons : premièrement, à cause de la conduite de Creston qui a présenté inexactement les faits relatifs aux honoraires d'intermédiation à la Bourse et à Sattva; deuxièmement, [TRADUCTION] « par égard pour le principe selon lequel l'[*AA*] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41). La formation de la CA saisie de la demande d'autorisation a écarté la décision de la CS pour ces deux raisons discrétionnaires.

[94] Pour les motifs énoncés précédemment, l'objectif qui vise à favoriser et à préserver l'intégrité du système d'arbitrage ne devrait pas constituer une considération distincte dans l'analyse que requiert l'al. 31(2)(a) préalable à l'exercice du pouvoir discrétionnaire. Bien que le régime instauré par le par. 31(2) reconnaît cet objectif, l'exercice du pouvoir discrétionnaire doit se rapporter aux faits et aux circonstances de l'affaire. Cet objectif général ne fait pas partie des considérations susceptibles de justifier le refus discrétionnaire de l'autorisation.

[95] Toutefois, la conduite des parties est un facteur que le tribunal peut prendre en considération dans l'exercice du pouvoir discrétionnaire résiduel que lui confère l'al. 31(2)(a). La cour d'appel doit faire preuve de déférence lorsqu'elle contrôle la décision discrétionnaire de refuser l'autorisation d'interjeter appel. Elle doit se garder d'intervenir seulement parce qu'elle aurait exercé son pouvoir

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2 S.C.R. 509, at paras. 18 and 30). An appellate court is only justified in interfering with a lower court judge's exercise of discretion if that judge misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117).

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

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

[98] In *Homex Realty and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011, at pp. 1037-38, misconduct by a party not directly relevant to the question at issue before the court resulted in denial of a remedy. The litigation in *Homex* arose out of a disagreement regarding whether the purchaser of lots in a subdivision, Homex, had assumed the obligations of the vendor under a subdivision agreement to provide "all the requirements, financial and otherwise" for the installation of municipal services on a parcel of land that had been subdivided (pp. 1015-16). This Court determined that Homex had not been accorded procedural fairness when the municipality passed a by-law related to the dispute (p. 1032). Nevertheless, discretionary relief to quash the by-law was denied because, among other things, Homex had sought "throughout all these proceedings to

discrétionnaire différemment (*R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509, par. 18 et 30). La cour d'appel ne saurait intervenir à l'égard de l'exercice du pouvoir discrétionnaire par le juge de l'instance inférieure que si celui-ci s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice (*R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117).

[96] En l'espèce, la formation de la CS saisie de la demande d'autorisation a fondé sur un facteur reconnu sa décision de refuser la réparation discrétionnaire : l'inconduite de Creston. La formation de la CA saisie de la demande d'autorisation a infirmé cette décision au motif que [TRADUCTION] « ces faits [la conduite de Creston] n'intéressent pas directement la question de droit » soulevée en appel (par. 27).

[97] La formation de la CA saisie de la demande d'autorisation n'a pas expliqué pourquoi l'inconduite doit se rapporter directement à une question de droit pour que l'autorisation soit refusée. Rien dans le par. 31(2) de l'*AA* ne limite l'exercice du pouvoir discrétionnaire du juge saisi de la demande d'autorisation de la façon avancée par la Cour d'appel. Mon interprétation de la jurisprudence ne cadre pas avec le point de vue selon lequel l'inconduite d'une partie doit se rapporter directement à la question devant être tranchée par la cour.

[98] Dans l'arrêt *Homex Realty and Development Co. c. Corporation of the Village of Wyoming*, [1980] 2 R.C.S. 1011, p. 1037-1038, l'inconduite d'une partie ne se rapportait pas directement à la question en cause devant la Cour, mais cette dernière a néanmoins refusé d'accorder la réparation. Le litige tirait son origine d'un désaccord sur la question de savoir si l'acheteur de lots sur un lotissement, Homex, avait assumé les obligations du vendeur prévues à la convention de lotissement, c'est-à-dire de satisfaire à « toutes les exigences, financières ou autres » relativement à l'installation des services d'utilité publique sur un lotissement (p. 1015-1016). La Cour décide qu'Homex n'a pas bénéficié de l'équité procédurale lorsque la municipalité avait adopté un règlement se rapportant au litige (p. 1032). Néanmoins, la demande visant à obtenir l'annulation discrétionnaire du règlement a été rejetée notamment

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avoid the burden associated with the subdivision of the lands" that it owned (p. 1037), even though the Court held that Homex knew this obligation was its responsibility (pp. 1017-19). This conduct was related to the dispute that gave rise to the litigation, but not to the question of whether the by-law was enacted in a procedurally fair manner. Accordingly, I read *Homex* as authority for the proposition that misconduct related to the dispute that gave rise to the proceedings may justify the exercise of discretion to refuse the relief sought, in this case refusing to grant leave to appeal.

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

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

[101] Although the CA Leave Court erred in granting leave, these protracted proceedings have nonetheless now reached this Court. In light of the fact that the true concern between the parties is the merits of the appeal — that is, how much the Agreement requires Creston to pay Sattva — and that the courts below differed significantly in their interpretation of the Agreement, it would be

parce que « [t]out au long de ces procédures, Homex a cherché à éviter les obligations qui se rattachent au lotissement des terrains » qu'elle détenait (p. 1037), même si Homex savait, de l'avis de la Cour, qu'elle devait assumer cette obligation (p. 1017-1019). Cette conduite se rapportait, non pas à la question de savoir si le règlement avait été adopté d'une manière équitable sur le plan de la procédure, mais au désaccord à l'origine dulitige. Par conséquent, je crois que l'arrêt *Homex* étaye la proposition selon laquelle une conduite répréhensible se rapportant au différend à l'origine du litige peut justifier le refus de la réparation discrétionnaire sollicitée, en l'occurrence l'autorisation d'interjeter appel.

[99] En l'espèce, l'arbitre a tiré la conclusion de fait suivante : Creston a induit la Bourse et Sattva en erreur en ce qui concerne [TRADUCTION] « la nature de l'obligation qu'elle avait contractée envers Sattva en affirmant que les honoraires d'intermédiation étaient payables en argent » (par. 56(k)). Bien que cette conduite ne soit pas reliée à la question de droit énoncée par la formation de la CA saisie de la demande d'autorisation, elle est reliée à l'arbitrage visant à déterminer le cours de l'action applicable aux fins du versement des honoraires d'intermédiation de Sattva. La Cour suprême pouvait à bon droit fonder sur une telle conduite sa décision de refuser l'autorisation, en vertu de son pouvoir discrétionnaire.

[100] Par conséquent, à mon humble avis, même si la formation de la CA saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la CS saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour.

[101] S'il est vrai que la formation de la CA saisie de la demande d'autorisation a commis une erreur en autorisant l'appel, ces interminables procédures ne s'en trouvent pas moins à l'heure actuelle devant nous. Puisque, par ailleurs, c'est la question de fond de l'appel — soit celle de savoir combien l'entente exige que Creston paie à Sattva — qui intéresse réellement les parties, et que les tribunaux d'instance

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unsatisfactory not to address the very dispute that has given rise to these proceedings. I will therefore proceed to consider the three remaining questions on appeal as if leave to appeal had been properly granted.

C. *Standard of Review Under the AA*

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

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

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

inférieure ont considérablement divergé d'opinion quant à l'interprétation qu'il faut donner à l'entente, il serait bien peu satisfaisant que le véritable litige à l'origine de cette instance ne soit pas réglé. Je vais donc examiner les trois autres questions soulevées en appel comme si l'autorisation d'interjeter appel avait été accordée à bon droit.

C. *Norme de contrôle applicable aux affaires régies par l'AA*

[102] Abordons les décisions des tribunaux siégeant en appel. Tout d'abord, il est nécessaire de déterminer la norme applicable au contrôle de la sentence arbitrale en fonction de la question à l'égard de laquelle la formation de la CA saisie de la demande d'autorisation a accordé cette dernière : l'arbitre a-t-il interprété la disposition sur les honoraires d'intermédiation à la lumière de l'entente dans son ensemble? Plus particulièrement, l'a-t-il interprétée en tenant compte de la stipulation relative au « plafond »?

[103] D'entrée de jeu, il convient de souligner que l'*Administrative Tribunals Act*, S.B.C. 2004, ch. 45, laquelle prévoit les normes de contrôle applicables aux décisions rendues par de nombreux tribunaux administratifs de la Colombie-Britannique (art. 58 et 59), ne s'applique pas aux arbitrages régis par l'*AA*.

[104] L'examen en appel des sentences arbitrales commerciales s'inscrit dans un régime, strictement défini et adapté aux objectifs de l'arbitrage commercial, qui diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif. Par exemple, la plupart du temps, les parties décident d'un commun accord de soumettre leur différend à l'arbitrage. Il ne s'agit pas d'un processus imposé par la loi. De plus, contrairement à la procédure devant un tribunal administratif, dans le cas d'un arbitrage les parties à la convention choisissent le nombre d'arbitres et l'identité de chacun. Ces différences révèlent que le cadre relatif au contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Par exemple, l'*AA* interdit

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Dunsmuir judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

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

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

le contrôle des conclusions de fait tirées par l'arbitre. En matière d'arbitrage commercial, une telle disposition est absolue. Suivant le cadre établi dans *Dunsmuir*, l'existence d'une disposition d'inattaquabilité (aussi appelée clause privative) n'empêche pas le tribunal judiciaire de procéder au contrôle d'une décision administrative, elle signale simplement que la déférence est de mise (*Dunsmuir*, par. 31).

[105] Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Dans les deux cas, le tribunal examine la décision rendue par un décideur administratif. En outre, l'expertise constitue un facteur tant en matière de contrôle judiciaire qu'en matière d'arbitrage commercial : quand les parties choisissent leur propre décideur, on peut présumer qu'elles fondent leur choix sur l'expertise de l'arbitre dans le domaine faisant l'objet du litige ou jugent sa compétence acceptable. Pour ces raisons, j'estime que certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences rendues en matière d'arbitrage commercial.

[106] La jurisprudence depuis l'arrêt *Dunsmuir* vient confirmer qu'il est souvent possible de déterminer la norme de contrôle applicable suivant la nature de la question en litige (voir par exemple *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 44). En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou les questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur (*Alberta Teachers' Association*, par. 30). La question dont nous sommes saisis, à savoir si l'arbitre a interprété l'entente dans son ensemble, n'appartient pas à l'une ou l'autre de ces catégories. Compte tenu des éléments pertinents de l'analyse établie dans l'arrêt *Dunsmuir*, la norme de la décision raisonnable s'applique en l'espèce.

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D. *The Arbitrator Reasonably Construed the Agreement as a Whole*

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

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

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

[110] In *Newfoundland and Labrador Nurses' Union*, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:

"Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in

D. *L'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble*

[107] Essentiellement pour les mêmes motifs que ceux exprimés par le juge Armstrong aux par. 57-75 de la décision de la CS sur l'appel, je suis d'avis que l'arbitre, en déterminant que Sattva était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 $ l'action, a donné une interprétation raisonnable de l'entente considérée dans son ensemble. Le juge Armstrong a contrôlé la décision de l'arbitre selon la norme de la décision correcte, mais ses motifs démontrent amplement le caractère raisonnable de cette décision. L'analyse qui suit est largement fondée sur son raisonnement.

[108] La question que devait trancher l'arbitre portait sur la date qui doit être retenue pour évaluer le cours de l'action aux fins du versement des honoraires d'intermédiation : la date établie selon la définition du cours qui figure dans l'entente ou la date du versement des honoraires d'intermédiation.

[109] L'arbitre a conclu que la valeur calculée selon la définition du cours l'emportait, soit 0,15 $ l'action. Selon lui, tel constat découlait des termes de l'entente et était [TRADUCTION] « clair et incontestable » (par. 23). Apparemment, comme il estimait que ce point était clair, il ne l'a pas motivé abondamment.

[110] Dans l'arrêt *Newfoundland and Labrador Nurses' Union*, la juge Abella cite le professeur David Dyzenhaus pour expliquer que les tribunaux siégeant en révision peuvent compléter les motifs du décideur de première ligne dans le cadre de l'analyse du caractère raisonnable :

[TRADUCTION] Le « caractère raisonnable » s'entend ici du fait que les motifs étayent, effectivement ou en principe, la conclusion. Autrement dit, même si les motifs qui ont en fait été donnés ne semblent pas tout à fait convenables pour étayer la décision, la cour de justice doit d'abord chercher à les compléter avant de tenter de les contrecarrer. Car s'il est vrai que parmi les motifs pour lesquels il y a lieu de faire preuve de retenue on compte le fait que c'est le tribunal, et non la cour de justice, qui a été désigné comme décideur de

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some respects defective. [Emphasis added by Abella J.; para. 12.]

(Quotation from D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

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

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

2. DEFINITIONS

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

And:

3. FINDER'S FEE

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

première ligne, la connaissance directe qu'a le tribunal du différend, son expertise, etc., il est aussi vrai qu'on doit présumer du bien-fondé de sa décision même si ses motifs sont lacunaires à certains égards. [Soulignement ajouté par la juge Abella; par. 12.]

(Citation de D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 304)

Par conséquent, on peut supposer que l'explication donnée par le juge Armstrong du jeu de la définition du cours et de la stipulation relative au « plafond » complète les motifs de l'arbitre.

[111] Les deux clauses en cause sont la définition du cours et la stipulation relative au « plafond » :

[TRADUCTION]

2. DÉFINITIONS

« cours », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

Et :

3. HONORAIRES D'INTERMÉDIATION

3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX. Ces honoraires d'intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l'intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation. [Je souligne.]

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

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

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

[112] L'article 3.1 de l'entente permet à Sattva de recevoir ses honoraires d'intermédiation en actions en fonction du « cours ». Aux termes de l'art. 2 de l'entente, le cours des titres des sociétés cotées à la Bourse de croissance TSX est égal au « cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition ». En l'espèce, compte tenu de la définition du cours, l'action vaudrait 0,15 $. Le passage « dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation » tiré de l'art. 3.1 de l'entente constitue la stipulation relative au « plafond ». Cette stipulation limite le montant des honoraires d'intermédiation. Le plafond correspond dans le cas qui nous occupe à 1,5 million $US (voir le point 3.3 de la politique 5.1 de la Bourse à l'annexe II).

[113] La stipulation relative au « plafond » limite le montant des honoraires d'intermédiation, mais elle ne change rien à la définition du cours. Comme l'explique le juge Armstrong, la définition du cours fixe la date à laquelle un moyen de paiement (dollars américains) est converti en un autre (actions) :

> [TRADUCTION] Le moyen de paiement des honoraires d'intermédiation est clairement établi par l'entente conclue en ce sens. La valeur marchande de ces actions au moment où les parties ont conclu cette entente était inconnue. L'intimée établit une analogie entre le paiement en actions des honoraires d'intermédiation de 1,5 million $US et une entente hypothétique en vertu de laquelle la somme de 1,5 million $US serait convertie en dollars canadiens. Dans les deux cas, les honoraires seraient payés en devises différentes. Le taux de change d'une à l'autre serait fixé à une date précise, tout comme l'est le cours de l'action dans l'entente relative aux honoraires. Ce taux de change permettrait de calculer la somme à verser en dollars canadiens en règlement des honoraires de 1,5 million $US, tout comme le cours permet de déterminer le nombre d'actions cédées en règlement des honoraires. Le dollar canadien est une forme de paiement, au même titre que l'action. Il importe peu que la valeur du dollar canadien augmente ou diminue après la date fixée pour établir le taux de change. Le

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amount of the fee based on the value of that currency on the date that the value is determined.

(SC Appeal Court decision, at para. 71)

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

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

[116] The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both the Market Price definition and the "maximum amount" proviso. The arbitrator's interpretation of the Agreement, as explained by Justice Armstrong, achieves this goal by reconciling the Market Price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

[117] As Justice Armstrong explained, setting the share price in advance creates a risk that makes selecting payment in shares qualitatively different from choosing payment in cash. There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient

montant des honoraires payé est toujours égal à 1,5 million $US. Il est converti en un certain nombre de dollars canadiens (ou d'actions) équivalant au montant des honoraires en fonction de la valeur de la devise à la date à laquelle cette valeur est déterminée.

(Décision de la CS sur l'appel, par. 71)

[114] Comme l'explique le juge Armstrong, accepter la position de Creston revient à ne pas tenir compte de la définition du cours et à fixer le cours de l'action en fonction de l'évaluation faite en prévision d'un placement privé.

[115] Cependant, rien dans l'entente n'indique, expressément ou implicitement, qu'il faille réévaluer avant la date du versement des honoraires d'intermédiation la conformité à la stipulation relative au « plafond ». L'entente ne précise pas non plus — ni expressément, ni implicitement — la base sur laquelle il faudrait procéder à une telle réévaluation — en l'occurrence un placement privé. Accepter l'interprétation de Creston reviendrait à faire fi du libellé de l'entente selon lequel les « honoraires d'intermédiation sont versés en actions de la société en fonction du cours ».

[116] La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond ». Comme l'explique le juge Armstrong, l'interprétation par l'arbitre de l'entente atteint cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne peut être considérée comme déraisonnable.

[117] Comme l'explique le juge Armstrong, fixer le cours de l'action en avance engendre un risque qui rend le paiement en actions qualitativement différent du paiement en argent. Le versement des honoraires sous forme d'actions présente un risque inhérent, qui ne se pose pas dans le cas du versement en argent. Les honoraires payés en argent ont une valeur prédéterminée. Par contre, quand les honoraires sont versés en actions, le cours de l'action (ou le mécanisme permettant de le déterminer) est fixé à l'avance. Cependant, le cours de l'action

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of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.

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

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

(SC Appeal Court decision, at para. 70)

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

fluctue avec le temps. La personne qui reçoit des honoraires payés en actions espère une augmentation du cours, de sorte que ses actions auront une valeur marchande supérieure à celle qui est établie selon le cours prédéterminé. En revanche, si le cours chute, cette personne reçoit des actions dont la valeur est inférieure à celle des actions selon le cours prédéterminé. Ce risque est bien connu de ceux qui évoluent dans ce milieu, et Creston et Sattva, des parties avisées, en auraient eu connaissance.

[118] En acceptant un paiement en actions, Sattva acceptait de se soumettre à la volatilité du marché. Si l'action de Creston avait chuté, Sattva aurait tout de même été liée par la valeur déterminée en application de la définition du cours, de sorte qu'elle aurait reçu des actions d'une valeur marchande inférieure au plafond de 1,5 million $US. Il ne serait guère logique d'accepter le risque d'une baisse du cours de l'action sans avoir la possibilité de bénéficier d'une hausse. Pour reprendre les propos du juge Armstrong :

> [TRADUCTION] Il serait contraire aux principes commerciaux reconnus de protéger l'appelante de la hausse du cours de l'action dont bénéficiait l'intimée à la date de versement des honoraires, alors qu'une telle augmentation était prévisible et aurait dû être soulevée par l'appelante, tout comme il serait contraire aux principes commerciaux reconnus, et aux termes de l'entente relative aux honoraires, d'augmenter le nombre d'actions cédées à l'intimée dans le cas où leur valeur aurait baissé par rapport au cours en vigueur à la date du versement des honoraires. Les deux parties ont reconnu, quand elles ont conclu l'entente relative aux honoraires, la possibilité de fluctuation de la valeur de l'action après la définition du cours.

(Décision de la CS sur l'appel, par. 70)

[119] Pour ces raisons, on ne peut prétendre que l'arbitre n'a pas tenu compte de la stipulation de l'entente relative au « plafond ». Le raisonnement de l'arbitre, que le juge Armstrong explique, satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité (*Dunsmuir*, par. 47).

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

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

[121] The CA Appeal Court noted two specific findings regarding the merits of the appeal that it held were binding on it and the SC Appeal Court: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but allowed it to receive shares valued at approximately $8 million if Sattva received its fee in shares; and (2) that the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement:

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

E. *La formation saisie de l'appel n'est pas liée par les observations formulées par la formation saisie de la demande d'autorisation sur le bien-fondé de l'appel*

[120] La Cour d'appel a conclu qu'elle-même et la formation de la CS saisie de l'appel étaient liées par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation en ce qui a trait non seulement à la décision d'autoriser l'appel, mais aussi au bien-fondé de l'appel. Autrement dit, elle a conclu que la formation de la CS saisie de l'appel avait commis une erreur de droit en faisant fi des conclusions de la formation de la CA saisie de la demande d'autorisation quant au bien-fondé de l'appel.

[121] La formation de la CA saisie de l'appel a mis en relief deux conclusions précises quant au bien-fondé de l'appel qui, à son avis, la liaient elle, et aussi la formation de la CS saisie de l'appel : 1º il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million $US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions $ et 2º l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente :

> [TRADUCTION] Le juge [de la CS saisi de l'appel] a conclu que l'arbitre avait expressément tenu compte du plafond des honoraires payables conformément au paragraphe 3.1 de l'entente et que sa sentence était correcte.
>
> Cette conclusion est contraire aux remarques formulées par la juge Newbury dans l'appel antérieur selon lesquelles, si ses honoraires étaient versés en actions, à raison de 0,15 $ l'unité, Sattva obtiendrait des honoraires d'une valeur, à la date du versement des honoraires, de plus de 8 millions $. Si elle optait pour le versement en argent, elle recevrait un montant de 1,5 million $US. La juge Newbury a statué expressément que l'arbitre n'avait pas soulevé cette anomalie et qu'il n'avait pas tenu compte du sens du paragraphe 3.1 de l'entente.
>
> Le juge [de la CS saisi de l'appel] était tenu d'accepter ces conclusions. De même, à défaut d'une décision d'une formation de cinq juges en l'espèce, nous devons aussi accepter ces conclusions. [par. 42-44]

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

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

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

[122] Avec tout le respect que je lui dois, j'estime que la formation de la CA saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la CA saisie de la demande d'autorisation la liaient elle, de même que la formation de la CS saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 88). Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli (*Pacifica Mortgage Investment Corp. c. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, par. 27, autorisation d'appel refusée, [2013] 3 R.C.S. viii). Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause, comme c'est le cas en l'espèce. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs (*Tamil Co-operative Homes Inc. c. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), par. 32).

[123] Creston concède ce point, mais prétend que la conclusion tirée par la formation de la CA saisie de l'appel selon laquelle elle était liée par les conclusions de celle saisie de la demande d'autorisation était sans conséquence parce que la première est arrivée à la même conclusion que la seconde sur le bien-fondé, à l'issue d'un raisonnement distinct et indépendant.

[124] Le fait que la formation de la CA saisie de l'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur. Dès lors que la formation de la CA saisie de l'appel a accordé un caractère obligatoire aux motifs concernant le bien-fondé de l'appel énoncés par celle saisie de la demande d'autorisation, elle ne pouvait guère arriver à une autre décision. Comme le souligne l'avocat de Sattva, considérer comme impérative la décision relative à la demande d'autorisation rendrait l'appel futile.

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VI. Conclusion

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

APPENDIX I

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

(a) "Market Price" definition:

2. DEFINITIONS

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

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

3. FINDER'S FEE

3.1 . . . the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee

VI. Conclusion

[125] La formation de la CA saisie de la demande d'autorisation a commis une erreur en accordant l'autorisation d'interjeter appel en l'espèce. Quoi qu'il en soit, la sentence arbitrale était raisonnable. L'appel interjeté à l'encontre des décisions de la Cour d'appel de la Colombie-Britannique datées du 14 mai 2010 et du 7 août 2012 est accueilli avec dépens devant toutes les cours. La sentence arbitrale est rétablie.

ANNEXE I

Dispositions pertinentes de l'entente relative aux honoraires d'intermédiation conclue entre Sattva et Creston

a) Définition du « cours » :

[TRADUCTION]

2. DÉFINITIONS

« cours », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

b) Disposition relative aux honoraires d'intermédiation (laquelle contient la stipulation relative au « plafond ») :

[TRADUCTION]

3. HONORAIRES D'INTERMÉDIATION

3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques

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is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

APPENDIX II

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

3.3 Finder's Fee Limitations

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

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

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

APPENDIX III

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

Appeal to the court

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

ANNEXE II

Point 3.3 de la politique 5.1 de la Bourse de croissance TSX : Emprunts, primes, honoraires d'intermédiation et commissions

3.3 Plafond des honoraires d'intermédiation

Les honoraires d'intermédiation sont assujettis à un plafond si l'avantage que retire l'émetteur prend la forme d'un achat ou d'une vente d'actifs ou d'une convention de coentreprise, ou si son avantage n'est pas lié à un financement précis. La contrepartie devrait être exprimée à la fois en valeur monétaire et en pourcentage de la valeur de l'avantage reçu. Sauf dans des circonstances exceptionnelles, les honoraires d'intermédiation ne doivent pas dépasser les pourcentages suivants :

Avantage	Honoraires d'intermédiation
300 000 $ et moins	Jusqu'à 10 %
Entre 300 000 $ et 1 000 000 $	Jusqu'à 7,5 %
1 000 000 $ et plus	Jusqu'à 5 %

De façon générale, les honoraires ou la commission, exprimés en pourcentage de la valeur monétaire de l'avantage, devraient être inversement proportionnels à cette valeur.

ANNEXE III

Commercial Arbitration Act, R.S.B.C. 1996, ch. 55 (dans sa version du 12 janvier 2007) (maintenant l'*Arbitration Act*)

[TRADUCTION]

Appel devant le tribunal

31 (1) Une partie à l'arbitrage peut interjeter appel au tribunal sur toute question de droit découlant de la sentence si, selon le cas :

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

(b) the court grants leave to appeal.

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

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

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

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

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

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

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

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

Appeal allowed with costs throughout.

Solicitors for the appellant: McCarthy Tétrault, Vancouver.

Solicitors for the respondent: Miller Thomson, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the BCICAC Foundation: Fasken Martineau DuMoulin, Vancouver.

(a) toutes les parties à l'arbitrage y consentent,

(b) le tribunal accorde l'autorisation.

(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :

(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,

(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,

(c) la question de droit est d'importance publique.

(3) Si le tribunal accorde l'autorisation en vertu du présent article, il peut assortir des conditions qu'il estime équitables l'ordonnance accordant l'autorisation.

(4) En appel, le tribunal peut, selon le cas :

(a) confirmer, modifier ou annuler la sentence,

(b) renvoyer la sentence à l'arbitre avec l'opinion du tribunal sur la question de droit qui a fait l'objet de l'appel.

Pourvoi accueilli avec dépens devant toutes les cours.

Procureurs de l'appelante : McCarthy Tétrault, Vancouver.

Procureurs de l'intimée : Miller Thomson, Vancouver.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intervenante BCICAC Foundation : Fasken Martineau DuMoulin, Vancouver.

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CANADA STEAMSHIP LINES LTD. v. THE KING

Judicial Committee of the Privy Council, Lords Porter, Normand, Morton of Henryton, Asquith of Bishopstone and Cohen.
January 21, 1952.

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Geoffrey Cross, K.C., *Hazen Hansard,* K.C. and *R. O. Wilberforce,* for appellant company; *A. J. Campbell,* K.C., *D. W. Mundell,* K.C. and *Frank Gahan,* for the Crown.

The judgment of their Lordships was delivered by

LORD MORTON OF HENRYTON:—It will be convenient to refer to the appellant company as "the company" and to the respondent as "the Crown".

This is an appeal by special leave from six judgments of the Supreme Court of Canada dated June 23, 1950 [[1950], 4 D.L.R. 703, S.C.R. 532], reversing in part a like number of judgments of the Exchequer Court of Canada (Angers J.) [[1949] 1 D.L.R. 172, [1948] Ex. C.R. 635], which had maintained petitions of right against the Crown for damages arising out of a disastrous fire.

In the first of these six cases the company was suppliant, claiming from the Crown $40,713.72 as the value of the property of the company destroyed in the fire. In the remaining five cases the suppliants were owners of other property destroyed by the fire. The suppliants in these five cases and the amounts respectively claimed by them from the Crown were as follows:

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H. J. Heinz Co. of Canada	$38,430.88
Can. & Dominion Sugar Co. Ltd.	$108,310.83
W. H. Taylor Ltd.	$3,670.25
Raymond Copping	$1,662.37
Cunningham & Wells Ltd.	$15,159.83

In addition to the present six cases, petitions of right were instituted against the Crown in some 250 other cases involving additional claims arising out of the fire to a total amount of $325,636.05, which petitions of right have remained in abeyance pending the outcome of these proceedings.

The events leading up to all these claims must now be set out. By an Indenture of Lease (hereafter called "the lease") dated November 18, 1940, the Crown leased to the company a piece of land on the western side of St. Gabriel Basin No. 1 of the Lachine Canal in the City of Montreal "together with the right and privilege to occupy, use and enjoy, for the purpose of receiving and storing therein freight and goods loaded onto and/or unloaded from vessels owned and operated by the lessee", the whole of a shed known as St. Gabriel Shed No. 1 and hereafter referred to as "the shed". The shed occupied the greater part of the said piece of land. The company was also granted "the right and privilege to construct, maintain and use, at its own cost and expense and over and/or across the said land, along the whole length of the southerly face of the said shed, a loading platform approximately 14 ft. in width, and a canopy extending approximately 20 ft. beyond the southerly edge of the said platform". Between the land demised to the company and the St. Gabriel Basin No. 2 there lay a strip of land 30 ft. in width. The term of the lease was 12 years from May 1st, 1940, and the rent was over $12,000 per annum. The lease was expressed to be "made and executed upon and subject to the covenants, provisoes, conditions and reservations hereinafter set forth and contained, and that the same and every of them, representing and expressing the exact intention of the parties, are to be strictly observed, performed and complied with namely:—". Then follow a number of clauses some of which must be set out, as the decision of this appeal ultimately turns upon the construction of cls. 7 and 17, and these two clauses must be considered in the light of the lease read as a whole. The more important clauses are as follows:

"1. That the Lessee will pay all rental herein reserved at the time and in the manner in these Presents set forth, without any abatement or deduction whatever . . . .

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"5. That the Lessor, His Servants or agents, shall at all times and for all purposes, have full and free access to any and every part of the said land, the said shed and the said platform.

"6. That the said land shall be used for purposes in connection with the Lessee's business, only, and for no other purpose or purposes whatever.

"7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

"8. That the Lessor will, at all times during the currency of this Lease, at His own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy.

"9. That the Lessee shall, in addition to the payment of the yearly rental hereunder, at its own sole cost and expense, insure, concurrently with the execution of this Lease or as soon thereafter as possible, and thereafter keep insured during the currency of this Lease with an insurance company or companies satisfactory to the Minister of Transport the said shed against fire and other casualty in the sum of FORTY-EIGHT THOUSAND DOLLARS ($48,000.00) . . . .

"10. That the Lessee shall before constructing or erecting the said platform, the said canopy or other structures, including alterations to the said shed, on the said land, submit to the General Superintendent plans or drawings showing the location and design and nature of construction of the said platform, the said canopy or such structures, and obtain his approval of such plans or drawings, and shall construct or erect the said platform, the said canopy or such structures on the location and in accordance with the designs as shown on the plans and drawings approved by the General Superintendent, and thereafter maintain the said platform, the said canopy or such structures in accordance with the designs respecting the same, and shall carry on the work of such construction and maintenance of the said platform, the said canopy and such structures at its own cost and expense and under the control and direction of the General Superintendent and to his entire satisfaction . . . .

"12. That it is distinctly understood and agreed that this Lease is granted subject to the condition that the said platform and the said canopy shall forthwith, upon termination of this Lease in any manner, except as provided for in Clause 18

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hereof, be and become vested in title in the Lessor without any payment of compensation to the Lessee in respect of the said platform and the said canopy . . .

"16. That the parcel or tract of land, thirty (30) feet in width, situated between St. Gabriel Basin No. 2 and the said land may be used by the Lessee in common with the public generally, it being understood and agreed, however, that the Lessee shall, in the discretion of the Superintending Engineer and in accordance with his direction, have preference in the use thereof.

"17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder."

Pursuant to the lease the company took possession of the leased premises and continued to occupy them at all times material to the present litigation. A few days prior to May 5, 1944, the Department of Transport in Montreal, representing the Crown, received a request from the company to effect certain minor repairs to the premises, including the doors of the shed. An inspection was made and the work undertaken by the employees of the Department of Transport almost immediately.

At this time the shed contained a large variety of merchandise awaiting shipment, other goods stored there by third parties and a quantity of equipment belonging to the company. A number of trucks and motor vehicles were on the wharf delivering or about to deliver further goods for transport.

The shed was constructed of corrugated iron on a steel frame and the shipping doors were hung on hinges bolted to the uprights of the frame. These uprights were in the form of steel "H-Beams", the flanges of which were one-quarter to three-eighths of an inch thick.

The Crown's employees, having almost completed their work on the afternoon of May 5th, had removed and straightened the upper hinge of one of the shipping doors which had to be replaced. These hinges had originally been affixed to the "H-Beam" with three-eighths inch bolts. When they came to replace the hinge in question the Crown's employees found that they had no three-eighths inch bolts with them, the smallest size being one-half inch in diameter. They elected to enlarge

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the three-eighths inch hole in the "H-Beam" so that it would take the half-inch bolt.

Inside the door, immediately opposite and a few feet distant from the "H-Beam" in question were piled a number of bales of cotton waste.

Having decided to enlarge the hole, the Crown's employees proceeded to make use of an oxy-acetylene cutting torch for this purpose. The operation of this torch involved the use of oxygen and acetylene gas which are combined in a cutting-head under pressure and, when ignited, produce extremely high temperatures of from 5,500° to 6,300° Fahrenheit. The flame of the torch, at such temperatures, will cut through steel.

The use of such a torch in the vicinity of inflammable material is dangerous, since, apart from the heat of the torch itself, the operation of cutting the metal necessarily produces a shower of sparks or particles of molten metal which fly off at a tangent from the point of cutting. The Crown's employees directed the torch from the exterior into the interior of the shed. For the purpose of preventing sparks from entering the shed, they placed a board on the inside across the opening of the "H-Beam". This board was some 3 ft. shorter than the beam and did not fit closely at the top because it was cut square whereas the roof of the shed sloped. There was accordingly openings at both the top and bottom of the beam through which sparks might escape. One of the workmen was stationed on the top of the bales of cotton waste and a pail of water was placed inside the shed.

The operation of enlarging the hole involved using the torch for about three or four minutes. Sparks escaped into the shed. The bales of cotton waste caught fire and the flames spread rapidly to the other contents of the shed and consumed the whole. Hence the claims, already mentioned, by the company and others against the Crown.

Angers J., after hearing the evidence, found as a fact that the fire and resulting damage were caused by the gross negligence of the Crown's servants while acting within the scope of their duties or employment. The Crown had denied negligence, and had pleaded that the company's claim was in any event barred by the provisions of cl. 7 of the lease. In third party proceedings the Crown relied upon cl. 17 of the lease as giving rise to a right of indemnity from the company against the claims of the other five suppliants.

The learned trial Judge did not express any view as to the meaning of cls. 7 and 17 of the lease. It was not necessary for

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him to do so because, basing himself on the law of Quebec which he reviewed exhaustively, he found that no clause would extend to relieve the Crown of liability for damages resulting from the gross negligence (*faute lourde*) of its servants. He accordingly refused to regard cl. 7 as a bar to the company's action or to hold that cl. 17 gave the Crown a right to indemnity in the other five cases. In the result he condemned the Crown to pay to the company and to the other five suppliants the damages respectively claimed by them, and he dismissed the third party proceedings brought by the Crown against the company. The amount of the damages was agreed and is not in issue.

The Supreme Court of Canada (Rinfret C.J.C. and Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.) by a majority of six to one (Locke J. dissenting) reversed the trial Judge in the company's own case and unanimously reversed the trial Judge in the cases of the other five suppliants in so far as the third party proceedings of the Crown against the company were concerned.

The Supreme Court concurred in the finding of the trial Judge that the Crown's servants were negligent, but declined to hold that such negligence amounted to gross negligence (*faute lourde*). On the interpretation which they placed upon cls. 7 (Locke J. dissenting) and 17 of the lease, they held that such clauses must be read as barring the company's action and as entitling the Crown to indemnity in the other actions. They accordingly dismissed the company's petition, confirmed the judgments maintaining the petitions in the five other cases and condemned the company to indemnify the Crown in respect thereof.

In view of the findings of the Supreme Court, the Crown does not now seek to deny that its servants were negligent but contends that their negligence was not gross negligence. Thus the issues arising upon this appeal are whether the Supreme Court rightly construed cls. 7 and 17 of the lease, whether the Crown's servants were guilty of gross negligence and if so whether by the law of Quebec, clauses stipulating immunity from or limitation of liability for the gross negligence of one of the contracting parties or his servants, or indemnity against such liability, are illegal and void. Counsel for the company conceded that such clauses were legal and effective if they applied only to negligence which did not amount to *faute lourde*. He opened the appeal by submitting that even if the negligence of the Crown's servants did not amount to "*faute lourde*", on the

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true construction of cls. 7 and 17 of the lease cl. 7 afforded no answer to the company's claim against the Crown, and cl. 17 did not entitle the Crown to the indemnity claimed in the third party proceedings. As this submission, if successful, would dispose of the appeal, their Lordships thought it well to hear it argued fully before hearing argument upon the other issues in the case.

In considering this question of construction their Lordships have had in mind arts. 1013 to 1021 of the *Civil Code* and also the special principles which are applicable to clauses which purport to exempt one party to a contract from liability. These principles were stated by Lord Greene M.R. in *Alderslade* v. *Hendon Laundry Ltd.*, [1945] K.B. 189 at p. 192 as follows:

"Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because [if it were not so construed] it would lack subject-matter. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause, to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence."

It appears to their Lordships that none of the learned Judges of the Supreme Court regarded this passage as being in any way in conflict with the law of Lower Canada, and Kellock J. observed [p. 719]: "It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case."

Their Lordships think that the duty of a Court in approaching the consideration of such clauses may be summarized as follows:

(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the *proferens*") from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed as to whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court

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of Canada in *Glengoil SS. Co.* v. *Pilkington* (1897), 28 S.C.R. 146.

(2) If there is no express reference to negligence, the Court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. If a doubt arises at this point, it must be resolved against the *proferens* in accordance with art. 1019 of the *Civil Code*: "In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation."

(3) If the words used are wide enough for the above purpose, the Court must then consider whether "the head of damage may be based on some ground other than that of negligence" to quote again Lord Greene in the *Alderslade* case. The "other ground" must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are *prima facie* wide enough to cover negligence on the part of his servants.

With these principles in mind, their Lordships turn to a consideration of cl. 7, and they will first consider its language apart from the contents of cl. 8 which immediately follows it. The claim of the company in the present case is "a claim . . . against the lessor for damage to . . . goods . . . being . . . in the said shed", and would therefore *prima facie* be barred by cl. 7. It is, however, a claim for damage admittedly caused by the negligence of the Crown's servants. Their Lordships must therefore consider the third question stated above, and in considering this question it is necessary to bear in mind that the only liability of the Crown in the Province of Quebec in respect of claims arising *ex delicto* is based upon s. 19(1)(*c*) [re-enacted 1938, c. 28, s. 1] of the *Exchequer Court Act*, R.S.C. 1927, c. 34. That section is in the following terms:

"19(1) The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

"(*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment."

Thus the field for claims against the Crown, not based upon negligence and coming within cl. 7, is not a very wide one, but

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counsel for the company has given the following instances of such claims:

1. Claims under art. 1614 of the *Civil Code* for "defects and faults in the thing leased, which prevent or diminish its use, whether known to the lessor or not".

There might be, says counsel, a defect in the construction of the roof of the shed, not known to the Crown, and as a result of this defect the roof might fall down and injure chattels in the shed which belonged to the company. A claim for damage to these chattels resulting from this breach of the lessor's obligation under art. 1614 is not a claim based on negligence and it would be barred by cl. 7.

2. Claims under art. 1612(3) of the *Civil Code.*

Suppose, for example, says counsel, that the Crown were to authorize a third party to carry out some operation on adjacent land which caused damage to the shed. In that event, again, the company would have a claim for damages, not based on negligence, which would be barred by cl. 7.

3. Claims for a reduction of the rent, by the joint operation of arts. 1617 and 1660 of the *Civil Code,* if, for instance, a trespasser caused damage to the shed by setting part of it on fire, and the lessee's right of action for damages against the trespasser proved to be ineffectual.

Counsel for the Crown contended that a claim for a reduction of the rent would not fall within clause 7, but their Lordships think that such a claim, although it would not be a claim for "damages" might fairly be described as "a demand against the lessor for . . . damage . . . of any nature . . . to the said shed" within the meaning of clause 7.

It was contended on behalf of the Crown that these instances of possible claims for damages were fanciful and remote, and would not have been within the contemplation of the parties when the terms of the lease were agreed. No doubt there may be cases in which it may be difficult to draw the line. In the present case, however, their Lordships are not prepared to assume that the obligations imposed upon lessors by the Civil Code were not in the minds of the parties. They think that the Crown may well have desired to protect itself from claims for damage arising out of any breach of these obligations, and yet may not have intended to go so far as to stipulate for protection from claims for damage resulting from the negligence of its servants.

So far, cl. 7 has been considered apart from cl. 8, but these two clauses must be read together, according to the ordinary

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principles of construction. So reading them, it appears to their Lordships most unlikely that cl. 7 was intended to protect the Crown from claims for damage resulting from the negligence of its servants in carrying out the very obligations which were imposed upon the Crown by cl. 8. It is difficult to imagine the Crown saying to the company, when the lease was being negotiated, "Notwithstanding that the Crown agrees to maintain the shed, at its own expense, throughout the term of the lease and notwithstanding that such an agreement implies an obligation to use due care in its performance, if the Crown's servants set about the work of repair in such a negligent manner that the shed and all the goods therein are destroyed, you are to have no claim for damages against the Crown" and if the Crown had made such a suggestion, it seems unlikely that the company would have accepted it.

Counsel for the Crown submitted that inconsistency between cls. 7 and 8 would be avoided if the former clause were read as barring claims for damages for non-feasance or misfeasance under cl. 8, but leaving open to the company any claims for specific performance which it might make as a result of non-feasance, under art. 1641(1) and (2) of the *Civil Code*. This is not an impossible construction of cl. 7, but it appears to their Lordships to be a somewhat strained and artificial construction. Counsel for the Crown also relied on the fact that under cl. 9 the company was bound to insure the shed, as an indication that the Crown did not intend to be liable for any damage to the shed, howsoever such damage might arise. This argument is not without force, as applied to the shed, but cl. 9 makes no reference to goods within the shed.

Their Lordships will shortly consider how far the construction of cl. 7 is affected by cl. 17, for they entirely agree with the view expressed by the majority of the Supreme Court as to the close inter-relation of these two clauses. If, however, cl. 7 were to be considered apart from cl. 17, their Lordships would conclude that, even if the case is put at its highest in favour of the Crown, the Crown has failed to limit its liability in respect of negligence in clear terms. They would therefore decide against the Crown in accordance with the principles already stated.

Their Lordships now turn to cl. 17, and observe at the outset that if the Crown's contention as to this clause is correct, it imposes a very remarkable and burdensome obligation on the company. However widespread may be the destruction caused by the negligence of the Crown's servants in carrying out the

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Crown's obligations under cl. 8, the whole of the damage must be paid for by the company. In the present case the claims are heavy, and it is obvious that the damage caused by a fire such as this might be even greater. Such a liability for the negligence of others must surely be imposed by very clear words, if it is to be imposed at all.

The opening words of cl. 17 are certainly very wide: "That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted." They are, however, considerably narrowed in their scope by the words which follow. These words limit the application of the clause to claims, etc., "in any manner based upon, occasioned by or attributable to" any one of three specified matters, namely, (1) "The execution of these Presents", (2) "Any action taken or things done or maintained by virtue hereof", (3) "The exercise in any manner of rights arising hereunder".

Are these words, in their ordinary meaning, wide enough to cover the negligent act of the Crown's servants, which caused the damage now under consideration?

The learned Chief Justice appears to have placed some reliance on the words "occasioned by or attributable to the execution of these Presents", treating "execution" as synonymous with "performance", but their Lordships are unable to take that view. They think that the words "execution of these Presents" refer only to the signing and sealing of the lease. This is the usual meaning of these words, and the word "executed" is used in the same sense at the end of the document, where it is stated that "The Lessee has executed these Presents". Their Lordships think that by this phrase the Crown must have desired to protect itself against third parties claiming that they had contractual rights against the Crown which had been violated by the execution of the lease and the resulting grant of various rights to the company.

The remaining part of cl. 17 gives rise to questions of great difficulty. Counsel for the Crown submitted that the negligent act of the Crown's servants was covered by the words "any action taken or things done . . . by virtue hereof". They contended that the words "by virtue of" may fairly be construed as meaning "in consequence of" and that the act of the Crown's servants in enlarging the hole was done in consequence of the lease, none the less so because it was negligently done. They pointed out, quite rightly, that the intent of the clause was to

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protect the Crown against claims by third parties and submitted (*a*) that the only acts which could involve claims against the Crown by third parties would be acts of the Crown's servants, and therefore the words in question must refer to, or at least include, acts of the Crown's servants; and (*b*) that the acts contemplated must be negligent acts, otherwise they would give rise to no liability to third parties.

Counsel for the company contended that this argument involved a strained and unnatural construction of the words in question and that the phrase "any action taken or things done . . . by virtue hereof" would naturally refer to the doing of an act in pursuance of some right or privilege conferred by the lease rather than to the doing of an act in performance of some obligation imposed by the lease. They further contended that even if the words in question could cover an act properly done in performance of an obligation imposed by the lease, they could not extend to cover an act negligently done in the course of carrying out such an obligation. They submitted the following argument on the construction of cl. 17. By the phrase "occasioned by or attributable to the execution of these Presents" the Crown was seeking to protect itself against the possible claims already mentioned, while by the rest of the clause the Crown was seeking to protect itself against possible liability to third parties occasioned by or attributable to acts of the company. The reference to the execution of the lease is closely linked up with the words which follow it. In executing the lease the Crown was conferring a large number of rights and privileges upon the company. The party who is likely to "take actions" or "do things" or "exercise rights" under the lease is the company. By cl. 17 the Crown is saying, in effect to the company "Nothing that you do under the lease is to involve the Crown in any liability. Third Parties may consider that they have a claim against the Crown by reason of the Crown's act in granting to you the right of occupying the shed, or by reason of acts done by you with the sanction of the Crown such as the erection of the loading platform and canopy in accordance with plans approved by the Crown under cl. 10 of the lease, or the exercise of 'preferential' rights under cl. 16. If any such claim is made against the Crown, and succeeds, you must indemnify the Crown". In support of this argument counsel referred to the latter part of art. 1618 of the *Civil Code* as showing that the Crown might become a party to an action by a third party claiming some "right in or upon the thing leased".

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The choice between these two contentions is not an easy one, but their Lordships have come to the conclusion that the company's contention is to be preferred, for the following reasons. First, it gives the more natural construction to the words "any action done by virtue hereof". It is at least doubtful whether these words can be applied to a negligent act done in the course of carrying out an obligation. Secondly, even if the words are wide enough to include such a negligent act, the principle laid down in the *Alderslade* case must be applied and their Lordships are inclined to think that on the company's construction, "the head of damage may be based on some other ground than that of negligence", although the possible grounds are somewhat limited in extent. Thirdly, their Lordships think it is manifest that the meaning and effect of cl. 17 are far from clear, and if this is so the Crown has failed to impose in clear terms the burdensome obligation which has already been described. There would have been no difficulty in inserting an express reference to negligence of the Crown's servants, in cls. 7 and 17, if these clauses had been intended to protect the Crown against the consequences of such negligence.

If their Lordships had agreed with the Supreme Court that cl. 17 extended so far as to cover negligent acts of the Crown's servants, they might well have had to reconsider the provisional view already expressed as to cl. 7, but as they have arrived at the contrary opinion, their provisional view as to cl. 7, so far from being disturbed, is strengthened. It would seem unlikely that if negligent acts by the Crown's servants are outside the scope of one clause, they are within the scope of the other.

The result is that, after hearing an able argument as to the construction of the lease from both sides, their Lordships find that the Crown has failed to establish either its defence under cl. 7 or its claim for indemnity under cl. 17. This being so, no other question arises for decision on this appeal.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the orders of the Supreme Court in the petition of the company against the Crown and in the five third party proceedings should be set aside, and the orders of Anger J. restored. The Crown must pay the company's costs in each of these six petitions, here and in the Courts of Canada.

Appeal allowed.

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The Consumers' Gas Company (*Defendant*) *Appellant*;

and

The Corporation of the City of Peterborough and Peterborough Utilities Commission (*Defendants—Third-Parties*) *Respondents*;

and

Gerard Fenn, Sandra Fenn, Candice Ann Fenn, by her next friend John Fenn, and the said John Fenn personally (*Plaintiffs*).

1981: December 10; 1981: December 17.

Present: Martland, Ritchie, Estey, McIntyre and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence — Contribution and indemnification — Appellant 25 per cent and respondents 75 per cent at fault — Appellant claiming full indemnification for liability as to damages from respondents — Appellant owing duty of care to Commission — No contractual provision for provision of indemnification for own negligence — Appeal dismissed — The Negligence Act, R.S.O. 1970, c. 296, s. 2(1).

At trial, Consumers' and the Utilities Commission were found to be negligent with respect to a gas line rupture and explosion following work in the vicinity of the main. The action against the City was dismissed. On appeal, the City was also found to be liable. The Court of Appeal apportioned fault as to 75 per cent against the Commission and the City and as to 25 per cent against Consumers' and denied Consumers' claim for full indemnity from the Commission and the City in respect of any damages it was required to pay. Both courts below found that Consumers' owed a duty of care to the Commission. There was no evidence of any contract between the parties providing for one party's being indemnified for its own negligence by the other. The sole issue before this Court was Consumers' claim for full indemnity.

Held: The appeal should be dismissed.

The bar to recovery by Consumers' was its own negligence to the plaintiffs, independent of anyone else's negligence, and it could not recover indemnity from the

The Consumers' Gas Company (*Défenderesse*) *Appelante*;

et

The Corporation of the City of Peterborough et Peterborough Utilities Commission (*Défenderesses—Tiers appelés*) *Intimées*;

et

Gerard Fenn, Sandra Fenn, Candice Ann Fenn, représentée *ad litem* par John Fenn, et ledit John Fenn personnellement (*Demandeurs*).

1981: 10 décembre; 1981: 17 décembre.

Présents: Les juges Martland, Ritchie, Estey, McIntyre et Lamer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Responsabilité — Contribution et indemnisation — Responsabilité partagée à 25 pour cent contre l'appelante et 75 pour cent contre les intimées — L'appelante demande d'être indemnisée entièrement par les intimées pour la responsabilité des dommages — Obligation de diligence de l'appelante envers la Commission — Aucune disposition contractuelle ne prévoit l'indemnisation pour sa propre négligence — Pourvoi rejeté — The Negligence Act, R.S.O. 1970, chap. 296, art. 2(1).

En première instance, le juge a conclu que Consumer et la Commission avaient été négligentes relativement à la rupture d'une conduite de gaz et à une explosion consécutives à des travaux exécutés dans le voisinage de la conduite. L'action contre la Ville a été rejetée. En appel, la Ville a également été tenue responsable. La Cour d'appel a partagé la responsabilité à 75 pour cent contre la Commission et la Ville et 25 pour cent contre Consumer et ont rejeté la demande faite par Consumer à la Commission et à la Ville de l'indemniser entièrement des dommages qu'elle était tenue de payer. Les cours d'instance inférieure ont conclu que Consumer avait une obligation de diligence envers la Commission. Il n'y avait aucune preuve d'un contrat entre les parties prévoyant qu'une partie doit être indemnisée par l'autre partie pour sa propre négligence. La seule question en litige devant cette Cour porte sur la demande de Consumer d'être indemnisée entièrement.

Arrêt: Le pourvoi est rejeté.

Ce qui empêche Consumer de recouvrer une indemnisation, c'est sa propre négligence envers les demandeurs, indépendamment de la négligence de toute autre per-

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Commission beyond that allowed by *The Negligence Act*. The mere fact that the parties were members of an informal committee did not establish mutual contractual obligations and would not support a claim for indemnity arising out of claimant's own negligence. An indemnity clause spelling out this obligation on the other party must be in the clearest terms.

APPEAL from a judgment of the Ontario Court of Appeal[1], dismissing an appeal from a judgment of R. E. Holland J. dismissing a claim to full indemnity for damages awarded. Appeal dismissed.

Warren H. O. Mueller, Q.C., for the appellant.

John Fitzpatrick, Q.C., for the respondents.

The judgment of the Court was delivered by

MARTLAND J.—As a result of a natural gas explosion and subsequent fire at the residence leased by the plaintiffs Gerard Fenn and Sandra Fenn, the plaintiff Sandra Fenn was severely injured, three children of Gerard Fenn and Sandra Fenn died and the plaintiff Candice Ann Fenn was injured.

The plaintiffs brought action against the appellant The Consumers' Gas Company ("Consumers' "), the respondent Peterborough Utilities Commission ("the Commission") and the respondent The Corporation of the City of Peterborough ("the City").

The natural gas which, upon ignition, exploded had escaped from a fracture in a four-inch wrought iron gas main owned and operated by Consumers'. The trial judge found that the fracture occurred because of strains placed upon the gas main as a result of lack of support or blocking following an excavation in the vicinity of the gas main by the Commission and as a result of inadequate and improper backfilling by the Commission. The trial judge also held that there had been negligence on the part of Consumers' in that the senior officers of Consumers' should have made clear, in some institutional way, the extreme danger of excavating in the vicinity of wrought iron mains. Furthermore, in the circumstances that existed, an employee of Consumers' should have

[1] (1979), 104 D.L.R. (3d) 174.

sonne, et elle ne peut recouvrer de la Commission une indemnisation supérieure à celle que lui permet *The Negligence Act*. Le simple fait que les parties étaient membres d'un comité officieux n'établit pas des obligations contractuelles réciproques et ne donne pas droit à une indemnisation résultant de la négligence de la partie qui la réclame. Une clause d'indemnisation qui énonce cette obligation de l'autre partie doit être rédigée très clairement.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario[1], rejetant l'appel d'un jugement du juge R. E. Holland qui a rejeté une demande d'indemnisation intégrale des dommages à payer. Pourvoi rejeté.

Warren H. O. Mueller, c.r., pour l'appelante.

John Fitzpatrick, c.r., pour les intimées.

Version française du jugement de la Cour rendu par

LE JUGE MARTLAND—Par suite d'une explosion de gaz naturel et d'un incendie qui a suivi à la résidence que louaient les demandeurs Gerard Fenn et Sandra Fenn, la demanderesse Sandra Fenn a été grièvement blessée, trois enfants de Gerard Fenn et Sandra Fenn sont décédés et la demanderesse Candice Ann Fenn a été blessée.

Les demandeurs ont intenté une action contre l'appelante The Consumers' Gas Company («Consumer»), l'intimée Peterborough Utilities Commission («la Commission») et l'intimée The Corporation of the City of Peterborough («la Ville»).

Le gaz naturel qui a fait explosion lorsqu'il a été allumé s'échappait d'une fissure dans une conduite de gaz en fer de quatre pouces de diamètre dont Consumer était propriétaire et qu'elle exploitait. Le juge de première instance a conclu que la fissure résultait des tensions imposées à la conduite de gaz du fait de l'insuffisance d'appui ou de support consécutive à une excavation faite par la Commission dans le voisinage de la conduite et du fait d'un remplissage insuffisant par la Commission. Le juge de première instance a en outre conclu que Consumer a été négligente en ce que les dirigeants de Consumer auraient dû énoncer clairement, d'une façon spéciale, le très grand danger de creuser près des conduites en fer. En outre, dans les circonstances qui prévalaient, un employé de

[1] (1979), 104 D.L.R. (3d) 174.

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inspected the site of the excavation on a regular basis and arrangements should have been made so that an inspection could be carried out before any backfilling occurred.

The trial judge awarded damages, as varied by the Court of Appeal, to Sandra Fenn in the amount of $773,179.43, to Gerard Fenn in the amount of $52,470.29 and to Candice Fenn in the amount of $6,526.55 as against Consumers' and the Commission. The action against the City was dismissed. As between Consumers' and the Commission, responsibility was apportioned 25 per cent against Consumers' and 75 per cent against the Commission. With respect to the right of Consumers' to indemnity, it was ordered that:

> ... the Defendant, The Consumers' Gas Company, is entitled to contribution and indemnity from Peterborough Utilities Commission for any amount the Defendant, The Consumers' Gas Company, is required to pay to the Plaintiff in respect of judgment and costs hereunder in excess of 25 per cent thereof.

On appeal, the Court of Appeal held the City liable as well as the Commission. The Court sustained the findings of negligence made by the trial judge as against Consumers' and the Commission. The apportionment of fault was not varied, the Commission and the City being held responsible as to 75 per cent and Consumers' as to 25 per cent.

Consumers' claimed full indemnity from the Commission and the City in respect of any damages which it was required to pay. This claim failed both at trial and in the Court of Appeal. Consumers' appealed, with leave, to this Court. The sole issue before this Court is as to Consumers' claim for full indemnity.

Subsection (1) of s. 2 of *The Negligence Act*, R.S.O. 1970, c. 296, provides as follows:

> **2.**—(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, except as provided by subsections 2, 3 and 4, 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

Consumer aurait dû inspecter régulièrement le chantier d'excavation et on aurait dû voir à ce qu'une inspection soit faite avant de procéder au remplissage.

Le juge de première instance a condamné Consumer et la Commission à payer des dommages-intérêts, que la Cour d'appel a modifiés aux montants de $773,179.43 à Sandra Fenn, de $52,470.29 à Gerard Fenn et $6,526.55 à Candice Fenn. L'action contre la Ville a été rejetée. Entre Consumer et la Commission, la responsabilité a été partagée à 25 pour cent contre Consumer et 75 pour cent contre la Commission. Quant au droit de Consumer à une indemnisation, il a été ordonné que

> [TRADUCTION] ... la défenderesse, The Consumers' Gas Company, a droit de réclamer à Peterborough Utilities Commission, en indemnisation, la partie du montant que la défenderesse The Consumers' Gas Company est tenue de payer aux demandeurs en exécution du jugement et des dépens qui excède 25 pour cent du montant total.

En appel, la Cour d'appel a tenu la Ville responsable au même titre que la Commission. La Cour a maintenu les conclusions du juge de première instance quant à la négligence de Consumer et de la Commission. Le partage de la responsabilité n'a pas été modifié, la Commission et la Ville étant tenues responsables à 75 pour cent et Consumer à 25 pour cent.

Consumer a demandé à la Commission et à la Ville de l'indemniser entièrement des dommages qu'elle était tenue de payer. Sa demande a échoué tant en première instance qu'en appel. Consumer a été autorisé à se pourvoir à cette Cour. La seule question en litige devant cette Cour porte sur la demande de Consumer d'être indemnisée entièrement.

Le paragraphe 2(1) de *The Negligence Act*, R.S.O. 1970, chap. 296, se lit comme suit:

> [TRADUCTION] **2.**—(1) Lorsque la faute ou la négligence de deux ou plusieurs personnes ont causé ou ont contribué à des dommages, le tribunal déterminera la part de chacun dans la faute ou dans la négligence; sous réserve des cas prévus aux paragraphes 2, 3 et 4, lorsque deux ou plusieurs personnes ont commis une faute ou une négligence, elles sont conjointement et solidairement responsables envers la personne qui a subi une perte ou un préjudice imputable à cette faute ou à cette négli-

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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.

The judgment of the Court of Appeal dealt with Consumers' claim to full indemnity in the following passage:

As we have agreed with the trial judge in his finding that Consumers owed a duty of care, not only to the plaintiffs but also to the Commission, we know of no authority which allows a party to be indemnified for its own negligence in the absence of a contractual right thereto and we were referred to none.

The authorities to which we were referred were not similar to the instant case in that in none of the cases cited was there found to be negligence by the one claiming indemnity towards the one from whom indemnity was claimed. Further, in most of the cases cited, there were contractual warranties between the parties and damages were being claimed for breach of such warranties. The evidence here does not establish that, by the mere fact of being members of an informal Committee, the parties had contractual obligations one to the other. If one is to be protected against and indemnified for one's own negligence there would have to be an indemnity clause spelling out this obligation on the other party in the clearest terms. In our view there is nothing in the relationship between the parties arising out of their membership in the Co-ordinating Committee which would support a claim for indemnity for loss occasioned by the claimant's own negligence (*Canada Steamship Lines Ltd. v. The King*, [1952] A.C. 192; *Smith and others v. South Wales Switchgear Ltd.*, [1978] 1 All E.R. 18). The bar to recovery of indemnity by Consumers is its negligence to the plaintiffs, independent of anyone else's negligence, and it cannot recover indemnity from the Commission beyond the 75 per cent allowed by *The Negligence Act*, R.S.O. 1970, c. 296.

I am in agreement with these reasons and, accordingly, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Outerbridge, Thomas, Mueller and Betts, Toronto.

Solicitors for the respondents: Fitzpatrick and Poss, Toronto.

gence; mais, entre elles, en l'absence de contrat exprès ou implicite, elles sont tenues de faire une contribution et de s'indemniser mutuellement dans la mesure de leur participation respective à la faute ou à la négligence.

Les passages suivants de l'arrêt de la Cour d'appel traitent de la demande d'indemnisation complète de Consumer:

[TRADUCTION] Puisque nous souscrivons aux conclusions du juge de première instance que Consumer avait une obligation de diligence, non seulement envers les demandeurs mais aussi envers la Commission, nous ne connaissons aucune jurisprudence qui permette à une partie de se faire indemniser pour sa propre négligence si aucun contrat ne lui donne ce droit, et on ne nous en a cité aucune.

La jurisprudence qui a été soumise diffère du cas en l'espèce en ce que dans aucun des arrêts cités, la partie qui réclamait l'indemnité n'avait commis de négligence à l'égard de la partie à qui elle réclamait l'indemnité. En outre, dans la plupart des arrêts cités, il y avait entre les parties des garanties prévues par contrat, et les dommages-intérêts étaient réclamés pour violation des garanties. La preuve en l'espèce n'établit pas que, du simple fait qu'elles étaient membres d'un comité officieux, les parties avaient l'une envers l'autre des obligations contractuelles. Si une partie doit être protégée contre sa propre négligence et être indemnisée, il doit y avoir une clause d'indemnisation qui énonce très clairement cette obligation de l'autre partie. A notre avis, rien dans les relations qu'a établies entre les parties leur qualité de membre du comité de coordination n'appuie une demande d'indemnisation pour une perte causée par la propre négligence de la partie qui la réclame (*Canada Steamship Lines Ltd. v. The King*, [1952] A.C. 192; *Smith and others v. South Wales Switchgear Ltd.*, [1978] 1 All E.R. 18). Ce qui empêche Consumer de recouvrer une indemnisation, c'est sa négligence envers les demandeurs, indépendamment de la négligence de toute autre personne, et elle ne peut recouvrer de la Commission une indemnisation supérieure aux 75 pour cent que lui permet *The Negligence Act*, R.S.O. 1970, chap. 296.

Je souscris à ces motifs et, par conséquent, je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante: Outerbridge, Thomas, Mueller et Betts, Toronto.

Procureurs des intimées: Fitzpatrick et Poss, Toronto.

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Fenn et al. v. City of Peterborough et al.; Peterborough Utilities Commission et al., Third Parties

25 O.R. (2d) 399
104 D.L.R. (3d) 174

1979 CanLII 77 (ON CA)

ONTARIO
COURT OF APPEAL
MACKINNON, A.C.J.O., JESSUP, ARNUP, ZUBER AND MORDEN, JJ.A.
8TH MAY 1979.

Limitation of actions -- Defendant negligently undermining gas main -- Main fracturing five months later and escaping gas causing explosion which killed some people and injured others -- Writ issued less than six months after explosion -- Statute providing that action must be brought within "six months next after the act committed" -- Whether action barred -- Public Utilities Act, R.S.O. 1970, c. 390, s. 32.

In early August, defendant utilities commission was replacing water service lines in a residential neighbourhood. The excavation work exposed a gas main. A fracture occurred in the gas main in early January because of stresses placed upon the main as a result of lack of support or blocking and inadequate and improper backfilling during and following the excavation. Gas escaped from the main and an explosion occurred destroying a house, killing some of its occupants and injuring others. An action was commenced less than six months later. The commission raised as a defence s. 32 of the Public Utilities Act, R.S.O. 1970, c. 390, which provides that: "No action shall be brought against any person for anything done in pursuance of this Act, but within six months next after the act committed ...". The trial Judge held that the action was not barred. On appeal by the commission to the Ontario Court of Appeal, held, the appeal should be dismissed.

The trial Judge was correct in holding that the six months did not begin to run until the date of the explosion. The basic purpose of a statutory limitation provision is to prevent the bringing of stale claims. In the case of claims against persons acting pursuant to statutory authority, the traditional legislative approach has been to provide for a much shorter period of time than for similar claims against defendants not so acting. However, it would be absurd to attribute to the Legislature an intention, in the public interest or otherwise, to bar claims which not only are not stale but which could never have been brought before the running of the stipulated time. Having regard to the provision's basic purpose, the words "the act committed" in s. 32 of the Public Utilities Act, should be interpreted to mean "the cause of action arose". "The act committed" is a compendious term referring to an act that, because of its consequences, has legal significance.

[Davies v. Traders Finance Corp., [1959] O.W.N. 99, 18 D.L.R. (2d) 48, [1956-60] I.L.R. 1065n, distd; Berardinelli v. Ontario Housing Corp. et al., [1979] 1 S.C.R. 275, 90 D.L.R. (3d) 481, 8 C.P.C. 100; Carey v. Metropolitan Borough of Bermondsey (1903), 67 J.P. 447; Huyton & Roby Gas Co. v. Liverpool Corp., [1926] 1 K.B. 146; Roberts v. Read et al. (1812), 16 East. 215, 104 E.R. 1070; Gillon v. Boddington (1824), Ry. & Mood. 161, 171 E.R. 979; Nicklin et al. v. Williams (1854), 10 Ex. 259, 156 E.R. 440; Whitehouse v. Fellowes (1861), 10 C.B. (N.S.) 765, 142 E.R. 654; Turley v. Daw (1906), 94 L.T. 216; Freeborn v. Leeming, [1926] 1 K.B. 160; Watson v. Fram Reinforced Concrete Co. (Scotland), Ltd. and Winget, Ltd., [1960] S.C. (H.L.) 92, refd to]

Municipal law -- Plaintiff injured as result of negligence of public utilities commission or its servants -- Whether commission statutory agent of municipality for which it was created -- Whether both commission and municipality liable to plaintiff -- Whether municipality entitled to be indemnified by commission.

Principal and agent -- Plaintiff injured as result of

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negligence of public utilities commission or its servants -- Whether commission statutory agent of municipality for which it was created -- Whether both commission and municipality liable to plaintiff -- Whether municipality entitled to be indemnified by commission.

A public utilities commission is the statutory agent of the municipality for which it was created. Where injury is sustained or damage suffered because of the negligence of the commission or its servants, both the municipality and the commission may be sued by the injured party on the basis of the common law principles applicable to principal and agent. However, as between the municipality and the commission, the municipality is entitled to be indemnified by the commission on the basis of the common law right of a principal, who is found vicariously liable to a plaintiff by reason of the negligence of his agent, to be indemnified by the agent.

[Campbell Flour Mills Co. Ltd. v. City of Peterborough (1925), 57 O.L.R. 458, [1925] 4 D.L.R. 23; Ridgway v. City of Toronto (1878), 28 U.C.C.P. 579; Young v. Town of Gravenhurst (1910), 22 O.L.R. 291; affirmed 24 O.L.R. 467; Scott v. Hydro-Electric Com'n of City of Hamilton (1914), 7 O.W.N. 385; Stevens-Willson v. City of Chatham et al., [1933] O.R. 305, [1933] 2 D.L.R. 407, disaprvd; MacDougall, Sons & Co. et al. v. Water Com'rs of City of Windsor (1901), 31 S.C.R. 326; affirming 27 O.A.R. 566; Gibbs et al. v. Trustees of Liverpool Docks (1856), 1 H. & N. 439, 156 E.R. 1273; revd 3 H. & N. 164, 157 E.R. 429; affd L.R. 1 H.L. 93, sub nom. Mersey Docks & Harbour Board Trustees v. Gibbs et al.; Humphreys v. City of London, [1935] O.R. 91, [1935] 1 D.L.R. 300; affd [1935] O.R. 295, [1935] 3 D.L.R. 39; Collins v. Hydro-Electric Com'n of Renfrew, [1948] O.R. 29; MacKinder and MacKinder v. City of London et al., [1953] O.R. 52, [1953] 1 D.L.R. 452; G.N.J. Properties Ltd. v. Barriesim Developments Ltd., City of Barrie Public Utilities Com'n, Third Party, [1973] 3 O.R. 614; Jones v. Manchester Corp. et al., [1952] 2 Q.B. 852; T.T.C. v. Metro. Toronto, [1960] O.R. 487; Re City of Berlin and County Judge of County of Waterloo (1914), 33 O.L.R. 73, 22 D.L.R. 296; Re Gillis; Township of Tisdale v.

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County of York, [1950] O.W.N. 21; Re Wright, [1938] O.R. 117, [1938] 2 D.L.R. 52, 69 C.C.C. 397; McFee v. Joss (1925), 56 O.L.R. 578, [1925] 2 D.L.R. 1059; Custom Ceilings Inc. v. S.W. Fleming & Co. Ltd. et al., [1970] 3 O.R. 17, 12 D.L.R. (3d) 209; Lister v. Romford Ice & Cold Storage Co. Ltd., [1957] A.C. 555; Ryan v. Fildes et al., [1938] 3 All E.R. 517; Morris v. Ford Motor Co. Ltd., [1973] Q.B. 792, refd to]

Damages -- Personal injuries -- Limit on awards of non-pecuniary general damages for pain and suffering and loss of amenities of life -- Plaintiff suffering devastating and totally disabling injury -- Cases in Supreme Court of Canada not establishing an absolute limit of $100,000 -- Higher award justified because of erosion of value of money since Supreme Court of Canada cases and because of fact that this plaintiff suffered more pain than plaintiffs in those cases -- Award of $125,000 appropriate for non-pecuniary general damages.

[Andrews et al. v. Grand & Toy Alberta Ltd. et al., [1978] 2 S.C.R. 229; 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577, 19 N.R. 50; Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al., [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480, [1978] 1 W.W.R. 607, 19 N.R. 552; Arnold et al. v. Teno et al., [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 19 N.R. 1; Lindal v. Lindal, [1978] 4 W.W.R. 592, refd to]

APPEAL by the defendant utilities commission and gas company, from a judgment of R. E. Holland, J., 14 O.R. (2d) 137, 73 D.L.R. (3d) 177, in favour of the plaintiffs in an action for damages for personal injuries and wrongful death; CROSS-APPEAL by the plaintiffs in respect of damages and the dismissal of their action against the defendant city; APPEAL by the gas company from the dismissal of its third party action against the commission and the city, and by the city from the dismissal of its third party action against the gas company and the commission.

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John J. Fitzpatrick, Q.C., and Harvey Poss, for appellant, Peterborough Utilities Commission.

Ian W. Outerbridge, Q.C., and Warren H. O. Mueller, for appellant, Consumers' Gas Company.

David A. L. Britnell, Q.C., Gordon H. T. Farquharson, Q.C., and Paul D. Blanchard, for respondent, City of Peterborough.

Eric R. Murray, Q.C., Barry G. A. MacDougall and William E. Pepall, for plaintiffs, respondents and cross-appellants.

W. Graham Dutton, Q.C., for Ontario Hospital Insurance Plan.

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BY THE COURT:-- On January 8, 1973, disaster stalked the household and entered the home of the respondents, Gerard and Sandra Fenn, with tragic and lasting consequences. At 12 o'clock noon of that day a natural gas explosion, followed by a fire, totally demolished their rented home at 521 Bolivar St. in the City of Peterborough, horribly injuring and mutilating Sandra Fenn and killing their three young children. It is accepted that this terrible event occurred through no fault or act of the Fenns.

The learned trial Judge gave judgment, after a 33-day trial, for, inter alia, damages of $719,074.43 in favour of Sandra Fenn against the appellant Consumers' Gas Company (Consumers) and the appellant Peterborough Utilities Commission (the Commission). He apportioned the liability at 75% to the Commission and 25% to Consumers and directed the usual contribution and indemnity each from the other. He dismissed the action as against the respondent City of Peterborough (the City) as well as the third party proceedings brought by Consumers against the Commission and the City and the third party proceedings by the City against Consumers and the Commission.

Consumers and the Commission appealed, both arguing that the negligence of the other was the sole cause of the explosion and, in any event, that its proportion of negligence which

contributed to the damage should be no more than 10%. Consumers also argued on various grounds that, if it should be held liable to any degree for the damages, it should be indemnified by either or both the Commission and the City in the third party proceedings. The Commission further argued that, as a matter of law, it was insulated from any finding of negligence in that the liability was that of the City. The Commission's final argument on liability, supported by the City, was that the action fails against it because of the effect of the limitation period found in s. 32 of the Public Utilities Act, R.S.O. 1970, c. 390.

Consumers and the Commission also appealed the quantum of damages awarded and Sandra Fenn cross-appealed on the issue of damages. Finally, counsel for the plaintiffs argued that the City should be liable to his clients on the basis of the applicability to the facts of this case of the principle enunciated in Rylands v. Fletcher (1868), L.R. 3 H.L. 330, affirming L.R. 1 Ex. 265.

The facts

The trial Judge carefully and comprehensively reviewed the evidence and made his findings of fact on that review. It is necessary for us to repeat some of those facts, less comprehensively, in order that our conclusions on various issues, some of which were not argued before the trial Judge, may be understood in their factual context. We do say, at the outset, that we agree completely with the trial Judge's findings of fact, his determination of liability and his apportionment of negligence based on those findings and determination. There was ample credible evidence to support those findings.

Bolivar St., on which the Fenns lived, runs east and west. Number 521 was on the south side of the street, being a two-storey, semi-detached brick residence with a basement. Its companion was No. 519, the more easterly of the two houses. Between the front lawn of the two houses and the roadway, was a sidewalk and a boulevard. Underneath the boulevard was an eight-inch steel gas main which did not service the house and a

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four-inch wrought iron gas main from which two service lines extended, one being a capped line ending in the wall of No. 519 and one servicing the water heater in No. 521. On the north side of Bolivar St. was a trunk water main with a service connection running south to the boulevard in front of No. 521 with a connection into No. 519.

The mid point of the eight-inch gas main, which was located close to the curb, to the mid point of the four-inch gas main was a distance of 3.5 ft. The top of the eight-inch main was 4.2 ft. from the surface and the top of the four-inch main was 3.5 ft. from the surface. The water service pipes varied slightly in their distance from the surface but were approximately six feet below the surface. The finding of fact by the trial Judge was that it was a fracture in the four-inch wrought iron gas main which caused a leak of natural gas. The gas was trapped below the surface by the frozen ground, percolating through the soil following the path of least resistance and entering the basements of Nos. 519 and 521, where it was probably ignited by the pilot light of the natural gas-fired hot-water heater in the basement of No. 521. The trial Judge held it was the combined negligence of the Commission and Consumers which led to the fracture and the resulting explosion, and, as already stated, apportioned the fault 75% to the Commission and 25% to Consumers.

The wrought iron gas main was laid in 1909 and operated by the City and the Commission for almost 50 years as part of a propane-air plant. It apparently was not much used in later years and in 1958 and 1959 the plant, piping and all physical assets, were sold to Consumers by the City. Transferred to Consumers as part of the sale were 227,450 ft. of wrought iron pipe which included, of course, the four-inch main running along Bolivar St. It was established that the fracture in the wrought iron pipe occurred through the threads where two lengths of pipe were joined by a threaded coupling. The trial Judge described the fracture as follows [14 O.R. (2d) 137 at pp. 141-2, 73 D.L.R. (3d) 177 at pp. 181-2]:

> The fracture occurred through the threads at the east edge of the coupling. The minimum thickness of the pipe at the

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fracture surface occurred at 40degrees counter-clockwise and was .043 ins. The maximum thickness was at 90degrees counter-clockwise and was .216 ins. A considerable amount of corrosion product was found over approximately 40degrees of the bottom surface of the pipe. The threads under this corrosion product had deteriorated. Relatively little corrosion had occurred at the thin section of the fracture face. The fracture had followed the route of a single thread over the top 120degrees in a brittle manner, leaving a granular flat surface on both sides of the fracture. Over approximately the next 65degrees on each side, the fracture was considerably rougher and included a step of one thread towards the west on both sides. The remaining approximately 110degrees followed the route on an individual thread down on both sides. At approximately 20degrees counter-clockwise from the bottom these two parts were connected by two sharp steps across the intervening thread. It is apparent that the main fractured in an almost completely brittle manner. It appears that the fracture initiated either near the top of the pipe or at the thinnest point in the pipe 40degrees counter-clockwise from the top. It appears probable that the fracture occurred without any measurable time between initiation and complete fracture.

The threaded portion where the fracture occurred was not overlapped and protected by the partner pipe.

Although little corrosion had occurred at the thin section where the fracture had occurred, there was a considerable amount of corrosion on the bottom surface of the pipe, and the threads under the corrosion had deteriorated. The pipe was oval shaped or asymmetric so that, the theory was, the thread cutter, which itself was round, would cut more deeply into certain portions of the pipe when cutting the thread. As noted, the trial Judge found that "the main fractured in an almost completely brittle manner".

The evidence was that the pipe as it lay in the ground was at a temperature of about 40degrees Fahrenheit and would be in what was termed a "brittle mode". This means that in cold weather the wrought iron pipe was particularly susceptible to

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fracture, and with the application of moderate force a brittle fracture would follow. It was accepted that stresses were sharply increased and concentrated at the roots of the notches made by the threading of the pipes. In addition, there is a propensity for fracture at grooved areas, called "notch sensitivity", that is unexplained by simple stress concentration. This concentration of stress at the root of the notch makes it even more sensitive to fracture when it is brittle in cold weather. This particular susceptibility of wrought iron pipe to fracture under the circumstances recited required that great care be taken when working around it and necessitated an adequate system being set up to protect against this susceptibility.

In the summer of 1972 a tenant at 519 Bolivar St. complained about a water leak. The Commission decided to excavate and replace the water service lines leading to Nos. 519 and 521. Prior to any excavation work being done, the Commission notified Consumers that work was to be done in the area. Consumers sent out Kenneth Davis, an employee for some 14 years, who marked out the location of the gas mains using paint and stakes. This was a regular and routine part of his job. He met George Cheel, a senior foreman of the Commission and with the Commission some 30 years, at the site where the locations of the four-inch and eight-inch gas mains were staked out. The stake-out report, a printed form, completed by Davis, contained this:

WARNING

> The Contractor must not work outside the area mentioned in part "C'' without a further stake-out by the Company.
>
> If excavation is necessary over or near underground gas plant, extreme caution must be observed especially where mechanical equipment is used. The actual location of the gas plant must be determined in advance by exposing it by hand.

There is no notation on the form that if pipe (or "gas plant", to use the terminology of the report) were exposed Consumers was to be notified immediately. The trial Judge noted that it

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was obvious from the evidence that Consumers knew excavations were to be carried out in the area of the old wrought iron main, although at the commencement of the work no one, either from the Commission or Consumers, had any real idea as to the extent of the excavations that would be required. We agree with the trial Judge's view that any excavation in the area of the wrought iron pipe should have been of concern to Consumers.

A four-man crew from the Commission commenced work on August 3, 1972. They first made an excavation through the asphalt surface at the north side of Bolivar and cut the old water service off at the main. They then moved to the south of the sidewalk at the property line of Nos. 519 and 521 to disconnect the old service pipe. A further excavation was then made north of the sidewalk, along its edge, in the boulevard from the area of the service to No. 521, in an easterly direction along the line of the water pipe, to the area where the pipe to No. 519 ran south. This excavation was approximately 12 ft. long and extended down some six feet to the water pipe. The south edge of this trench was at the north edge of the sidewalk. A backhoe was used to assist with the digging and with its two-foot bucket the width of the bottom of the trench was at least two feet. It was at this stage of the operation that the Commission's employees had to make a further excavation that had not been anticipated. In attempting to pull the old water pipe, followed by the new copper pipe replacement, under the roadway and through the excavation on the north side of the street the old pipe broke or stuck. It then became necessary to excavate in the boulevard between the eight-inch steel gas main and the four-inch wrought iron main. It should be noted that during these excavations there was no inspection by Consumers.

In this final excavation the backhoe was once again used to assist in the digging. The excavation was approximately five feet from east to west and at least two feet wide at the bottom, which was some six feet down. The backfilling of this excavation was done with the backhoe and blade and there was little or no compacting done in the course of completing the backfilling.

The distance between the four-inch and eight-inch main was

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only three feet. The trial Judge found, as he well could on the evidence and the reasonable inferences from that evidence, that, as a result of this last excavation, the four-inch gas main was partially exposed for a distance of five feet or so, and "at best, was supported, or appeared to be supported, by a wedge of soil" [p. 140 O.R., p. 180 D.L.R.]. Counsel for the Commission argued strenuously that there was no evidence to support this conclusion of the trial Judge and that the opinion of the expert who gave evidence for Consumers was based on different hypotheses which the evidence did not support. In our view there was ample evidence to support the trial Judge's finding that the support for the four-inch main had been interfered with to such an extent that it was a contributing cause to the fracture which led to the escape of gas on January 8, 1973. It was noted by the trial Judge that in the course of the digging of this last trench the backhoe bucket had struck the eight-inch main but such striking, and the exposure of the four-inch main, were not reported to Consumers.

Some time prior to 1973 a co-ordinating committee had been set up by the City's engineering department in co-operation with certain other companies and utilities including Consumers and the Commission. This committee met fairly regularly to discuss matters of common concern and "regulations" were issued by the co-ordinating committee from time to time. A meeting of the committee was held on June 1, 1972, and the chairman of the committee (who was employed in the City's engineering department) "was requested to review the present regulations in regard to road cuts and make any necessary revisions, and present to the Committee at a future meeting". On June 9, 1972, "regulations" with respect to "cuts" in street allowances were circulated. A note to the regulations reads, in part, as follows:

> Normally no one will be given permission to cut into any portion of a City street allowance except the Peterborough Utilities Commission ... the Consumers' Gas Company ... These regulations are meant to apply to the above-mentioned agencies.

Included in the regulations was the requirement for a permit

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before any cut was made into a roadway or sidewalk. No permit was required where the cut only affected grass areas or private driveways or sidewalks. The regulations required that in trench restoration, the trench would be backfilled with material similar to the original material so that the frost effect on the compacted trench would be the same as on the ground around it. Further, the backfill was to be compacted in layers not exceeding six inches in depth. These directions were not followed by the Commission employees in backfilling either the five-foot or the twelve-foot trench.

Findings of negligence

1. The Commission

The trial Judge, having recited these and other facts, came to the conclusion, as already noted, that the Commission was 75% at fault for the explosion and Consumers 25% at fault. His reasons, based on his findings of fact, for holding the Commission liable were as follows [at pp. 145-6 O.R., pp. 185-6 D.L.R.]:

> It is common knowledge that gas is dangerous and when mixed with air in certain proportions and ignited it will burn or explode. It is to be expected, therefore, that gas distribution and transmission systems and gas-operated equipment will be treated with the greatest of care. There is a high risk and this produces a correspondingly high duty. This high duty of care rested in this case not only on the Gas Co. but also on the Commission. The officers and employees of the Commission, particularly William Powell, the general manager, who has been with the Commission 26 years, and George Cheel, the senior foreman, who had been with the Commission 30 years, had operated or assisted in the operation of this very system when it was used for the distribution of manufactured gas prior to its sale to the Gas Co. in 1959. Through their own experience they should have realized that the system was old and subject to leaks. With hindsight it is easy to set too high a standard. However, in my view, the senior officers of the Commission had an obligation to ensure that if digging was to be performed in

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the area of a gas main the following steps would be taken:

(1) A full description of the proposed work would be given to the Gas Co. with the request that the Gas Co. stake out the gas mains;

(2) If any change in the proposed work occurred requiring any further excavation in the proximity of a gas main, then the Gas Co. should be immediately advised of the change;

(3) Digging in the vicinity of gas mains should be done very carefully and if necessary by hand;

(4) Any gas mains uncovered should be immediately reported to the Gas Co.;

(5) The Gas Co. should be given the opportunity of making a decision on the support of any exposed mains and backfilling. That is, the Gas Co. should have the opportunity of doing the support work or requiring the Commission to do the work and also should be given the opportunity of either doing the backfilling itself or supervising backfilling by the Commission;

(6) Any backfilling performed by the servants of the Commission should be done with great care and with proper and adequate compaction.

These precautions were not taken and the senior officers of the Commission were negligent in this regard. I am also of the view that the servants of the Commission in this case were negligent in that:

(1) Although it was the original intention of the Commission to replace the defective water line without disturbing the gas main, it should have been clear that by the time the excavating work was finished the four-inch gas main had been exposed and was not adequately supported. In spite of this the exposure of the main and lack of support was not reported to the Gas Co.

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(2) No effort was made to properly backfill around the gas main and to make sure that the backfill was properly and adequately compacted so as to provide adequate support for the main.

Counsel for the Commission argued that the negligence found against his client did not, in law, contribute to the damage because once work was done around the old wrought iron gas main, no matter how carefully done, it was then susceptible to fracture to the knowledge of Consumers which had not set up an adequate system to protect against this susceptibility. The trial Judge did advert to the failure of Consumers to maintain any inspection or supervision of the work when it was immediately adjacent to its pipes and held it negligent in that failure. However, as he also pointed out, the fact of the matter is that the main had been in the ground for 64 years without fracture and then fractured following the excavation work. This goes beyond coincidence and "natural" causes. Further, we agree entirely with his characterization of the conduct of the servants of the Commission as "reckless", not only in the way they backfilled around the gas main, but in carrying out their excavation work around it. There was, in this entire operation, on the part of the servants of the Commission, as said by the trial Judge, "a callous disregard for the safety of others". The Commission was negligent qua the plaintiffs and Consumers.

2. Consumers

In turning to the liability of Consumers one must have regard, as did the trial Judge, to the statement of Lord Wright, in Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd. et al., [1936] A.C. 108 at pp. 118-9, [1935] 4 D.L.R. 737 at pp. 741-2, [1935] 3 W.W.R. 446:

> That gas is a dangerous thing within the rules applicable to things dangerous in themselves is beyond question. Thus the appellants who are carrying in their mains the inflammable and explosive gas are prima facie within the principle of Rylands v. Fletcher, L.R. 3 H.L. 330, affirming Fletcher v. Rylands (1866) L.R. 1 Ex. 265: that is to say,

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> that though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come prima facie within the rule of strict liability if the gas escapes: the gas constitutes an extraordinary danger created by the appellants for their own purposes, and the rule established by Rylands v. Fletcher, L.R. 3 H.L. 330, requires that they act at their peril and must pay for damage caused by the gas if it escapes, even without any negligence on their part. The rule is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land: it applies equally in a case like the present where the appellants were carrying the gas in mains laid in the property of the City (that is in the sub-soil) in exercise of a franchise to do so. ... [T]he rule of strict liability has been modified by admitting as a defence that what was being done was properly done in pursuance of statutory powers, and the mischief that has happened has not been brought about by any negligence on the part of the undertakers. ... [T]he rule has been held inapplicable where the casualty is due to the act of God; or to the independent or conscious volition of a third party, as in Box v. Jubb, 4 Ex. D. 76, which was approved by the Judicial Committee in Richards v. Lothian, [1913] A.C. 263; and not to any negligence of the defendants.

Counsel for Consumers argued before the trial Judge and again before us that his client was not guilty of any negligence and that the whole cause of the explosion was the negligence of the Commission's workmen, who exposed the four-inch gas main and struck the eight-inch steel main but reported neither to their foreman. If it had been reported to the foreman and then to Consumers, Consumers, he argued, would have dealt with the matter in some appropriate way and there would have been no explosion. His argument, in detail, went to support the finding of negligence made by the learned trial Judge against the Commission and with this portion of his argument we have no difficulty in agreeing.

However, in assessing the negligence and the liability of Consumers, without any finding of strict liability on the basis of Rylands v. Fletcher, the trial Judge noted Lord Wright's

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description of the responsibility of a corporation in carrying inflammable gas as "tremendous" and went on to say [at p. 147 O.R., p. 187 D.L.R.]:

> I must bear this tremendous responsibility in mind. We are dealing with an old main that was fragile and delicate and entitled to be treated with care and respect. Some 25% of the Peterborough system consisted of old cast iron or wrought iron mains. It was these mains that produced leaks. The only way of checking the condition of the mains was through leak surveys and by visually examining the mains when exposed. The mains were subject to corrosion and corrosion had been a problem in Peterborough. Professor Sawers was called as an expert witness on behalf of the Gas Co. and said that as soon as you excavate anything under the level of the main you affect its support and the closer you get and the deeper you go, the greater the loss of support. Roderick Long, an engineer with the Gas Co. for many years, and who was general superintendent of operations in 1972, was even more specific and testified that any parallel excavation closer than six feet to a gas main three feet below the level of the line would be of concern. It was his view that in excavating you should stay at least two feet out from the main for every foot you go below the level of the main. It is perfectly obvious that an escape of gas from a fractured main can result in an explosion and fire with the attendant loss of life, injury and damage to property. The officers and employees of the Gas Co. should have had in mind at all times the danger inherent in excavating in the proximity of this old wrought iron main and should have borne in mind at all times the tremendous responsibility that rested upon them to do everything reasonable within their power to ensure that there be no escape of gas as a result of any act or neglect on their part or as a result of any act or neglect on the part of third parties. A main of this age required the greatest care and consideration. The alternative was to remove wrought iron mains from the system completely or to line them with plastic.

He then pointed out that Lord Wright in Northwestern Utilities (at p. 127 A.C., p. 749 D.L.R.) had discussed the standard

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of care imposed on a company like Consumers and had stated:

> If they did know [of the City Works] they should have been on their guard: they might have ascertained what work was being done and carefully investigated the position, or they might have examined the pipes likely to be affected so as to satisfy themselves that the bed on which they lay was not being disturbed. Their duty to the respondents was at the lowest to be on the watch and to be vigilant:

The trial Judge went on to hold [at pp. 148-9 O.R., pp. 188-9 D.L.R.]:

> The officers and employees of the Gas Co. were negligent.
>
> In the first place the senior officers of the Gas Co. should have made clear, in some institutional way, the extreme danger of excavating in the proximity of wrought iron gas mains. Some system should have been in effect to clearly inform all Gas Co. field men of the danger and, through them, other companies or utilities engaged in excavating anywhere in the area of gas mains. The failure to do this undermines any justification the Gas Co. might have in relying on other utilities to inform them of any exposure of their gas mains. Roderick Long, general superintendent of the Gas Co., knew that any parallel [excavation] closer than six feet to a gas main three feet below the level of the line would be of concern and this sort of knowledge should have been passed on to the field men. The Gas Co. could not very well rely on warnings from some other utility if the employees of that other utility did not themselves fully realize the danger.
>
> In the second place, in the circumstances that existed, I am of the opinion that a Gas Co. employee should have inspected the site of the excavation on a regular basis and arrangements should have been made so that an inspection could be carried out before any backfilling occurred. If this had been done it is probable that the exposed main would have been properly supported and the backfill properly compacted.

Counsel for Consumers argued that the trial Judge's

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statement, supra, that the knowledge of Consumers should have been passed on to the field men was not a finding of negligence and was not a cause contributing to the explosion. Further, while acknowledging that a duty of care was owed to the plaintiffs, counsel for Consumers submitted that there was no such duty owed by Consumers to the Commission. His position was that the Commission knew as much about the extreme danger in working close to this ancient pipe as did Consumers and there was no duty on Consumers to protect the Commission from its own negligence. However, there was evidence, much of which was recited to us and some of which was referred to by the trial Judge, from which he could properly draw the inference that Consumers, and Consumers alone, were aware of the various factors that made this wrought iron pipe much more susceptible to fracture than steel pipe and of the extreme danger involved in excavating near such pipe and interfering with its support. The Commission was not shown to have this particular knowledge and it is clear, as found by the trial Judge, that the employees of the Commission did not fully realize the danger in excavating near the wrought iron pipes. Consumers should have made known to those excavating the great danger attendant upon such work in the circumstances recited, and have been present as a matter of routine. There was, of course, another benefit or security which Consumers could realize on such occasions by being present: the opportunity to inspect, visually, the pipe for potential danger areas.

To restate the matter: Consumers had a duty to warn the Commission of the great danger involved in excavating near the wrought iron pipe and an obligation when such excavation work was proceeding "to be on the watch and to be vigilant". Such a duty goes well beyond the "system" which Consumers argued it already had of "snifters" driving up and down the street from time to time, participation in the co-ordinating committee and the practice of "staking-out" the location of gas mains. If the Commission had been given notice of the extreme danger it would thereby have had the opportunity of exercising the necessary great care and of involving Consumers in ensuring that all necessary protective measures were taken. We agree with the trial Judge that the failure to warn and to supervise was a contributing cause of and to the explosion.

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It was the combined negligence of both the Commission and Consumers which led to the disastrous explosion. The division of liability was made by the trial Judge on his assessment of their degrees of fault which contributed to the explosion based on his knowledge and understanding of the evidence. As stated at the beginning, we agree with the trial Judge that, on the facts, the Commission's negligence which contributed to the explosion and the ensuing damage was considerably greater than that of Consumers. As was noted by Dickson, J., in his dissenting reasons for judgment in Taylor v. Asody, [1975] 2 S.C.R. 414 at p. 423, 49 D.L.R. (3d) 724 at p. 728, 3 N.R. 381, an appellate Court is not free to substitute its apportionment of fault for that made by the trial Judge "unless there has been palpable and demonstrable error in appreciation of the legal principles to be applied or misapprehension of the facts by the trial Judge". The other members of the Supreme Court were in agreement with this statement of principle. We can see no error in the trial Judge's appreciation of the legal principles which he had to apply in determining liability and the apportionment of fault, and there was no misapprehension by him of the relevant facts, even though there might be some minor errors in his recital of the facts not relevant to the final determinations he made. Accordingly, we would not interfere with his apportionment of fault.

Consumers argued that, in any event, it was entitled to be indemnified by the Commission for the 25% of the damages it was ordered to pay the plaintiffs. It based its argument on various grounds but it was all predicated on the submission that it owed no duty of care to the Commission. The grounds advanced which, counsel submitted, supported Consumers' right to be totally indemnified by the Commission were:

(a) The Commission had interfered with its common law right to support (of the wrought iron pipe);
(b) the Commission had interfered with its statutory right to support;
(c) Consumers had a claim in contract or quasi-contract against the Commission based on the fact that both the Commission and Consumers were members of the co-ordinating committee and had

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agreed to abide by the regulations and understandings of that committee. This constituted a contract inter se and the failure of the Commission to restore the boulevard in accordance with the applicable regulation was a breach of that contract;
(d) Consumers was entitled to recover from the Commission on the basis of a rather ill-defined claim in "equity and good conscience";
(e) Consumers was entitled to be indemnified by the City in that the City, in allowing its servant or agent, the Commission, to remove or interfere with the pipe's support, had "derogated from its grant".

We shall deal later with the relationship between the City and the Commission but the same answer must be given to all these submissions whether Consumers' claim for indemnity is made against the Commission or against the City.

As we have agreed with the trial Judge in his finding that Consumers owed a duty of care, not only to the plaintiffs but also to the Commission, we know of no authority which allows a party to be indemnified for its own negligence in the absence of a contractual right thereto and we were referred to none.

The authorities to which we were referred were not similar to the instant case in that in none of the cases cited was there found to be negligence by the one claiming indemnity towards the one from whom indemnity was claimed. Further, in most of the cases cited, there were contractual warranties between the parties and damages were being claimed for breach of such warranties. The evidence here does not establish that, by the mere fact of being members of an informal committee, the parties had contractual obligations one to the other. If one is to be protected against and indemnified for one's own negligence there would have to be an indemnity clause spelling out this obligation on the other party in the clearest terms. In our view there is nothing in the relationship between the parties arising out of their membership in the co-ordinating committee which would support a claim for indemnity for loss occasioned by the claimant's own negligence: Canada Steamship Lines Ltd. v. The King, [1952] A.C. 192, [1952] 2 D.L.R. 786, 5 W.W.R. (N.S.) 609; Smith et al. v. South Wales Switchgear Ltd.,

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[1978] 1 All E.R. 18. The bar to recovery of indemnity by Consumers is its negligence to the plaintiffs, independent of anyone else's negligence, and it cannot recover indemnity from the Commission beyond the 75% allowed by the Negligence Act, R.S.O. 1970, c. 296.

The defence of the Commission and the City based on s. 32 of the Public Utilities Act

The Commission and the City relied upon the limitation provision contained in s. 32 of the Public Utilities Act as a bar to this action. The section reads:

> 32. No action shall be brought against any person for anything done in pursuance of this Act, but within six months next after the act committed, or in case there is a continuation of damage, within one year after the original cause of action arose.

This action was commenced on July 6, 1973, and the submission of the defendants, relying on s. 32, was, quite simply, that "the act committed" was the excavation and backfilling in August of 1972, and, therefore, the limitation period expired in February of 1973. The defendants relied on what was said by this Court in Davies v. Traders Finance Corp., [1959] O.W.N. 99 at p. 100, 18 D.L.R. (2d) 48 at p. 54, [1956-60] I.L.R. 1065n, with respect to the similar terms of s. 11 of the Public Authorities Protection Act, R.S.O. 1950, c. 303, which read:

> 11. No action, prosecution or other proceedinq shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the act, neglect or default complained of, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

It may be noted now that the language of this provision remained unchanged until its amendment by 1976 (Ont.), c. 19,

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s. 1, which amendment will be referred to later in these reasons.

One of the claims asserted in Davies was for damages for breach of warranty of title against a Sheriff who had, under an execution against a conditional sale purchaser of a motor vehicle, sold the vehicle to the plaintiff. It was held that the purchase was subject to the riqhts of the conditional sale vendor. The Sheriff's sale was on May 3, 1956, but the conditional sale vendor did not seize the vehicle from the plaintiff until February 27, 1957. The action was commenced on August 26, 1957.

Morden, J.A., for the Court, said at p. 54 of 18 D.L.R.(2d):

> Under s. 11 of the Public Authorities Protection Act, the time runs from the date of the act, neglect or default complained of. If the act or default was a breach of warranty, it occurred on May 3, 1956, and the time began running then: Tremaine v. Canada Sand Lime Pressed Brick Co. (1921), 21 O.W.N. 110; (1922), 22 O.W.N. 12. Incidentally the plaintiff suffered no damages until the seizure which was made long after the time had run. His cause of action did not accrue until the seizure. This leads to the startling result pointed out by Scrutton, L.J. in Huyton & Roby Gas Co. v. Liverpool Corp., [1926] 1 K.B. 146 at p. 155: "that you may lose a cause of an action before you have got it." It is interesting to note that English statute law, which was until 1939 in the same terms as the Ontario Act, was amended in that year to provide that the limitation period begins running "from the date on which the cause of action accrued": 1939 (Imp.), c. 21, s. 21(1). This unfair result is no longer possible in England but it is in this Province.

In the case before us the trial Judge referred to Davies in the following passage [at p. 153 O.R., p. 193 D.L.R.]:

> To hold that s. 32 of the Act bars the action would have the effect, had the explosion occurred a month or so later, of barring a cause of action before it even accrued. This unfair result is said to be still possible in Ontario: Davies

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v. Traders Finance Corp., [1959] O.W.N. 99 at p. 100, 18 D.L.R. (2d) 48 at p. 54, [1956-60] I.L.R. 1065n.

He held that the six-month period provided for in s. 32 did not commence to run until the date of the explosion for two reasons:

1. Because the "fraud" of the Commission prevented the time running until discovery of the facts. He quoted from judgments of Lord Denning, M.R., in Eddis et al. v. Chichester Constable et al., [1969] 2 All E.R. 912 at p. 915, and in King v. Victor Parsons & Co. (a firm), [1973] 1 All E.R. 206 at p. 209.
2. Because the Commission was negligent in failing to backfill properly and thereby provide adequate support for the gas main, which lack of support continued to the explosion. Reference was made to passages in the judgments of Bankes, L.J., and Scrutton, L.J., in Huyton & Roby Gas Co. v. Liverpool Corp., [1926] 1 K.B. 146 at pp. 152 and 155 respectively, a case concerned with the application of s. 1(a) of the Public Authorities Protection Act, 1893 (U.K.), c. 61.

In our view the trial Judge was correct in holding that the six months did not begin to run until the date of the explosion. We base our conclusion on reasoning different from that of the trial Judge but which is more direct, in our respectful view, having regard to the issues to be resolved. We should mention that, having regard to what was said in Davies v. Traders Finance Corp. Ltd., supra, the reasoning we propose to follow may not have appeared to the trial Judge to have been open to him.

Before embarking on these reasons we shall deal with some preliminary matters. It is not disputed that the Commission, if the requisite facts are shown, is entitled to the benefit of s. 32 of the Public Utilities Act. Mention is made of this because s. 32 appears in Part III of the Act which begins with s. 26, which provides:

> 26. This Part applies to all municipal corporations owning or operating public utilities.

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A reading of the plain opening language of s. 32 itself, which refers to "any person", and of other sections in Part III, makes it reasonably clear that the Part's sections are not exclusively confined to the rights and duties of municipal corporations. However, if for the reason mentioned above, or any similar reason, the Commission were not entitled to argue the applicability of s. 32, then it clearly could argue the applicability of s. 11 of the Public Authorities Protection Act, R.S.O. 1970, c. 374, which it has pleaded and which, as indicated, uses similar language to that in s. 32. If the 1976 amendment to this provision were applicable to this action (the amendment applies "in respect of causes of action arising before or after this Act comes into force" (April 14, 1976): 1976 (Ont.), c. 19, s. 2), then there could be no possible defence available to the Commission based on a limitation provision.

Further, we accept that the Commission, in carrying out its activities in front of Nos. 519 and 521 Bolivar St. in August of 1972, was acting in pursuance of the Public Utilities Act, even though the Act contains no express provisions relating to excavating and backfilling. Such work is obviously directly incidental to the operation of the waterworks system. Reference should be made to s. 4(3) which requires "... land, not being the property of the [municipal] corporation, [to] be restored to [its] original condition without unnecessary delay". The inapplicability of this provision, because the pipe was in City property, should not be read as excluding an implicit duty to excavate and backfill with due care.

Also, we see no need to enter into a detailed analysis of the meaning of the word "act" from the vantage point of the distinction between a positive act and an omission, because the conduct of the Commission which gave rise to the claim against it would seem to be a combination of excavation and backfilling, whether the backfilling be described as bad backfilling or failure to backfill adequately. In any event, it would seem to be generally accepted that "anything done" or "act" would include failures to act or omissions: see, e.g., Wilson v. Mayor and Corp. of Halifax (1868), L.R. 3 Ex. 114 at pp. 119-20, and Watson v. Fram Reinforced Concrete Co.

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(Scotland), Ltd. and Winget, Ltd., [1960] S.C. (H.L.) 92 at pp. 111 and 115. The fact that another section in the Act (s. 52), which is of later origin, uses more extended language, "act, default, neglect, or omission", does not persuade us otherwise.

The basic purpose of a statutory limitation provision is to prevent the bringing of stale claims. This purpose may be accomplished by providing that the kind of legal claim in question must be brought, if at all, within a specified period of time. In the case of claims against persons acting pursuant to statutory authority, the traditional legislative approach has been to provide for a much shorter period of time than for similar claims against defendants not so acting. For example, the six-month period provided for in s. 11 of the Public Authorities Protection Act, and in the provision we are considering, may be contrasted with the six-year period provided for in s. 45(1)(g) of the Limitations Act, R.S.O. 1970, c. 246, with respect to general negligence claims. However, it may reasonably be thought to be absurd to attribute to the Legislature an intention, in the public interest or otherwise, to bar claims which not only are not stale but which could never have been brought before the running of the stipulated time.

The approach recently enunciated by Estey, J., for the Supreme Court of Canada in Berardinelli v. Ontario Housing Corp. et al., [1979] 1 S.C.R. 275, 90 D.L.R. (3d) 481, 8 C.P.C. 100, to the interpretation of s. 11 of the Public Authorities Protection Act is clearly relevant to s. 32 of the Public Utilities Act (at p. 280 S.C.R., p. 492 D.L.R.):

> Section 11, being a restrictive provision wherein the rights of action of the citizen are necessarily circumscribed by its terms, attracts a strict interpretation and any ambiguity found upon the application of the proper principles of statutory interpretation should be resolved in favour of the person whose right of action is being truncated.

With these approaches in mind it is reasonable to interpret "the act committed" in s. 32 of the Public Utilities Act as

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having the same meaning as the "anything done in pursuance of this Act" (in the first clause of the section) for which an "action [may] be brought". Surely, the "anything" must embrace that minimum combination of facts which must exist to enable the action to be brought and the word "act" should also receive such an interpretation.

This approach is consistent with the meaning of the second part of s. 32 which provides for a one-year limitation period where there is a continuation of damage, i.e., a continuation of the act which causes the damage (Carey v. Metropolitan Borough of Bermondsey (1903), 67 J.P. 447) "after the original cause of action arose''. With respect to a claim for damages for negligence, with which we are now concerned, the original cause of action could not arise until the plaintiff had suffered some damage as a result of the defendant's act. It is unreasonably inconsistent to construe the section as not requiring, in the context of a negligence action, any infliction of damage on the plaintiff to start the time running for a "once-and-for-all" act or omission but to require it for an action based on a continuing cause of action where, indeed, the limitation period is longer.

In our view, having regard to its basic purpose, the legislation is capable of the interpretation we have placed on it, in effect, construing "the act committed" as "the cause of action arose'', and it should receive this interpretation. It is not unreasonable to think that the various Legislatures (and we shall be turning to similar provisions shortly) which have used this, or almost identical language, have intended by "the act committed" to use somewhat compendious terms to refer to an act having legal significance to the plaintiff -- but only after the act has, because of its consequences, such significance.

It may be that the original draftsman of the language of s. 32 considered, wrongly, that with respect to actions for damages, the defendant's conduct and the infliction of damages, which together give rise to the cause of action (where such damages are a necessary element) will always be concurrent; or, to express the point differently, that the breach of duty

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causing the damages would be a very short-lived temporal event, the event including the infliction of the damages. The use of the expression "act committed", with such an assumption in mind, is understandable. If there should be a time lag between the defendant's conduct and its infliction of the plaintiff's injuries or damages there is no "act", i.e., breach of duty, until the wrongful infliction of damage and, in our view, it does no violence to either the language or the undoubted policy of the provision to read it this way.

Admittedly, the language is capable of the more restrictive interpretation which would confine "act" solely to the conduct of the defendant, isolated from its legally significant consequences. This approach was apparently adopted in Davies v. Traders Finance Corp. Ltd., supra, and was mentioned in Huyton & Roby Gas Co. v. Liverpool Corp., supra, and other cases. Nonetheless, if regard is had to previous judicial decisions, it can be seen that the great preponderance of them supports the interpretation which we prefer.

First, it should be noted that there is nothing new or unique in the language of s. 32. In Ontario this particular provision traces its lineage back to the Municipal Water-works Act, 1882 (Ont.), c. 25, s. 24, which read:

> 24. If any action or suit be brought against any person or persons for anything done in pursuance of this Act, the same shall be brought within six calendar months next after the act committed, or in case there shall be a continuation of damages, then within one year after the original cause of such action arising.

An earlier local statute, "An Act for the construction of Water Works for the Town of Peterborough", 1874 (Ont.), c. 78, s. 31, read:

> 31. If any action or suit be brought against any person or persons for anything done in pursuance of this Act, the same shall be brought within six calendar months next after the act committed, or in case there shall be a continuation of damages, then within one year after the original cause of

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such action arising.

Reference may also be made to "An Act to Protect Justices of the Peace in Upper Canada from Vexatious Actions", 1853 (U.C.) c. 180, s. 7, which read:

> 7. And be it enacted, That no Action shall be brought against any Justice of the Peace for any thing done by him in the execution of his Office, unless the same be commenced within Six Calendar Months next after the act complained of shall have been committed.

This, undoubtedly, was based on identical English legislation enacted in 1848, the Justices Protection Act (U.K.), c. 44, s. 8.

A great many English statutes, beginning in the 18th century, contained limitation provisions relating to actions "for anything done in pursuance of this Act" and provided that the action "shall be commenced within six calendar months after the fact committed, and not afterwards": see, for example, the Schedule to the Public Authorities Protection Act, 1893 (U.K.), c. 61; Darby & Bosanquet, A Practical Treatise on the Statutes of Limitations in England and Ireland, 2nd ed. (1893), with Supplement (1899), pp. 577-89, and Chartres, The Public Authorities Protection Act, 1893 (1912), pp. 142-82. Such legislation may reasonably be regarded, as indicated, as the model copied by identical or similar legislation in Ontario.

One of the earliest English cases was Roberts v. Read et al. (1812), 16 East. 215, 104 E.R. 1070. There, surveyors of highways, in the execution of their office, undermined a wall adjoining a highway. The wall fell in more than three months afterwards. An action on the case was commenced within three months of this event. The applicable statute was the Highway Act, 1773 (U.K.), c. 78, which in s. 82 provided that:

> 82. ... if any Action or Suit shall be commenced against any Person or Persons for any Thing done or acted in pursuance of this Act; then, and in every such Case, such Action or Suit shall be commenced or prosecuted within Three

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> Calendar Months after the Fact committed, and not afterwards ...

The reasons refer to s. 81 but the correct section appears to be s. 82.

The defendants contended that the "thing done or acted" was the undermining of the wall and not the falling of the wall, which was a mere consequence of such wrongful act. The whole of the judgment of Lord Ellenborough, C.J., for the Court, is as follows, at p. 217:

> It is sufficient that the action was brought within three months after the wall fell, for that is the gravamen: the consequential damage is the cause of action in this case. If this had been trespass, the action must have been brought within three months after the act of trespass complained of; but being an action on the case for the consequential damage, it could not have been brought till the specific wrong had been suffered; and that only happened within three months before the action was brought.

This judgment was followed 12 years later in Gillon v. Boddington (1824), Ry. & Mood. 161, 171 E.R. 979, which was an action against the London Dock Company which, two years before the commencement of the action, had undermined the wall of the plaintiff's wharf. The wall subsequently fell down. The action was commenced within six months of this event. The London Dock Act, 1880 (U.K.), c. 47, in s. 151 provided that no action should be commenced against any person for anything done pursuant to that Act after six calendar months next after the fact committed. To the defendant's argument based on this provision, Abbott, L.C.J., said at p. 164:

> I am of opinion that the case of Roberts v. Read is an answer in point of authority to the objection which has been taken upon the Act of Parliament, and I cannot forbear saying, that I have great pleasure in finding such a decision in the books; for it appears to me to be one in which the wisdom of the common law has been interposed to prevent the injustice which might arise from too literal an adherence to

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the words of an Act of Parliament.

In a subsequent case, Nicklin et al. v. Williams (1854), 10 Ex. 259 at p. 268, 156 E.R. 440, with reference to the statutes requiring that the action be brought within a certain time "from the fact committed", Parke, B., said: "Those statutes mean, no doubt, the limitation to run from the act, that is, the cause of action." [Emphasis added.]

In Whitehouse v. Fellowes (1861), 10 C.B. (N.S.) 765, 142 E.R. 654, identical language appeared in the relevant statutory limitation provision: "within three months after the fact committed". There were several issues in the case relating to the application of the provision but it represents, at the least, a further clear affirmation of the principle that "fact committed", where damage is a required element of the cause of action in question, includes the occurrence of such damage.

The Public Authorities Protection Act, 1893 (U.K.), c. 61, repealed public general statutory provisions of the kind referred to in the foregoing cases, and substituted therefor, in s. 1(a), a general and somewhat more elaborate provision requiring that the action be commenced "within six months next after the act, neglect, or default complained of".

With reference to the earlier statutes there seems to have been little doubt in the cases or treatises that "fact [or act]" committed meant the accrual of a complete cause of action. Chartres, The Public Authorities Protection Act, 1893 (1912), at pp. 142-3, states the law as follows:

> By "the act complained of" is, of course, denoted an act such as is capable of being complained of in a Court of law, that is, an act such as gives rise to a cause of action. Now, it may be that an act causing damage is in itself the legitimate exercise of a right, and that the damage which has resulted from it constitutes the sole ground of complaint. In such a case the damage, and not the act from which it flows, is "the act complained of," and the period of limitation will run not from the date of the act causing the damage, but from the date at which the damage itself was sustained. And as the

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infliction of the damage, not the causal act, is "the act complained of," it follows that in such cases every recurrence or repetition of damage at successive intervals will give rise to a fresh "act complained of," and will afford a fresh starting-point for a new limitation period.

Darby and Bosanquet, op. cit., sum up the earlier law as follows, at p. 589:

> It will be noticed that in many of the public Acts referred to above the time runs not from the accrual of the cause of action, but from the "time of the act or fact committed," and it is believed that this was the most usual expression in local and personal Acts, and hence, questions have frequently arisen whether time begins to run from the time of the committal of the act which causes the damage, or from the time when the damage happened. It is clear from the case of Whitehouse v. Fellowes 10 C.B.N.S. 765, in which most of the former cases on the subject were referred to, that for this purpose the words "from the act or fact committed," must be treated as substantially the same as "from the accrual of the cause of action, and that, if the cause of action, as laid, is the happening of the damage and not the mere doing of the act which causes the damage, the principle laid down in Bonomi v. Backhouse in the Exchequer Chamber 28 L.J.Q.B. 378, which was subsequently confirmed by the House of Lords 9 H.L. 503, and followed by the House of Lords in the Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 127, will apply, and time will run, not from the doing of the act, but from the happening of the damage.

Halsbury's Laws of England, 2nd ed., vol. 8 (1936), p. 771, para. 1063, stated:

> In many of the statutes which fix a special period of limitation, such period commences from the act or fact committed; these words mean substantially the same as "from the accrual of the cause of action". Thus if the cause of action, as laid, is the happening of the damage and not the mere doing of the act which causes the damage, time will run not from the doing of the act, but from the happening of the

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damage.

It may have been thought that because of the well-settled state of judicial interpretation of the language we are considering there would be no issue respecting the quite similar language in the Public Authorities Protection Act, 1893. However, in Turley v. Daw (1906), 94 L.T. 216, Bray, J., at p. 218, expressed the view that "act, neglect or default" did not mean cause of action, as did Salter, J., in Freeborn v. Leeming, [1926] 1 K.B. 160 at pp. 165-6 and, apparently, Atkin, L.J., in Huyton & Roby Gas Co. v. Liverpool Corp., [1926] 1 K.B. 146 at pp. 156-7. In Huyton & Roby, Scrutton, L.J., left the point open. At p. 155 he said:

> It is not necessary to decide in the present case what is the result where no damage occurs till six months has elapsed from the act, and damage is a necessary part of the cause of action. If time runs from the act this leads to the startling result that you may lose a cause of an action before you have got it. Possibly this remarkable result might be avoided by holding that the words "neglect complained of," "default complained of," involve something which can be legally complained of, and therefore the time runs from the accruing of the cause of action, though not from the latest development of the damage; but it is not necessary so to decide in the present case.

This was a case turning on later language in the section: "... in case of a continuance of injury or damage, within six months next after the ceasing thereof".

As far as more recent legislation is concerned, s. 1(a) of the Public Authorities Protection Act, 1893, except in so far as it relates to criminal proceedings, was replaced by s. 21 of the Limitation Act, 1939 (U.K.), c. 21, which used the language "one year from the date on which the cause of action accrued". In Ontario, by 1976 (Ont.), c. 19, s. 1(1), s. 11 of the Public Authorities Protection Act was amended in the same way -- by substituting "cause of action arose" for "act, neglect or default complained of". Of course, this amendment, which seems to have been a somewhat delayed response to what

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was said in Davies v. Traders Finance Corp. Ltd., supra, and which, probably by inadvertence, was not made with respect to s. 32 of the Public Utilities Act, should not be construed as a declaration that the previous state of the law was different: the Interpretation Act, R.S.O. 1970, c. 225, s. 17.

With respect to Davies we would observe that, notwithstanding what was said therein, it was not a case where the cause of action was defeated by the statute before it arose. The claim was for breach of warranty of title and the cause of action arose on the sale by the Sheriff, and not on the subsequent seizure, even though the plaintiff may not have been aware of it at the time. This latter feature raises problems of a different order.

To return to the United Kingdom jurisprudence, very useful reference may be made to the majority reasons for judgment of the House of Lords in Watson v. Fram Reinforced Concrete Co. (Scotland), Ltd. and Winget, Ltd., [1960] S.C. (H.L.) 92, where the relevant part of the limitation period under consideration read "... before the expiration of three years from the date of the act, neglect or default giving rise to the action". The pursuer was injured in August of 1956 while working, for his employer, with a cement mixer which had been manufactured by the second defender and supplied by it to the employer in July of 1955. The injuries were alleged to have been caused by a defect in the manufacture of the mixer. The second defender was joined in the action in March of 1959. It pleaded the limitation period mentioned above, submitting that there could be no act, neglect, or default on its part after the machine had been sold and delivered to the pursuer's employers.

The House of Lords, by a majority, held that the three-year period ran from the date the cause of action accrued, that is, when the workman was injured, and that, accordingly, the action was not time-barred. We would refer, in particular, to the judgments of Lord Keith of Avonholm at pp. 112-3, and of Lord Denning at pp. 115-9. It may be that the words "giving rise to the action" provide additional support for the decision reached but there is still much in the reasons given to support the

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conclusion which we have arrived at with respect to s. 32 of the Public Utilities Act.

Having regard to the foregoing, it is our conclusion that when this action was commenced on July 6, 1973, it was commenced in time.

The position of the Public Utilities Commission as statutory agent of the City

The trial Judge rejected the submission of the Commission that it "was a mere statutory agent for the City and that as such the City and not the Commission is liable for the negligence of the Commission and its employees" [p. 150 O.R., p. 190 D.L.R.]. He relied upon the decision of the Ontario Appellate Division in Campbell Flour Mills Co. Ltd. v. City of Peterborough (1925), 57 O.L.R. 458, [1925] 4 D.L.R. 23, from which he quoted extensively, and concluded that so far as this particular commission was concerned, it did not appear that it was the statutory agent of the City, under the relevant legislation.

He then went on to hold that the common law doctrine of respondeat superior did not impose liability on the City for the negligence of the Commission. He found that the Commission was an independent authority and there was not the control vested in the City that would impose vicarious liability on the City as master or principal for the acts of its servant or agent. He therefore dismissed the action against the City with costs, but gave the plaintiffs the right to recover those costs against the Commission and Consumers. The third party proceedings by the City against the Commission were dismissed without costs.

In this Court the Commission, as already noted, raised the point that even if it were negligent, the liability would be that of the City and not of the Commission. No one in this Court asserted that the City was liable for the negligence of the Commission on the common law basis of respondeat superior, and no more need be said about it.

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However, counsel for the Commission has urged upon us, as he did at trial, that a long line of authority in Ontario has established that where a public utilities commission has been negligent in carrying out its activities, only the municipal corporation and not the public utilities commission is liable to the injured party. The City submitted that the Commission's position was wrong in law, that if it was supported by authority, the cases were wrongly decided, but that in any event, if the Commission's position was correct as a general proposition, it had no application in Peterborough. Support for the last point was to be found, the City submitted, in the Campbell Flour Mills case, supra, which was correctly decided, was binding on this Court, and had properly been followed by the trial Judge.

Alternatively, the City submitted that if it was vicariously liable for the negligence of the Commission, acting as the City's "statutory agent", the City had a right of complete indemnity from the Commission. The City was without fault of its own, and the ultimate responsibility should rest upon the actual wrongdoer, the Commission.

Counsel for Consumers stated that it was in his interest to have a finding of liability against both the City and the Commission, since he had a claim for indemnity against the City, but had one argument in support of the claim against the City that was not available against the Commission. Counsel for the plaintiffs had no submissions to make on the question of "statutory agency", saying he was not concerned with whether it was the City or the Commission who was liable for the Commission's negligence.

The earliest Ontario public utility statutes dealt with the supply of water, and were applied for by individual municipalities. They "seem to have been drafted by different persons" employed by the municipality in question: see MacDougall, Sons & Co. et al. v. Water Com'rs of City of Windsor (1901), 31 S.C.R. 326 at p. 329. The first such statute appears to be that of Toronto, passed in 1872 (c. 79), simultaneously with that of Ottawa (c. 80). In 1874 came the first Peterborough statute (c. 78), passed simultaneously with

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that of Windsor (c. 79): see MacDougall, supra, at pp. 331-2 (that case involved the Windsor statute).

The Peterborough Act contained in s. 1 the same words as the Toronto Act: "by and through the agency of commissioners". Section 2 of the Act provided that: "The commissioners and their successors shall be a body corporate, under the name of 'The Water Commissioners for the Town of Peterborough ...' ". However, s. 38 provided that the Act "shall not have any force or effect until the council of the corporation of the Town of Peterborough shall pass a by-law authorizing the construction of the said water works". It is an historical fact that no such by-law was ever passed. Hence the Act never became operative.

The Toronto statute was the subject of consideration in Ridgway v. City of Toronto (1878), 28 U.C.C.P. 579. Section 1 of that statute enacted that the city "by and through the agency of commissioners" should have power to purchase, construct and manage waterworks. The commissioners and their successors were created a body corporate under the name of "The Water Works Commission for the City of Toronto". The case involved a man who, while shovelling snow off the sidewalk in front of his house, suddenly had one foot sink into the ground a few inches off the sidewalk, owing to the negligent construction of a drain to carry water away from an old reservoir, not in use. The work was done by the water commissioners. Although described as "the defendants", the city appears to have been the sole defendant. It was held liable. The case is of interest here primarily because of the following passage in the reasons of Hagarty, C.J., at p. 584:

> 2. The whole of the operations of the water commission were, in the words of the statute, the acts of the city corporation through their agency. They were merely the means through and by which the city erected the water works.

In 1882 the first general Act in this field was passed: the Municipal Water-works Act, 1882, c. 25 (earlier referred to). Section 38 of that Act provided, in part:

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38. The council of the city, town, or village may itself, or by its officers, exercise and enjoy the powers, rights, authorities and immunities hereby conferred upon the corporation of such municipality, or such council may, either before the commencement of the works, or at any time while they are in course of construction, or after their completion, by by-law, assented to by the electors of the municipality, provide for the election of commissioners for such purpose:

(2) Upon the election of commissioners, all the powers, rights, authorities or immunities which, under this Act, might have been exercised or enjoyed by the council and the officers of the corporation acting for the corporation, shall and may be exercised by the commissioners and the officers appointed by the commissioners, and the council thenceforth during the continuance of the board of commissioners shall have no authority in respect of such works;

. . . . .

(4) Nothing herein contained shall be construed to divest the council of its authority with reference to the providing of moneys required in respect of such works, and the treasurer of the municipality shall, upon the written certificate of the said commissioners, pay out any moneys so provided.

The words in earlier private Acts, "by and through the agency of commissioners", do not appear in this Act, nor does it constitute the commissioners a body corporate. The Act was carried forward, without significant amendment, into R.S.O. 1887, c. 192, and became R.S.O. 1897, c. 235 (in which s. 38 became s. 40).

In 1899 the Court of Appeal decided McDougall [sic] v. Windsor Water Com'rs, 27 O.A.R. 566, already referred to. The action was in contract. The city was not sued. The water commissioners pleaded that under the statute incorporating them, they were merely agents for the City of Windsor for the purpose of managing the city's system of waterworks and that

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the city should be a party to the action. There were other defences raised. Osler, J.A., after quoting at length from the Act incorporating the commissioners (1874, c. 79), said at pp. 576-7:

> The general provisions of this Act are of a somewhat similar character to those of other Acts passed about the same period for a like purpose. In some of these, e.g. the Toronto Act, 35 Vict. ch. 79 (O.), and the Peterborough Act, 37 Vict. ch. 78 (O.), the status of the commissioners as agents of the municipal corporation is more expressly declared by enacting that the municipal corporation "by and through the agency of commissioners," who are created a corporation, shall have and may exercise the powers subsequently conferred upon the commissioners and their successors.
>
> The Ottawa Act, 35 Vict. ch. 80 (O.), which says nothing about agency, seems to place the commissioners in that respect in a more independent situation, although they can rent or purchase property for the purposes of their works only with the assent of the city.
>
> I think the commissioners are to be regarded, as were those appointed under the Toronto Act, as the statutory agents of the corporation for many purposes: Ridgway v. Toronto (1878), 28 C.P. 579; Bailey v. Mayor of New York (1842), 3 Hill (N.Y.) 531. They evidently have a large discretion as to the system to be adopted, the method of managing the works, and the contracts into which they will enter for purposes of carrying them out. These contracts are intended to be entered into by them in their own corporate name, and the Act does not in terms require any prior assent thereto on the part of the city. And it seems also clear that in relation to such contracts they may sue and be sued in their own corporate name. Nevertheless inasmuch as they have no funds or property of their own which they can apply for the purposes of such a contract as that in question, they are wholly dependent therefor upon money raised or to be raised by the paramount authority, the city, for such purposes, under the borrowing powers of the latter. The city is the principal, the

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commissioners, the agent.

Osler, J.A., concluded that the contract sued upon was ultra vires the commissioners. Moss, J.A., likewise held that while the commissioners undoubtedly had the power to contract and be contracted with, their powers were subject to certain limitations as to the mode of raising or procuring the funds for purposes going beyond "incidental maintenance", and that the contract in question was beyond their powers. He did not discuss agency, in terms.

The case was taken to the Supreme Court of Canada; the appeal of the plaintiffs was dismissed: 31 S.C.R. 326. Gwynne, J., for the Court, said at p. 329, with reference to the judgments of the Court of Appeal, that he entirely concurred in their construction of the statute that corporations incorporated as water commissioners "act as agents of, and not as paramount to, the municipal corporation of the city". The history of such statutes is traced at pp. 329-32. At p. 337 Gwynne, J., said:

> The water commissioners corporation are not by the Act made paramount to the city corporation, nor have they any power to compel the municipal council to pass a by-law, the principle of which they may utterly disapprove of as wasteful, extravagant, ineffectual for the purpose contemplated or of an experimental character, or the principle of which had been disapproved of and rejected by the ratepayers, or for the purpose of experimenting upon suggestions of the commissioners. The statute does not place the council of the municipality in subjection to the water commissioners of the city in any such manner. I am of opinion also that the city corporation were a necessary party if not the sole necessary party to be made defendants in the present action, for if the instrument sued upon constituted a valid contract under the provisions of the Act of 1874 the question really at issue was. Were the city corporation bound by the act of their agents, the water commissioners corporation? To an action raising such an issue the city corporation was the necessary party.

It is important to recall the context in which this statement

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was made. Two of the three water commissioners, including the mayor of Windsor, determined to build a filter plant, although they knew the City Council had approved a settlement of certain litigation with the Town of Walkerville which involved the city moving its intake pipe beyond or above the point of discharge of the Walkerville sewage, which action would make a filter plant unnecessary. The city refused to consent to be made a party to the action of the contractor who was building the filter plant; the ratepayers had voted against a by-law to raise the money for the plant.

At p. 334 Gwynne, J., made the suggestion that the municipal corporation should not only be a defendant but perhaps the sole defendant:

> Then the sec. 45 of 37 Vict. ch. 79 declares, as it appears to me, in clear terms, that in the exercise of the powers vested by the Act in the water commissioners incorporation, that body acts only as agents of, and as subordinate to, or concurrently with the municipal corporation in the matter of waterworks, for the whole cost of the construction and maintenance of which, as the property of the municipal corporation, they alone are liable, and therefore, as it seems to me, they should be made defendants, if not sole defendants, in every action brought to recover any sum of money made payable in respect of every valid contract for such purposes entered into by their agents the water commissioners incorporation.

(Emphasis added.) Riddell, K.C., was counsel for the plaintiff throughout. Ten years later, as a trial Judge, he was to give judgment in what became the leading case on the position of public utility commissions vis a vis the municipality to which they supplied a utility.

That case is Young v. Town of Gravenhurst (1910), 22 O.L.R. 291, affirmed with a minor variation as to damages 24 O.L.R. 467. With the rapid increase in the use of electricity, municipal corporations had been authorized in 1883 to establish local hydro-electric power commissions: see the Municipal Light and Heat Act, 1883 (Ont.), c. 21, later R.S.O. 1897, c. 234.

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The Town of Gravenhurst had constituted a board of commissioners in 1904 to manage the distribution of both electric power and water. This action was brought by a young boy and his mother against the town, as sole defendant, as a result of injuries received by him through the negligent "leak" of electric power, which found its way to a light socket in the plaintiffs' home. The defendant contended that the action did not lie against the town at all; if anyone was liable, it was the commissioners.

Riddell, J., reviewed the relevant portions of what, for convenience, may be called "the water-works Act" and the "hydro-electric power Act", and said, at p. 295:

> The whole effect of sec. 40 of [the water-works Act] is to permit the council, instead of acting for the "corporation," i.e., the "body corporate" themselves, to deliver this agency to officers appointed by the council or to Commissioners. The Commissioners then become the body which acts for the corporation --and so "statutory agents."

(The phrase "statutory agents", first used by Osler, J.A., in McDougall, is here adopted by Riddell, J., and appears frequently in later cases. It appears to have no more special meaning than "agents by virtue of statute".)

Riddell, J., referred to the McDougall case and to Ridgway v. City of Toronto, supra, saying of the latter (at pp. 295-6):

> It is true that the word "agency" appears in the statute, but it is not used in the technical sense, and adds nothing to the meaning--the Act might have read "through Commissioners," and then it would have meant precisely the same thing.

At p. 296, Riddell, J., referred to Gibbs et al. v. Trustees of Liverpool Docks (1856), 1 H. & N. 439, 156 E.R. 1273; reversed 3 H. & N. 164, 157 E.R. 429; appeal dismissed sub nom. Mersey Docks & Harbour Board Trustees v. Gibbs et al. (1866), L.R. 1 H.L. 93, which had laid down that "in every case the liability of a body created by statute must be determined upon a true interpretation of that statute". He then said:

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> In all the many cases in which this case is mentioned, I do not find that any one has ever again made the suggestion that a statutory commissioner is not merely an agent.

He concluded (at p. 297) that "it is the corporation of the town which is the principal, and the Board of Commissioners but the agent".

> On appeal it was again contended for the town that the board of commissioners alone was liable. The argument was rejected. Moss, C.J.O., said at 24 O.L.R., p. 472:

> The Board of Commissioners, when constituted and elected, is a body which assumes not the ownership but the management and conduct of the works, very much in the same way as, but for the by-law, the council would, in the exercise by it of the powers of the corporation as provided by sec. 5 of the Municipal Act, 1903.
>
> The law on this point seems to be well settled so far as this Province is concerned; and it does not support the defendants' contention.

> Garrow, J.A., held that Riddell, J., had "quite properly" overruled the objection that the board of commissioners was the proper body to be sued; he paraphrased the judgment below as "holding that the Board was merely a statutory agent to carry out for the defendants objects which the Legislature had placed under the defendants' management and control" (p. 476).

> In Scott v. Hydro-Electric Com'n of City of Hamilton (1914), 7 O.W.N. 385, an action in negligence, brought against the commission alone, the jury disagreed on negligence, but Kelly, J., dismissed the action, following Young v. Town of Gravenhurst, supra, and holding that the Act constituting the Hamilton commission (the Public Utilities Act, 1913, c. 41) "does not give them a position higher or more independent than that of agent for the municipal corporation" (p. 386).

> The Public Utilities Act of 1913 consolidated the Municipal

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Water-works Act, and the Municipal Light and Heat Act and incorporated certain provisions of several related Acts. Under ss. 34(2) and 36(1) of the new Act, all public utility commissions established under the two general Acts mentioned were created corporate bodies. Previously, the particular Acts creating commissions in certain cities sometimes made the commission a body corporate, and sometimes did not. As we shall note later, the Peterborough Commission had become a body corporate in 1907, and would have been one much earlier if the 1872 legislation had been implemented by a municipal by-law.

The Public Utilities Act of 1913 has of course continued down to the present time; the section creating a public utility commission a body corporate is s. 42(1) of the present Act.

Leaving aside the Peterborough legislation and the Campbell Flour Mills case which considered it, Ontario Courts have consistently followed Young v. Town of Gravenhurst, supra. In 1932 Rose, C.J.H.C., tried the action of Stevens-Willson v. City of Chatham et al., [1933] O.R. 305, [1933] 2 D.L.R. 407. (His judgment is there reported along with that of the Court of Appeal.) There the plaintiff's factory was damaged by a fire caused by a short circuit of high-voltage electric power wires. The city's firemen were alleged to have been negligent in not putting water on the fire because they thought it was unsafe in view of the fire's electrical origin. Employees of the hydro-electric branch of the commission were alleged to have been negligent in being too slow in turning off the power. Rose, C.J.H.C., said of the commission, at p. 308 O.R., p. 409 D.L.R.:

> Then as to the Public Utilities Commission. There has been argument as to the legal position of the Commission, as to whether under the statute (R.S.O. 1927, ch. 249, sec. 33 and the following sections) and under the by-law and agreement put in as exhibits 3 and 4, the Commission is merely an agent of the municipality, and whether for an act of an employee of the Commission--an employee controlled, it is true, by the Commission--the Commission is responsible, or whether the action must be against the municipality. The matter is dealt with in Young v. Town of Gravenhurst (1910), 22 O.L.R. 291,

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and 24 O.L.R. 467, and in Scott v. Hydro-Electric Commission of the City of Hamilton, of which there is a note, but not a full report in (1914), 7 O.W.N. 385. It looks rather as if any action based upon negligence of persons employed by the Commission ought to be an action against the municipality and not against the Commission; but that point need not be decided if the view that I am about to state is correct.

In the end the Chief Justice found no negligence on anyone's part.

On appeal, counsel for the commission is noted as having relied in argument on the Young and Scott cases as justifying dismissal of the action against it. Riddell, J.A., said at p. 313 O.R., p. 413 D.L.R., that it was "admitted" on the hearing, on the authority of Young, that there was no cause of action against the commission. Fisher, J.A. (dissenting on the merits), said at p. 315 O.R., p. 414 D.L.R., that on the argument, plaintiffs' counsel "abandoned" the appeal against the commission; Davis, J.A., at p. 324 O.R., p. 424 D.L.R., also said that counsel "abandoned" the appeal against the commission "recognizing, on the authority of such cases as Young v. Town of Gravenhurst (1910), 22 O.L.R. 291; 24 O.L.R. 467, that there was no cause of action against the Commission, it being merely a statutory agent of the Municipality". The only mention of the Campbell Flour Mills case was by counsel for the city, who is noted as having referred to it in support of the proposition that the city was not bound to maintain a fire department or provide it with equipment.

The plaintiffs appealed to the Supreme Court of Canada, [1934] S.C.R. 353, [1934] 3 D.L.R. 1, but only against the city. On the point now under consideration by us, Duff, C.J.C., said at p. 363 S.C.R., p. 6 D.L.R.:

> Two other questions were considered in the Court of Appeal. First, the question whether the Commission is answerable in legal proceedings for the negligence of its servants, in such a situation as that presented here, where negligence is established. It may be that--by reason of the pertinent decisions and the re-enactment, more than once, of the

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pertinent legislation after the decisions were pronounced, and the acceptance of the decisions as expressing the effect of the legislation, and, consequently, as giving an authoritative guidance in the conduct of municipal affairs --it may be that, for these reasons, these decisions are not now open to review. I express no opinion on that, or on the effect of the legislation. Neither do I discuss the question whether, by force of the legislation, the Corporation is responsible for the collateral negligence of the servants of the Commission in the execution of the duties of the Commission under the by-law and the statutes. On these questions it is better, I think, to say nothing, until a case arises in which a decision on one or more of them is necessary.

Rinfret, J., even "assuming" that the city was liable for the negligence of the servants of the commission, declined to interfere with the concurrent findings of the Courts below. Lamont, J., expressed himself thus, at p. 364 S.C.R., p. 7 D.L.R.:

The learned trial judge held that the course pursued by the officials and servants of the Utilities Commission was a reasonable one and was justified under the circumstances. He, therefore, absolved the Commission from any blame in connection with the burning of the appellants' mills. This finding was affirmed by the majority of the Court of Appeal, and I am not prepared to differ from it. As the Utilities Commission was not guilty of any negligence contributing to the appellants' loss, it is unnecessary to determine whether or not the Commission was the statutory agent of the municipality; and that question I wish to leave open for future consideration.

Crocket, J. (dissenting), said at p. 366 S.C.R., pp. 8-9 D.L.R.

During the hearing of the plaintiffs' appeal from the trial judgment their counsel, acting upon the suggestion of the court that the Public Utilities Commission was the statutory agent of the City Corporation on the principle affirmed in

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Young v. Town of Gravenhurst and other cases and was therefore an unnecessary party to the action, abandoned their appeal against that corporation, though maintaining that the City of Chatham was liable for the negligence, if any, of the Utilities Commission. The Appeal Court accordingly considered the appeal upon that assumption and dismissed it on a division of opinion, Riddell and Davis, JJ.A., supporting the judgment of the learned trial judge, while Fisher, J.A., dissented.

Notwithstanding the abandonment in the lower Court of the case against the commission, Crocket, J., discussed the matter of "statutory agency", saying at pp. 368-9 S.C.R., pp. 10-1 D.L.R.:

> By their abandonment of their appeal against the Commission the plaintiffs have staked their whole case, in so far as it concerns the negligence which they charge against the Commission or its servants, upon the assumption that the Commission, though a separate corporation, is the agent of the municipality for the management of its light and power system, and that the present respondent, the City of Chatham, is therefore quite as fully responsible for any negligence on the part of the Commission or its servants as it is for the negligence of any other department of the civic government.
>
> This at once raises the question as to whether the Commission is in fact the statutory agent of the respondent in the sense that its negligence is the negligence of the respondent and, if so, whether it is now open to the plaintiff to impeach the finding of the learned trial judge that the Commission was guilty of no negligence in the circumstances.
>
> . . . . .
>
> The intention of the court and of the parties plainly was that the plaintiffs' case, in so far as it was based upon charges of negligence on the part of the Commission, should be dealt with in the same way as if it had been charged against the municipality as being responsible for the

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negligence of its statutory agent.

Considering this branch of the case from this standpoint, the first question which naturally arises is as to whether the Commission is in fact the statutory agent of the respondent for the management of its light and power plant. As to this we think the Court of Appeal were right in holding that it was. All three of the Appeal Judges concurred in this view, though differing upon the question of negligence. It was argued by the learned counsel for the respondent that Young v. Town of Gravenhurst, on which the Appeal Court's decision was based, was not correctly decided. We think it was and that there is no substantial difference between the provisions of R.S.O., 1897, caps. 234 and 235, upon which that case was decided, and the provisions of the Public Utilities Act, R.S.O. 1914, cap. 204, in pursuance of which the Public Utilities Commission of the Corporation of the City of Chatham was constituted.

At p. 374 S.C.R., p. 16 D.L.R., Crocket, J., observed:

I am glad therefore, convinced, as I am, that the judgment of the Appeal Court ought not to be affirmed on the question of the negligence of the Commission, that a careful comparison of the statutory provisions under which the Public Utilities Commission of the City of Chatham was constituted with those upon which Young v. Town of Gravenhurst was decided, has firmly assured me that the Appeal Court was fully justified in holding that the Commission is the statutory agent of the respondent municipality and that any negligence, of which it may be guilty, is properly chargeable against the municipality as its principal. The principle affirmed in Young v. Gravenhurst has indeed been so consistently followed by the courts of Ontario in so many other cases that it may well be said to be the established law of that province.

Less than two years later, Kerwin, J., then an Ontario trial Judge, decided Humphreys v. City of London, [1935] O.R. 91, [1935] 1 D.L.R. 300; affirmed O.R. loc. cit., p. 295, [1935] 3 D.L.R. 39. There the plaintiff's husband had been killed

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while working in a park owned by the City of London. By the statute 1912, c. 107, the management and control of all public parks in London had been given to the water commissioners for the City of London. The city relied upon this as relieving it from liability.

The only way counsel for the city sought to distinguish Young v. Gravenhurst and Stevens-Willson, supra, was to say that in Young v. Gravenhurst the commissioners were not a body corporate, and only became such under the Public Utilities Act of 1913. Kerwin, J., pointed out that Stevens-Willson was decided years after the change (although the point had not been there taken), and while noting that Duff, C.J.C., had left the point open in the Supreme Court, he (Kerwin, J.) could not find that any change had been made in the law, merely because the Commission had now been created a corporation. "The Commission is still the statutory agent of the municipality" (p. 95 O.R., p. 304 D.L.R.). The judgment was affirmed [1935] O.R. 295, [1935] 3 D.L.R. 39, but the point involving the commission was not taken on appeal.

Collins v. Hydro-Electric Com'n of Renfrew, [1948] O.R. 29, was a case involving a contract for the sale of lands. The defence was that a necessary consent from the Hydro-Electric Power Commission of Ontario had not been obtained. The town was not a party to the action (or the contract).

Robertson, C.J.O., said at p. 32:

> I agree with the judgment of Mr. Justice Hogg disposing of this appeal. In my opinion the appellant has misconceived the relation of the respondent to the municipal corporation. The respondent is a mere agent of the municipal corporation, exercising whatever powers it has for and on behalf of the municipality. I am aware that in some of the legislation passed in recent years the relationship has become somewhat confused, and it seems to have been considered that a hydro-electric commission established in a municipality had some independent status other than that of the agent and trustee of the municipality. In my opinion the true relationship is still the same as it was when Young v. Town of Gravenhurst

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(1911), 24 O.L.R. 467, was decided.

Hogg, J.A., with whom Fisher, J.A., agreed, did not discuss the question of the relationship of the town to the Renfrew commission.

MacKinder and MacKinder v. City of London et al., [1953] O.R. 52, [1953] 1 D.L.R. 452, was again a case involving a park owned by the City of London, but this time both the city and the Public Utilities Commission were sued, following an accident in the park. Judson, J., at trial, followed the Humphreys case, holding the commission was the statutory agent of the city; the city was the occupier of the park through its agent. Judgment was given against the city. The action against the commission was dismissed, although the negligence was that of two of its employees.

The city appealed, and solely as a precautionary measure, the plaintiffs cross-appealed against the dismissal of the action against the commission. The Court of Appeal agreed with the trial Judge that the commission was in law the statutory agent of the city, and that any occupancy of the agent would be in law the occupancy of the city (p. 61 O.R., p. 454 D.L.R.).

The latest case to which we were referred is the judgment of Pennell, J., in G.N.J. Properties Ltd. v. Barriesim Developments Ltd.; City of Barrie Public Utilities Com'n, Third Party, [1973] 3 O.R. 614. The plaintiff was the purchaser of land from the defendant. The defendant had entered into a prior subdivision agreement with the City of Barrie. The plaintiff was charged $1,800 by the Public Utilities Commission of Barrie for the installation of underground hydro services, and sued to recover that amount from the defendant, who sought to claim over against the commission in third party proceedings. An appeal from an unsuccessful motion to strike out the third party claim came before Pennell, J. After referring to the submission that the appellant commission was the statutory agent of the City of Barrie and in consequence of that fact there was no cause of action against the commission, Pennell, J., said at p. 616:

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> Now several high authorities have held that any action based upon the negligence of persons employed by a public utilities commission in the Province of Ontario ought to be an action against the municipality and not against the commission. Of course, the present case involves an alleged breach of contract, but the cases which I have selected for mention have a peculiar value in relation to the matter now under consideration.

He then discussed the Young and the Stevens-Willson cases, reproduced the portion of the judgment of Crocket, J., in the latter case, already quoted herein, and held there was no cause of action against the commission; the City of Barrie was the principal and the commission "merely the agent".

> This line of cases, which began over a century ago, has been regarded in this Province as establishing these propositions:

(1) A public utilities commission is the statutory agent of the municipality for which it was created.
(2) Where a public utilities commission enters into a contract relating to some aspect of its operations, only the municipal corporation and not the commission may be sued on the contract.
(3) Where injury is sustained or damage suffered because of the negligence of the commission or its servants, only the municipality and not the commission may be sued by the injured party.

> Reference to Rogers, The Law of Canadian Municipal Corporations, 2nd ed. (1971), para. 259.5 at p. 1439, and to 17 C.E.D. (Ont. 2nd), p. 495, para. 24, indicates that these propositions represent the generally held view. The Supreme Court of Canada in Stevens-Willson v. City of Chatham et al., supra, expressly left open the third proposition, in the passage already quoted above from the judgment of Duff, C.J.C., and in the light of what Lamont, J., said, supra, the first proposition is probably also open in that Court.

> However, so far as this Court is concerned, the first proposition has been firmly adhered to in every case in which the subject has arisen. Even though it developed in an age when

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the nature and size of public utility operations bore no relationship to the complex operations of many of today's commissions, the proposition is so firmly embedded in the law of Ontario, and has been followed so consistently in the Court of Appeal, that we see no reason to depart from it.

The second proposition flows logically from the first. If a contract is made with an entity known to be acting as agent for a known principal, only the principal and not the agent can be sued on the contract. On this basis, there is no reason to question the actual results in McDougall v. Windsor Water Com'rs; Collins v. Hydro-Electric Com'n of Renfrew, or G.N.J. Properties Ltd. v. Barriesim Developments, all of which were contract cases.

It is the third proposition, relating to cases of negligence of a commission, that gives us serious difficulty. Of the cases falling into this group, the judgment of Kerwin, J., at trial in Humphreys v. City of London is not binding on this Court; the Court of Appeal did not deal with the point. The other "London park" case (MacKinder and MacKinder v. City of London) was treated as a case of occupier's liability, and the crucial issue was: who was in occupation? At trial and on appeal the City of London was held to be in occupation, through its agent, the public utilities commission; the city had turned over to the commission the occupation and management of the park. The park was not a public utility, a fact which doubtless strengthened the argument that the commission was not performing a function independent of the city but was its designated agent.

This leaves for consideration four of the cases already discussed: Ridgway v. Toronto; Young v. Town of Gravenhurst; Scott v. Hydro-Electric Com'n of City of Hamilton, and the Stevens-Willson case. Of these, the Scott case is not binding on us. In none of the four cases does the argument appear to have been made that at common law, a plaintiff injured by the negligence of an agent acting in the course of his duties can sue the principal or the agent or both. We accept the holding of these cases that the municipality can be successfully sued for the negligence of its "statutory agent", the public

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utilities commission, but we are not prepared to perpetuate the alleged corollary, that only the municipality can be held liable. Because the common law principle that both the principal and his negligent agent can be sued does not appear to have been considered, we regard these four judgments, so far as they hold that only the principal, the municipality, can be held liable, as having been delivered per incuriam.

The common law principle that both the negligent agent and his principal are liable is discussed in 25 Hals., 3rd ed., p. 546, para. 1030; Bowstead on Agency, 13th ed. (1968), p. 305, and Jones v. Manchester Corp. et al., [1952] 2 Q.B. 852 at pp. 868-71. Until the U.K. legislation of 1935 (the Law Reform (Married Women and Tortfeasors) Act, 1935 (U.K.), c. 30), the principal and his agent were regarded in the United Kingdom as joint tortfeasors in some circumstances; that Act permitted contribution between joint tortfeasors. We will revert to this aspect later in these reasons.

Mr. Britnell, for the City of Peterborough, submitted that the law applicable to Peterborough and its public utilities commission is different from the law applicable in other municipalities, because of what has been termed "the peculiar legislation relating to Peterborough".

The submission is founded upon Campbell Flour Mills Co. Ltd. v. City of Peterborough (1925), 57 O.L.R. 458, [1925] 4 D.L.R. 23, a unanimous judgment of the Appellate Division, comprising the five Judges of the First Divisional Court. The argument is not reported save for a listing of the statutes and cases referred to. The statutes mentioned include the Municipal Act, R.S.O. 1914, c. 192, s. 248; the Public Utilities Act, R.S.O. 1914, c. 204, ss. 26-45; the Power Commission Act, R.S.O. 1914, c. 39, ss. 18-24; "An Act respecting the City of Peterborough", 1907, c. 82, ss. 1, 2 and 6, and two references respecting public inquiries. The cases include Young v. Town of Gravenhurst, supra, and Scott v. Hydro-Electric Com'n of City of Hamilton, supra, and several cases on public inquiries.

The case involved the power of the Council of the City of Peterborough to initiate an inquiry before the County Court

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Judge under s. 248 of the Municipal Act into the hydro bills rendered to the plaintiff by the Public Utilities Commission of Peterborough for the period March, 1919 to December, 1921. An alderman who was himself a miller had raised the matter before the Municipal Council and had successfully pressed for a judicial inquiry.

This action was then launched claiming an injunction to restrain the city and the Judge from proceeding with the inquiry. The commission was also a defendant. Middleton, J.A., sitting as a High Court Judge, granted the injunction.

Section 248 of the Municipal Act authorized a municipal council to request the Judge to "investigate any matter relating to a supposed malfeasance or breach of trust ... or to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business". The argument for the plaintiff, put simply, was that the City of Peterborough had handed over to the Public Utilities Commission the matter of the distribution of hydro-electric power in Peterborough, including the billing, and that this subject had ceased to be part of the city's public business. The Appellate Division agreed with this submission and dismissed the appeal.

Hodgins, J.A., for the Court, put what may be termed the broad basis for its decision in these words (pp. 465-6 O.L.R., pp. 28-9 D.L.R.):

> It is urged that, as the Corporation of Peterborough is by statute entitled to any surplus resulting from the operations of the business managed and controlled by the Water Commissioners of Peterborough, it follows naturally that the business must be that of the corporation and so within the section, but it is difficult to regard that fact as an exact test in this matter, for two reasons. It ignores the object of setting up an authority, different from the council, which, under the statute, represents the people of the municipality, which authority is elected by and is responsible to the same constituency, to deal with this particular enterprise. It must be clear to every one that the

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Legislature has from time to time vested in independently elected or appointed bodies various parts of what was originally the business of the municipality, and has specially favoured in that respect the segregation of what are called public utilities. In particular the management and control of electrical energy has generally been placed in the hands of local commissions on account of its technical character. And this has been done to establish contact between these bodies and the Ontario Power Commission, so that the production and distribution of power may be kept up to a proper and scientific standard, a thing hardly possible if they were managed as only one of many municipal activities. But another reason is that the argument is manifestly too wide in its scope, for nothing in which the inhabitants of the municipality can be said to be pecuniarily or indirectly interested or concerned as affecting their good or welfare could then be excluded. It would lead to unexpected results if the passing of a resolution by the council should be taken to authorise an inquiry merely because the council therein asserted that its interests were involved.

It is when Hodgins, J.A., analyzed the statutes involved, and drew certain conclusions from that analysis that problems emerged and remain. He begins (at p. 467 O.L.R., p. 30 D.L.R.) by quoting s. 40(2) of the Municipal Waterworks Act, R.S.O. 1897, c. 235 (the italics are his):

> "Upon the election of commissioners, all the powers, rights, authorities, or immunities which, under this Act, might have been exercised or enjoyed by the council and the officers of the corporation acting for the corporation, shall and may be exercised by the commissioners and the officers appointed by the commissioners, and the council thenceforth during the continuance of the Board of Commissioners shall have no authority in respect of such works."

Reference is next made to the 1906 statute, "An Act to provide for the Transmission of Electrical Power to Municipalities, 1906, c. 15, whereby the Hydro-Electric Power Commission of Ontario ("H.E.P.C.") was constituted, and municipalities were

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empowered to contract with it for a supply of electrical power for themselves and the inhabitants of the municipality.

Next is mentioned the 1907 Act, c. 82, "An Act respecting the City of Peterborough," upon which counsel for the city laid great stress in the argument before us. Hodgins, J.A., noted that by this Act the city obtained power to purchase the plant and business of the Peterborough Light and Power Company, subject to the approval of the agreement by H.E.P.C., and to develop and sell electric energy or to receive, rent or lease it, subject to such conditions as to rates, etc., as H.E.P.C. prescribed. He noted that the Water Commissioners of Peterborough were constituted a body corporate by s. 6 of this Act, that the management, control and operation of "the business" was vested in them, and "they were thenceforth to have vested in them all the rights, powers, authorities, immunities and duties conferred upon a municipal council entering into a contract with [H.E.P.C.] under 6 Edw. VII, ch. 15" (p. 468 O.L.R., p. 31 D.L.R., emphasis by Hodgins, J.A.).

Hodgins, J.A., referred to s. 3 of the 1907 Act making rates charged subject to regulations of H.E.P.C. and giving H.E.P.C. power to examine the books of the water commissioners and examine their rates. He referred to a contract entered into in 1913 between the city and H.E.P.C. for the exclusive supply of power by H.E.P.C. to the city for 30 years. This agreement, he noted, was confirmed by the Power Commission Act, 1913, c. 12, s. 5 (along with a considerable number of similar agreements).

The next portion of his judgment must be quoted in full (commencing at p. 468 O.L.R., p. 31 D.L.R.):

> By (1914) 4 Geo. V. ch. 87, an Act respecting the City of Peterborough, which recites the statute of 1907, the Peterborough Water Commissioners are declared to be a Public Utilities Commission under R.S.O. 1914, ch. 204, and are to continue, as the statute states, "to be a body corporate, and all special or general authority, powers and duties conferred or imposed by any Act now in force upon the Peterborough Water Commissioners or conferred or imposed by the Public Utilities Act on a Public Utilities Commission and the

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commissioners thereof are hereby conferred and imposed upon the Peterborough Utilities Commission and the commissioners thereof and the provisions of any Act now in force affecting the Peterborough Water Commissioners, together with the provisions of the Public Utilities Act in so far as they are applicable to and not inconsistent with any such Act, shall apply to the said Peterborough Utilities Commission and the commissioners thereof."

The authority, powers, and duties conferred on a Public Utilities Commission by the Public Utilities Act, R.S.O. 1914, ch. 204, are those of control and management, and, when a contract is made by the corporation with the Hydro-Electric Power Commission, a Public Utilities Commission is required to be established for that purpose. Section 35 provides that after the establishment of such a commission its powers, rights, etc., shall be exercised by the commission and not by the council. By this statute authority was given to take over the Peterborough Light and Power Company.

It was argued that secs. 8, 9, and 10 of the Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, enlarged the meaning of the words "part of its public business." These sections make the "inhabitants" a body corporate, under the name of "The Corporation of the City of Peterborough," and provide that the powers of a municipal corporation shall be exercised by its council. But these sections in no way, in my opinion, derogate from the devolution upon the Water Commissioners of Peterborough of the authority to manage and direct the business entrusted to them as a statutory corporation by the statute of 1907, and a Public Utilities Commission, under the statute R.S.O. 1914, ch. 204. These were formerly conferred upon the municipal council, whose authority was by the statute of 1897 and by that of 1914 excluded while the Board of Commissioners continued.

To hold otherwise would be to beg the question, because, while the Corporation of the City of Peterborough represents the inhabitants, it does so only so far as the Legislature consents to the business of those inhabitants being so represented, and not where they are, as to the supply and

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distribution of electrical energy, represented directly, by force of special legislation, by the Public Utilities Commission. There is no power, save that of the Legislature, to divert from the Water Commission of Peterborough the power and authority given to it by the legislation I have outlined. It is for this reason that I do not think Young v. Town of Gravenhurst, 24 O.L.R. 467, is in point. Under the peculiar legislation relating to Peterborough, which I have set out, the Water Commission are not merely the servants and agents of the Corporation, as was the case there. They are constituted an independent authority, and, while they exist, the Corporation of Peterborough is debarred from exercising the powers, etc., entrusted to them.

The conclusion to which I feel bound to arrive is that the matter sought to be investigated under the council's resolution is no "part of its public business," but is solely that of the Water Commission of Peterborough as a Public Utilities Commission.

In that view the injunction was properly granted and the appeal must be dismissed with costs.

With the greatest respect, we are unable to agree with the suggested distinction between Young v. Town of Gravenhurst, supra, and the Campbell Flour Mills case. Statutory provisions stating that upon the creation of water commissioners (incorporated or unincorporated) for a municipality, or of a public utilities commission, all of the powers of management and control of the utility in question should thereafter be in the commissioners or commission, and not in the council of the municipality, had been not unusual since 1872. Reference may be made to the first Toronto Act, 1871-72, c. 79, s. 25, and the Ottawa Act, 1871-72, c. 80, s. 25, each of which provided that the commissioners "shall have the full, entire and exclusive possession, control and management of the said lands and water works and all things appertaining thereto"; and to the Windsor Act, 1874, c. 79, s. 1 of which prescribed that the waterworks already constructed or to be constructed "shall be placed under the management of commissioners, and their successors ... who shall have power to design, construct, build, purchase,

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improve, alter, hold, and generally maintain, manage and conduct water works, and all buildings, matters, machinery and appliances therewith connected or necessary thereto, in the Town of Windsor ...". Section 45 of the Windsor Act gave the Town of Windsor the option of itself operating the water works; it read:

> 45. Notwithstanding the provisions of this Act, authorizing the working, management and extension of the water works of the said Town of Windsor through the agency of commissioners, if the Corporation of the town of Windsor shall desire to retain the working and management in its own hands, then all the powers, rights, authorities, duties and liabilities by this Act given to, granted and vested in the said commissioners shall be vested in the said Corporation, and the said Corporation shall be vested with all the powers, privileges and immunities necessary for carrying into effect the intentions and objects of this Act.

The Municipal Waterworks Act, R.S.O. 1897, c. 235, s. 40(2), quoted by Hodgins, J.A., supra, was of general application. So was the H.E.P.C. Act, 1906, c. 15. While Hodgins, J.A., does not mention the Act, the Municipal Light and Heat Act of 1883 was likewise of general application. As already indicated, that statute became merged in the first Public Utilities Act of 1913. In the following year the Peterborough Water Commissioners were declared a public utilities commission, by a special Act, referred to by Hodgins, J.A. Hodgins, J.A., italicized the words of the 1914 special Act which preserved in the Peterborough Public Utilities Commission all special statutory powers and duties conferred on the Peterborough water commissioners "by any Act now in force".

There were no special powers or duties in prior statutes which made peculiar to Peterborough the basic characteristics of water commissioners or public utility commissions, which were that the land and works were owned by the municipality, the management, control and maintenance, and the collection of rates, was the function of the commission, and surplus revenue was to be turned back to the municipality.

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The Peterborough P.U.C. is deemed to be a commission established under Part III of the Public Utilities Act, R.S.O. 1970, c. 390, by virtue of s. 39 of that Act. It is at least arguable that as such, the P.U.C.'s existence may be terminated, with the assent of the electors, under s. 45 of the Act, in the same way as any commission established by by-law.

In our respectful view, in so far as Campbell Flour Mills may be said to hold that the legal relationship between the City and the P.U.C. is different in Peterborough from the situation in other municipalities, the decision is either obiter or wrong.

With the actual decision we have no quarrel. The H.E.P.C. Act, coupled with s. 3 of the 1907 Peterborough Act, gave H.E.P.C. express power to examine the books and the rates of the commissioners. In this sense, the examination of rates charged to a particular user of power had been given by statute to H.E.P.C., and such rates were not to be examined elsewhere under the guise of investigating "the business of the city".

If Campbell Flour Mills Co. Ltd. v. City of Peterborough, supra, on that part of its holding that "it's different in Peterborough" was wrongly decided, should we follow it anyway, as we have decided to do with the first proposition established by the "statutory agency" cases? In connection with Campbell Flour Mills, the situation differs factually in that it is not simply part of a long line of consistent cases. Until the instant case, it appears to have been cited only once on the question of the relationship of a public utility to the municipality. That single instance was in T.T.C. v. Metro. Toronto, [1960] O.R. 487, where the T.T.C. sought to enjoin the Metropolitan Corporation from carrying out an inquiry by a County Court Judge of certain expenditures of the T.T.C. Counsel for the T.T.C. relied on Campbell Flour Mills and Re City of Berlin and County Judge of County of Waterloo (1914), 33 O.L.R. 73, 22 D.L.R. 296. Thompson, J., pointed out that in 1927 the Legislature had amended s. 248 of the Municipal Act to include within the ambit of inquiry the activities of local boards and commissions, and observed (at p. 492) that since the amendment of 1927 the Campbell Flour Mills case and another

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case relied on had little or no application. Obviously, on that view of the law, Thompson, J., had no occasion to consider the correctness of Campbell Flour Mills, even if it had been open to him to do so. He said, at p. 492:

> In the Berlin case the inquiry sought was with respect to matters under the administrative jurisdiction of a police commission. It was there held that the inquiry required was not within the scope of the section as it related to matters solely within the paramount, statutory, jurisdiction of the police commission, an independent statutory body, and not to matters within the jurisdiction of the municipal council. It was said, in effect, that although the term good government of the municipality embraced a very wide ambit, some limitation must be placed upon it and that it was limited to matters within the jurisdiction of the council.
>
> Likewise, in the Peterborough case, and for similar reasons, it was held that such an inquiry did not lie with respect to matters within the statutory jurisdiction of a public utility commission.
>
> The decisions in these cases proceed upon the basis that the powers of government relating to the questions involved were the powers of the particular board or commission concerned and not of the municipality, and that such questions, as matters of business, public or otherwise, related exclusively to the business of such independent body and not to the business of the council.
>
> In my view, since the amendment of 1927, already referred to, these cases have little or no application; and it would appear that it was enacted to overcome their effect.

Thus we are not dealing with a case which has been relied on and followed in other cases, on the question of statutory agency between the City and the Commission, nor one on the faith of which citizens have "ordered their affairs". We therefore propose not to follow it.

While this Court will generally follow one of its own

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decisions in a civil case, the Court has occasionally departed from this long-standing practice. In Re Gillis; Township of Tisdale v. County of York, [1950] O.W.N. 21, the Court of Appeal on November 16, 1949, gave judgment in which, inter alia, the Court expressed its views upon s. 10 of the Children's Protection Act, R.S.O. 1937, c. 312. After the reasons for judgment had been handed out, counsel for one of the parties drew to the attention of the Court its decision in Re Wright, [1938] O.R. 117, [1938] 2 D.L.R. 52, 69 C.C.C. 397. Robertson, C.J.O., in additional reasons given on December 12, 1949, said at p. 23:

> While we had not that case before us in considering our judgment, the provisions of s. 10 of The Children's Protection Act have been frequently considered by members of this Court, and with every respect to the opinion expressed in Re Wright, we are not able to read the provisions of subs. 4 of s. 10 as they were interpreted in that case. In our opinion the time referred to in the first line of subs. 4 is the time of residence of the child in subs. 2, and of the mother in subs. 3, and has no relation to the period of five years referred to in the latter part of subs. 3. Added to this, the concluding clause of subs. 4, in our opinion, supports this view. We, therefore, deem it unnecessary either to change our judgment or to call for further argument.

In our view, the ratio of the Campbell Flour Mills case should be confined strictly to the point actually decided, namely, that the City of Peterborough had no power to initiate a judicial inquiry into the rates for hydro-electric power charged to a particular customer of the Peterborough Public Utilities Commission. It should not be regarded as authority for the proposition that while public utilities commissions elsewhere are statutory agents for the municipality which they serve, and if the commission is negligent, both the municipality and the commission are liable, in Peterborough the commission operates independently of the city and is not its statutory agent.

The trial Judge should, therefore, have held that the City was vicariously liable for the negligence of the Commission,

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and the Commission was also liable to the plaintiff. As between the City and the Commission on the one hand and Consumers on the other, the City and the Commission are responsible for 75% of the judgment and costs of the plaintiffs and Consumers for 25% with contribution and indemnity between them on that basis, subject to the City's separate rights to indemnity, which we now discuss.

The City's claims for indemnity

The City has asserted, in third party proceedings, that if it is found liable to the plaintiffs, it is entitled to be indemnified by Consumers, and on different grounds, by the Commission. The City did not formally cross-appeal the dismissal of its third party claim against the Commission and Consumers but the issue was clearly raised in its statement and full argument was heard without objection. We are, accordingly, prepared to grant leave to the City to file such a notice of cross-appeal nunc pro tunc. The City's claim against Consumers is based on the following provision of the franchise agreement between the City and Consumers:

> 3. The Company [Consumers] shall at all times wholly indemnify the City from and against all loss, damage and injury and expense to which the City may be put by reason of any damage or injury to persons or property caused by the construction, repair, maintenance or operation by the Company of its works in the said City as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the Company in connection with the construction, repair, maintenance or operation by the Company of any of its works in the City unless the cause of such loss, costs, damage, injury or expense can be traced elsewhere.

The proper interpretation of cl. 3, in the context of the whole agreement, is that it is intended to indemnify the City against loss occasioned by acts of Consumers or of those for whom Consumers may be responsible in law.

Furthermore, this clause does not state in clear and

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unambiguous language that Consumers is to indemnify the City against the results of the City's own negligence or of negligence for which it is responsible in law. Without such clear language, an indemnity clause ought not to be construed as conferring a right of indemnity for loss occasioned by one's own negligence (the principle is stated early in these reasons, along with two cases supporting it: Canada Steamship Lines Ltd. v. The King, [1952] A.C. 192, [1952] 2 D.L.R. 786, 5 W.W.R. (N.S.) 609, and Smith et al. v. South Wales Switchgear Ltd., [1978] 1 All E.R. 18). We think the same rule applies to negligence of another for the results of which one is in law responsible.

The City's appeal as to its claim for indemnity against Consumers in the third party proceedings instituted by the City is, therefore, dismissed.

The City's claim against the Commission, made in the same third party proceedings, rests on the common law right of a principal who is found vicariously liable to a plaintiff by reason of the negligence of his agent in the performance of his authorized duties to be indemnified by the agent. It is not a right which has been pursued frequently, but its existence is clear. It is an exception to the common law rule that there could be no contribution between joint tortfeasors. The principal asserting the right must himself have been without fault in the occurrence which caused the damage. No one in this case has alleged any positive fault on the part of the City. Its liability is purely vicarious. Hence all the necessary ingredients of a good claim for indemnity are present.

The underlying principle is not confined to cases of agency; it has been applied even where there are no contractual relations at all between the wrongdoer and a person who is vicariously liable for the damages occasioned by the wrongful act. Thus, in McFee v. Joss (1925), 56 O.L.R. 578, [1925] 2 D.L.R. 1059, McFee, the owner of a motor vehicle, had been held liable under the Highway Traffic Act to a person injured by the negligence of Robert Joss, to whom McFee had rented a car for use by Robert Joss in his father's business. McFee sued Robert Joss and his father for indemnity for the damages and costs

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assessed against him, plus his own costs of his unsuccessful defence. Ferguson, J.A., for the Court said, at p. 584 O.L.R., p. 1064 D.L.R.:

> ... as I read the cases, 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. The 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. I am also of opinion that such right of indemnity exists independently of the statute [the Highway Traffic Act], 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.

The case was considered and its principle adopted by Morand, J., in Custom Ceilings Inc. v. S.W. Fleming & Co. Ltd. et al., [1970] 3 O.R. 17, 12 D.L.R. (3d) 209.

In Lister v. Romford Ice & Cold Storage Co. Ltd., [1957] A.C. 555, the House of Lords unanimously held that a servant owes a duty to his master to carry out his work with reasonable care, and if damages are recovered against the master by a person injured by the servant's negligence, the master can recover from the servant the damages and costs the master has been obliged to pay. The cause of action was characterized as breach of an implied term of the contract between the master and the servant. (The House divided three to two on the question whether there was a duty on the master fo effect insurance protecting his servant (a lorry driver) and whether, if there was, this afforded the servant a defence to the master's action, which was, in fact, brought by the master's insurers.)

The author of Powell, The Law of Agency, 2nd ed. (1961), states at p. 322, that "as a result of the decision in [the

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Lister case] an agent would seem to be liable to indemnify his principal against damages and costs which the principal has had to pay to a third party by reason of a tort committed by the agent against that third party".

Most of the English cases have arisen in situations where the master was seeking contribution from his servant whose negligence had rendered the master vicariously liable. In Ryan v. Fildes et al., [1938] 3 All E.R. 517, Tucker, J., in discussing the argument that the Law Reform (Married Women and Tortfeasors) Act, 1935 provided for contribution but not indemnity among joint tortfeasors, noted (at p. 525) that it was immaterial that the master "might have had" a right of indemnity at common law. In Jones v. Manchester Corp. et al., [1952] 2 Q.B. 852, Singleton, L.J., at p. 865, quoted with apparent approval this passage from Salmond on the Law of Torts, 10th ed. (1945), p. 78:

> "It would seem clear on principle that in all cases of true vicarious liability the person held vicariously liable for the tort of another should have a right of indemnity as against that other. Thus, a master who has paid for the negligence of his servant should be able to sue that servant for indemnity."

Denning, L.J., while acknowledging that the existence of the right "has often been assumed to be the law" (p. 868), was clearly sceptical of the existence of such a right, apart from express contract, and said that he knew of no case in which it had actually been decided. As appears from his judgment in Morris v. Ford Motor Co. Ltd., [1973] Q.B. 792, his main concern was that an insured employer might sue (and recover from) an uninsured employee.

The existence of the right was made clear in the Lister case, supra, and Salmond in the 15th edition (1969), at p. 648, treats the matter as settled. See also Atiyah, Vicarious Liability in the Law of Torts (1967), c. 38; Morris v. Ford Motor Co. Ltd., supra; Davenport v. Com'r for Railways et al. (1953), 53 S.R. (N.S.W.) 552, per Owen, J., at pp. 556-7 and Herron, J., at pp. 559-60; Winfield and Jolowicz on Tort, 10th

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ed. (1975), at pp. 532-4; Fridman, The Law of Agency, 3rd ed. (1971), at p. 250; Finnegan v. Riley, [1939] 4 D.L.R. 434 (Ont. C.A.), and Prosser, Handbook of the Law of Torts, 4th ed. (1971), at p. 311.

We therefore hold that the City is entitled to judgment against the Commission in the third party proceedings for the amount the City is required to pay to the plaintiffs by way of damages and costs, together with the City's costs of its defence in the main action (see McFee v. Joss, supra, at p. 586 O.L.R., p. 1066 D.L.R.), and its costs of the third party proceedings. The City is also entitled to recover against the Commission that portion of its costs of the appeal in the third party proceedings as if the successful portion of its appeal had taken one-half day. This allocation of its costs will reflect adequately the fact that the City failed in its attempts to overcome the line of cases on statutory agency and to persuade us that the law in Peterborough was different from that applicable elsewhere.

Liability of the City based on Rylands v. Fletcher

As mentioned earlier, the plaintiffs sought to have liability imposed upon the City based on the principle of Rylands v. Fletcher (1868), L.R. 3 H.L. 330, affirming L.R. 1 Ex. 265. The plaintiffs did not serve a notice of cross-appeal on this issue. We think that such a notice should have been served for the matter to be properly before us. The City was before the Court as a respondent with respect to the issue of its liability to the plaintiffs on the Commission's appeal and counsel for the City was prepared to argue the issue on the merits. We, accordingly, heard such argument from both sides as though the requisite notice had been served.

Without repeating all the details of the factual background, the essential facts are that the pipe at the point of fracture was on City property within the limits of the street allowance and it was owned by Consumers, having, as already stated, been sold to it by the City as part of an underground system in 1959. It was in that year that the City granted to Consumers the franchise to supply natural gas.

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The oft-quoted statement of the principle in question is that of Blackburn, J., at p. 279 of (1866), L.R. 1 Ex. 265:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

It may be noted at the outset that the facts of the present case, as far as the City is concerned, do not come within a literal application of this language. The City did not (a) bring the gas into its land (b) for its purposes. However, the plaintiffs' argument is, essentially, that the City is liable because it permitted Consumers to bring the gas onto its lands. On the issue raised several cases and textual statements were cited to us or otherwise came to our attention. Those apparently helpful to the plaintiffs are: Humphries v. Cousins (1877), 2 C.P.D. 239; Aikman v. Geo Mills & Co. Ltd. et al., [1934] O.R. 597; Aldridge and O'Brien v. Van Patter et al., [1952] O.R. 595, [1952] 4 D.L.R. 93, and Winfield and Jolowicz on Tort, 10th ed. (1975), at p. 375. Those favouring the City are: Whitmores (Edenbridge), Ltd. v. Stanford, [1909] 1 Ch. 427 at p. 438; St. Anne's Well Brewery Co. v. Roberts et al. (1928), 140 L.T. 1 at pp. 5, 6 and 9; 28 Hals., 3rd ed., p. 158, para. 222, and Charlesworth on Negligence, 5th ed. (1971), at pp. 279-81. In our view, none of the foregoing compels a particular result on the facts of this case.

For a combination of reasons we think that it is not appropriate that the Rylands v. Fletcher principle be applicable to the City. The gas distribution enterprise was entirely that of Consumers, with all of its attendant benefits and risks. Consumers had the ownership not only of the gas but also, together with the control and care thereof, of the pipe from which the gas could escape. In light of these considerations we do not think that the mere fact that the City has permitted Consumers to assume ownership of a chattel on its lands, for the purposes of Consumers, should entail strict

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liability on the part of the City. Cases in which an owner leases land for a hazardous purpose, or for a purpose that inevitably has to amount to a nuisance, may be distinguished on the ground that in such cases it can be said that the owner, in a sense, shares in the use of the land for such purpose.

Related to the foregoing is the fact that the City is acting pursuant to statutory powers in granting the franchise. As far as the current legislation is concerned reference may be made to the Municipal Act, R.S.O. 1970, c. 284, s. 354(1), para. 102, and various provisions in the Municipal Franchises Act, R.S.O. 1970, c. 289. In the latter statute particular reference may be made to the powers of the Ontario Energy Board respecting the right to supply gas in municipalities (s. 8) and to approve gas franchise by-laws (s. 9). It must be assumed that all of such powers are conferred to be exercised in the public interest. Thus it cannot be said that the Consumers pipe runs through City land merely because the City has permitted it to do so and that the public interest has not been taken into account in the granting of the right to Consumers to supply gas in the City. These considerations should be taken into account in considering the appropriateness of the City being strictly liable for damages resulting from the activities of Consumers.

In the result, then, we see no merit in this particular claim advanced by the plaintiffs.

Damages

We turn now to the important issue of damages. As a result of the explosion and the fire which followed, Sandra Fenn, who was then 24 years of age, was horribly injured. Her children were killed; Candice Fenn, a sister-in-law, was injured; Gerard Fenn, Sandra's husband, returned home to find his house destroyed, his children dead and his wife being loaded into an ambulance, and as a result he suffered severe nervous shock. The learned trial Judge in his reasons for judgment described the injuries to Sandra Fenn and the effect of the explosion on Gerard Fenn. It is unnecessary to review again the injuries, the treatment and the result of the injuries in the same detail. It will be sufficient for the purposes of this appeal

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simply to quote and adopt a portion of the trial Judge's reasons as follows [14 O.R. (2d) 137 at pp. 158-60, 73 D.L.R. (3d) 177 at pp. 198-200]:

> Following the explosion Mrs. Fenn was pinned to the floor by rubble. Her baby Gregory had been in her arms and was beside her. She was conscious until her rescue. She watched the fire spread. Her legs were consumed by fire and her body and hands terribly burned. She heard her children crying. When she was rescued the burns to her legs were so severe that her feet fell off. When admitted to hospital she was in a tremendous amount of pain, in deep shock and crying out about her children. What was left of her legs below the knees was badly burned and charred and consisted of little more than bits of completely burned flesh clinging to exposed bones. Her entire back was deeply burned and charred. Her upper thighs and buttocks were deeply burned, and also her upper arms and fingers. The little fingers were completely charred and mummified. She was taken to the operating-room where both ler legs were amputated just above the knee. Her burns were cleaned up and dressed, she was placed face down on a Stryker frame and transferred to the intensive care unit. Further surgery was performed on January 15th, when both fifth fingers were amputated and further surgery was performed on both hands. Mrs. Fenn was subjected to a number of further operations and skin grafts and on March 8, 1973, obstruction of an airway was caused as a result of a malfunctioning intravenous infusion. This necessitated an emergency tracheotomy.
>
> I do not think it is necessary to describe in detail the treatment that Sandra Fenn received. She suffered excruciating pain for several months. She became very depressed and on one occasion, more than a year following the accident, attempted suicide. She is still easily depressed. She suffers from continuing nightmares. She is permanently incapacitated.
>
> Mrs. Fenn's present condition was described by Dr. Hoyle Campbell, a well recognized plastic surgeon, who was called as a witness at trial. Her whole back has been grafted,

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together with her right arm and elbow. She still has an unstable scar on her right elbow. The right medial aspect of her right wrist and the flexor surface of the right palm and wrist have been grafted but there is contracture present which will be permanent unless further work is done. There is a fusion of the proximal intraphalangeal joints of the third and the fifth digits on the right hand and the fifth has been transposed to the fourth position. This hand does work and she can grasp with it, although inefficiently. The thumb is drawn by the contracture into the palm and while some extension is possible, the extensor mechanism is working at a considerable disadvantage. The posterior aspect of the left arm has been grafted and there is some scar drag, particularly noticed when she trys to flex her elbow fully. There is gross scarring in the dorsum of the wrist, with loss of the fourth digit at the proximal joint. The legs have been amputated through the lower thighs and healing is complete although there is extensive scarring on the posterior aspect of the stumps, extending up the posterior thighs which pull it very taut when she flexes her hips, almost to the point of tearing. She has undergone so many operations and so much pain that the thought of further reconstructive surgery is abhorrent to her.

Following Mrs. Fenn's release from hospital in the autumn of 1972, she moved into an apartment with her husband. It was impossible for either of them to adjust to the changed circumstances. Mr. Fenn was terribly depressed and eventually attempted suicide with the result that he was admitted to hospital. No one was left to care for Mrs. Fenn and she was also admitted to hospital. After counselling, it was agreed that it would be in the best interests of both Mr. and Mrs. Fenn if they separated. They have lived separate and apart ever since.

. . . . .

Attempts have been made in the past to mobilize Mrs. Fenn on artificial limbs. These attempts have failed.

Damages for the injury to Sandra Fenn were assessed at

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$712,417.56. Damages under the Fatal Accidents Act, R.S.O. 1970, c. 164 (repealed by s. 79 of the Family Law Reform Act, 1978 (Ont.), c. 2), for the deaths of the three Fenn children were assessed at $5,000. Damages were also assessed for the claim of Gerard Fenn and Candice Fenn, but these amounts are not relevant to this appeal.

The assessments were made by a trial Judge of great experience in cases of personal injury and the appeals as originally launched did not involve the issue of damages. However, following judgments of the Supreme Court of Canada in Andrews et al. v. Grand & Toy Alberta Ltd. et al., [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577, Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al., [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480, [1978] 1 W.W.R. 607, and Arnold et al. v. Teno et al., [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 19 N.R. 1, the defendants applied for and received leave to enlarge their appeals to include appeals against the assessment of damages for Sandra Fenn. These appeals in turn led to a cross-appeal by Sandra Fenn respecting her damages and the assessment under the Fatal Accidents Act for the death of her children.

Sandra Fenn's damages were assessed as follows:

1. General damages including future loss of income $250,000.00

2. Cost of the purchase of a specially equipped vehicle 9,000.00

3. Out-of-pocket expenses excluding that portion apportioned to OHIP 15,026.95

4. Present value of future economic loss 351,354.63

5. Cost of past insured services apportioned to OHIP 37,035.98

6. Estimated future cost of insured services apportioned in favour of OHIP 50,000.00

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$712,417.56

Items 2, 3 and 5 are not in dispute.

(a) Non-pecuniary general damages

The figure of $250,000 is stated to include amounts for pain and suffering and the loss of amenities of life as well as an amount for loss of future income. It is now necessary to separate these two heads of damage and identify an amount for pain and suffering and loss of the amenities of life, i.e., the non-pecuniary damages.

Stated bluntly, the position of the appellants is that the trilogy of cases decided by the Supreme Court of Canada has established a limit of $100,000 for non-pecuniary damages. In those cases the plaintiffs suffered devastating and totally disabling injuries; the non-pecuniary damages in each case were fixed or confirmed at $100,000. In Andrews, Dickson, J., said at p. 263 S.C.R., p. 477 D.L.R.:

> Cases like the present enable the Court to establish a rough upper parameter on these awards. It is difficult to conceive of a person of his age losing more than Andrews has lost. Of course, the figures must be viewed flexibly in future cases in recognition of the inevitable differences in injuries, the situation of the victim, and the changing economic conditions.

In Teno, Spence, J., said at p. 334 S.C.R., p. 640 D.L.R.:

> I am in respectful agreement with Dickson J. that there should be uniformity, always allowing flexibility to meet each differing individual case, in awards for non-pecuniary damages. Perhaps one should say there must be upper limits with awards lower in some cases and some higher in exceptional cases.

In our opinion, these cases do not establish an absolute limit for non-pecuniary damages. The figure of $100,000 is put

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forward as a rough level of non-pecuniary general damages which is reached by those plaintiffs whose lives are left in total ruin but who are made economically whole by the assessment of pecuniary damages.

In Lindal v. Lindal, [1978] 4 W.W.R. 592, Fulton, J., addressed himself to the question whether $100,000 constituted an absolute limit for non-pecuniary general damages and concluded, at p. 602:

> The door is thus open to make a higher award and, as I say, the problem which has been of real concern to me is whether there are facts here which move this case through that door.

There can be little doubt that Sandra Fenn's crushing and totally disabling injuries move her to at least the $100,000 plateau. The question is whether or not this amount should be increased.

In this case there are two factors which justify an award somewhat higher than $100,000. Firstly, the trial in this case (the point in time as of which damages are to be assessed) took place approximately a year and a half after the latest of the trials in the trilogy of cases decided by the Supreme Court. It is apparent that during that time there has been an appreciable erosion in the value of money. Secondly, it appears that Sandra Fenn has suffered substantially more pain than any of the plaintiffs in Teno, Andrews and Thornton. We do not in any way wish to minimize the suffering of the plaintiffs in any of those three cases. Assuredly, any of these plaintiffs suffers terribly with the dawn of each new day which renews the recognition of cold reality. However, unlike the other plaintiffs, Sandra Fenn suffered excruciating, prolonged, raw physical pain which requires an increase in her assessment of damages. Taking into account these two additional factors, an appropriate figure for general damages would be $125,000.

(b) The discount rate

Before dealing with the balance of the assessment of damages, it is necessary to direct our attention to the problem of the

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appropriate discount rate. Substantial parts of the plaintiff's claim involve the provision of periodic payments for care and maintenance, etc. Critical to the actuarial calculation of a fund sufficient to such a task is the selection of a discount rate. In earlier times, this was a relatively simple operation which involved only the proper estimate of the interest rate which would prevail over the life of the fund. Now, however, the discount rate must take into account not only the interest rate but also the eroding effect of inflation. In Teno, Andrews and Thornton, these factors were considered and a discount rate of 7% was selected by the Supreme Court of Canada. In this case the trial Judge accepted a discount rate of 3%.

It cannot be said that the 7% discount rate is a matter of law for, as Dickson, J., said in Andrews, at p. 259 S.C.R., p. 474 D.L.R., "[t]he result in future cases will depend upon the evidence adduced in those cases." (See also Sheppard et al. v. Wells et al., Ontario Court of Appeal, unreported, released June 21, 1978 [summarized [1978] 2 A.C.W.S. 323], and Richards v. B and B Moving & Storage Ltd. et al., Ontario Court of Appeal, unreported, released September 8, 1978 [summarized [1978] 3 A.C.W.S. 113].)

However, it was argued that Teno, Thornton and Andrews as a matter of law provided a formula for the ascertainment of a discount rate and this is accomplished by subtracting the long-term inflation rate from present interest rates. In support of this proposition the appellants quoted from Dickson, J., in the Andrews case, at p. 255 S.C.R., p. 471 D.L.R.:

> In my opinion, it would be better to proceed from what known factors are available rather than to ignore economic reality. Analytically, the alternate approach to assuming a stable economy is to use existing interest rates and then make an allowance for the long-term expected rate of inflation.

In our view, it is apparent from the context from which these remarks are taken that Dickson, J., was speaking of present interest rates for long-term investments. It is further implicit in this analysis that when one speaks of long-term investments and long-term inflation rates one is speaking of

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the same long-term and that the long-term so far as possible should correspond to the projected life of the fund which is the subject of the calculation. However, it is not necessary for a Court to struggle unduly with these economic concepts when, as in this case, it is given the ample assistance of expert witnesses. In this case, the uncontradicted evidence, accepted by the trial Judge, was that the long-term probable differential between investment return and inflation was not greater than 3% and this figure should be used as the discount rate.

On the other hand, counsel for the plaintiff urged that the discount rate should be lower than 3% and based his argument on the proposition that at least some of the funds that the plaintiff would be required to expend for her care and maintenance would be subject to income tax and the discount rate should be decreased in order to ensure that these funds would be tax paid in her hands. In our view, the question of the tax burden is far too complex and too personal to each plaintiff to be accommodated by a simple reduction of the discount rate.

The plaintiff further argued that in future she will be compelled to expend funds on wages for persons to assist her and that the evidence in this case demonstrates that because of increased productivity, wages will rise at a rate faster than the ordinary inflation rate. This argument fails, however, for want of a sufficient evidentiary base. The evidence in this case is of a general character and is not sufficient to warrant the conclusion that the services that the plaintiff will require will increase in cost at a rate beyond the inflation rate. We adopt the 3% discount rate which was selected by the trial Judge and which was fully supported by the evidence.

(c) Cost of future care

The trial Judge accepted a figure of $15,861 as the yearly cost of future care which included household help, nursing care, wheelchairs, home modification, transportation and the like. He estimated that this expense would continue for the next 32 years until Sandra Fenn attained the age of 60 years

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(she was 28 at the date of trial). He then estimated that the cost of her care would escalate to $18,861 for the next five years until she attained the age of 65. These figures were not challenged. The cost of future care was attacked simply on the basis that the trial Judge had used an incorrect discount rate in calculating the present cost of these future expenses. Accepting as we do that the trial Judge used the correct discount rate, we are in agreement with his assessment of the cost of future care at $351,354.63. In addition to this cost of future care, it was estimated that the Ontario Hospital Insurance Plan would incur future costs for medical treatment as well as costs of Sandra Fenn's permanent care beyond age 65. Utilizing the same discount rate of 3% the trial Judge calculated that the future cost to OHIP would be $50,000 and we are in agreement with him.

(d) Basic costs of living: lost earning capacity

It is now appropriate to return to an issue which the learned trial Judge doubtless had in mind when he allowed an unspecified amount for loss of income within the assessment of general damages at $250,000. The amounts assessed under the prior heading of future care include nothing for the basic cost of living, i.e., food and shelter, etc., until Sandra Fenn reaches 65 years of age, at which point the cost of institutional care is provided.

Prior to the explosion, Sandra Fenn was not employed in the sense that she earned a wage from an outside source. She was, however, employed, and one might say gainfully, in the care of her family and the management of her household. This household, funded by the earnings of Gerard Fenn, provided Sandra Fenn with a modest but comfortable living. The explosion destroyed not only the Fenn house but the household as well. The marriage was unable to withstand the tragedy heaped upon it and without the fault of either Gerard or Sandra Fenn, crumbled. The plaintiff Sandra Fenn is now left without support or any realistic likelihood of ever being supported by her husband. Her injuries have rendered her utterly incapable of supporting herself.

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It appears that this issue can be approached in either one of two ways and each leads to substantially the same result. The funds necessary to provide for the basic living costs can be classed simply as part of the cost of future care made necessary as a result of the explosion. Dickson, J., in Andrews, having spoken of moderation in the assessment of non-pecuniary damages, included this significant sentence at p. 261 S.C.R., p. 476 D.L.R.:

> Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.

The loss of basic living expenses is a pecuniary loss. The appellants who seek moderation in non-pecuniary damages in accord with the principles enunciated in Andrews, Teno and Thornton, must surely yield to the counterbalancing principle of full compensation for pecuniary losses.

On the other hand, the matter might be approached as an assessment of damages for the lost earning capacity of Sandra Fenn. Support for this approach is found in the words of Spence, J., in Teno, who said at p. 328 S.C.R., p. 636 D.L.R.:

> I turn next to the consideration of an award to cover the income which the infant plaintiff would have earned had she grown to womanhood and joined the work force. This amount was not separately assessed or considered by the learned trial judge although he did emphasize in discussing the global award that it would have to be made to cover the plaintiff's own living costs even apart from the award to cover the special care with which I have already dealt as "she had been deprived of an opportunity to provide for herself".

And at pp. 329-30 S.C.R., p. 637 D.L.R.:

> If there is no allowance for the loss of future income, then the fund from which her ordinary living costs would be supplied would have to come from the amount awarded for non-pecuniary damages and there can be no excuse for depriving

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the infant plaintiff of an allowance for those non-pecuniary damages fixed in a fashion which I shall discuss hereafter by requiring her to use those non-pecuniary damages to live on.

The remaining problem is the selection of an amount. There is no helpful employment history of Sandra Fenn to be used as a guide. We select the figure of $6,000 per year as a reasonable estimate of her earning capacity, a figure barely above the poverty level and a figure which is consistent with the approach used by Spence, J., in Teno. Further, the sum of $6,000 a year is a reasonable, if somewhat arbitrary, estimate of her basic living expenses. Thus this sum, it seems to us, can be justified on either basis. Using the actuarial evidence supplied, the provision of this sum from the date of trial until Sandra Fenn reaches age 65, using a 3% discount rate, would cost $154,105. Age 65 is significant as the customary end of one's working life expectancy and in this case the age at which the trial Judge estimated Sandra Fenn would require institutional care. Thus, the termination date will be the same whether this annual sum is classed as the cost of basic living expenses or as lost earning capacity.

(e) Income tax

In his reasons for judgment the trial Judge spoke of the income tax burden that would fall upon the plaintiff and the necessity of providing the cost of future care as a tax paid sum in the plaintiff's hands. It does not appear in his assessment, however, that any specific allowance was made to cover the tax burden. The appellants took the position that the Supreme Court of Canada in Teno, Thornton and Andrews established a rule of law that the extra amount of money required to pay tax to ensure the cost of future care will be tax paid in the plaintiff's hands is not an allowable claim. We do not agree that those cases stand for that proposition. It is true that in none of those cases was a claim for amounts sufficient to meet tax liability allowed, but it appears that the claims failed for want of adequate proof. In Andrews (p. 260 S.C.R., p. 475 D.L.R.) and Teno (p. 325 S.C.R., p. 633 D.L.R.) reference was made to the possibility that the tax laws might be amended to afford more generous treatment to accident

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victims. Thus far, there has been no legislative response.

It is important, however, to keep the tax question within its proper limits. The defendants are not obliged to provide a sum to pay the taxes that will be incurred on the interest income on the general damage award. We are concerned simply with the amount for future care. However, it must be recognized that other amounts which generate income will propel a plaintiff into a position where the tax rate applicable on the amounts in question will be higher. However, as was pointed out in both Andrews and Teno, the existence of s. 110(1)(c)(iv.1) of the Income Tax Act diminishes the problem. The tax problem is further complicated by the fact that the funds paid to a plaintiff such as Sandra Fenn out of a self-exhausting fund are part capital and part income and it is only the income portion which is subject to tax. In this case there was evidence given as to the tax burden that would fall upon the plaintiff but this evidence is not sufficient to enable us to make any specific assessment because this evidence fails to take into account the fact that the funds payable to Sandra Fenn are mixed capital and income and further the tax calculations mixed inextricably the tax liability on the income from her general damage award and the cost of future care. Thus, despite the commonly recognized fact of the inevitability of death and taxes, the evidence in this case falls short of enabling us to make a specific assessment under this head.

(f) Management fee

In her cross-appeal, the plaintiff Sandra Fenn asked that the assessment of damages be increased by the award of a management fee to enable her to seek professional assistance in the handling of the funds awarded to her. It is inherent in the award that the fund must be managed in such a way as to produce income which will exceed the inflation rate by 3%. The management of a large self-exhausting fund which must endure over a very long term and achieve its objects is a task which requires professional assistance. Sandra Fenn is a person of modest capacity who would have found the management of such a fund difficult under the best of circumstances; the facts of this case make it abundantly clear that the explosion has

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seriously diminished her capacity. In Teno a sum of $35,000 was allowed to provide a self-exhausting fund out of which management fees could be paid over the life of the principal award. It has been pointed out that Diane Teno was a much younger plaintiff and that the fund in this case will not endure for quite so long a period. In all of the circumstances, we are of the opinion that the sum of $25,000 under this head would be appropriate.

(g) The contingencies

It was lastly argued by the appellants that the sums awarded to the plaintiff under the various heads of damage should be reduced by some percentage to reflect the contingencies, i.e., the possibilities, that she might not require all of the care estimated, or she might require institutional care (less expensive than home care) earlier; that if the $6,000 a year is characterized as lost income that it would be affected by the possibility of layoffs or illnesses, etc. In speaking of contingencies, Dickson, J., said in Thornton, at p. 283 S.C.R., p. 489 D.L.R.:

> The imposition of a contingency deduction is not mandatory, although it is sometimes treated almost as if it were to be imposed in every case as a matter of law. The deduction, if any, will depend upon the facts of the case, including the age and nature of employment of the plaintiff. Most forms of employment, however, are exposed to the possibility of layoff, illness, accidents and the like.

And in Andrews, at pp. 249-50 S.C.R., p. 468 D.L.R.:

> This whole question of contingencies is fraught with difficulty, for it is in large measure pure speculation. It is a small element of the illogical practice of awarding lump sum payments for expenses and losses projected to continue over long periods of time. To vary an award by the value of the chance that certain contingencies may occur is to assure either over-compensation or under-compensation, depending on whether or not the event occurs.

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In this case, the trial Judge in his calculations for future institutional care has already reduced Sandra Fenn's statistical life expectancy of 78 to 70 and on the facts of the case we are satisfied that he was not in error in so doing. This reduction in life expectancy reflects itself in the diminished costs of institutional care beyond age 65. The appellants, however, argued that there should be a substantial reduction in whatever sum is allowed for either lost income or the basic cost of living. It would appear that none of the other sums awarded realistically lend themselves to the concept of reduction premised on the contingencies. However, one may appropriately ask why the concept of contingencies has almost always been interpreted as a factor which should diminish a damage award. Surely there are contingent factors which may lead to the enlargement of damages. In this case there exists the spectre of tax liability which will to some extent diminish the funds which Sandra Fenn will receive for the cost of future care.

As mentioned earlier, the evidence falls short of demonstrating exactly what that tax liability will be but the fact of some tax liability has not been dispelled and it would seem reasonable that this tax liability is a contingency which should be weighed in favour of the plaintiff. In Oliver et al. v. Ashman et al., [1961] 3 All E.R. 323 at p. 340, Pearson, L.J., said:

> Where a plaintiff has been rendered helpless by his injuries, which have been caused by the defendants' negligence, the sum awarded as compensation should be sufficient to ensure that he will be properly looked after by others in any situation which can reasonably be foreseen, so that even rather improbable contingencies will be covered.

In cases such as this where a plaintiff has been totally disabled and Courts are faced with the task of providing sums to ensure proper care for a lifetime, one should not be quick to reduce those sums under a ritualistic theory of contingencies. In this case, it is not difficult to foresee that in countless ways Sandra Fenn will be put to extra expense to accomplish the ordinary small tasks and to partake of the

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small pleasures in life and this contingency should as well be weighed in the balance. In the result we are not persuaded that there should be any percentage reduction of the figures already arrived at under the theory of contingencies. Those possibilities which may tend to increase the financial burden on Sandra Fenn are at least the equal to those possibilities which may tend to diminish the sums awarded.

(h) Summary of damages

In summary, Sandra Fenn's damages should be assessed as follows:

1. Non-pecuniary damages for loss of the amenities of life, pain and suffering $125,000.00

2. Cost of the purchase of a specially equipped vehicle 9,000.00

3. Out-of-pocket expenses excluding that portion apportioned to OHIP 15,026.95

4. Present value of future care 351,354.63

5. Cost of past insured services apportioned to OHIP 37,035.98

6. Estimated future cost of insured services appor- tioned in favour of OHIP 50,000.00

7. Present cost of future basic living allowance or lost earning capacity 154,105.00

9. Management fee 25,000.00

TOTAL: $766,522.56

(i) Damages under the Fatal Accidents Act

As a result of the explosion the three Fenn children, Dean

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age four and a half, Virginia two and a half, and Gregory four months, were killed. In his reasons for judgment the trial Judge awarded the sum of $5,000 for the death of all three children and described the amount as "so small and so insignificant compared to the death of these three children". However, as he rightly observed, the calculations of these damages must be based upon a reasonable expectation of pecuniary benefit. The plaintiffs by way of cross-appeal ask that this assessment be substantially increased. We are, however, not persuaded that in selecting this largely conventional sum the trial Judge was in error, and we would not interfere with the award in this connection.

Interest

Pursuant to leave granted by the order of Houlden, J.A., on December 21, 1977, the plaintiffs cross-appeal for an order that the judgment in appeal be varied to provide for interest on the judgment at a rate of 10% per annum, or such rate as this Court deems just, from the date of judgment to the date of payment. The plaintiffs in their application to Houlden, J.A., had sought to remove the stay of execution and the matter of a stay was adjourned to the Court hearing the appeal.

While this cross-appeal was brought on behalf of all of the plaintiffs, we propose to give effect to it only with respect to the plaintiff Sandra Fenn.

The first branch of the argument on behalf of the plaintiff Sandra Fenn was based upon what was said to be delay on the part of the defendants in perfecting the appeal. This delay is said to have occurred prior to the actual ordering of the entire transcript; discussions were then going on, on a rather spasmodic basis, on the subject of whether part of the transcript could be omitted for the purposes of the appeal. The plaintiff was not involved in any controversy with the defendants on that matter.

While undoubtedly there were delays in the perfecting of the appeal, particularly with respect to the making of a decision as to what evidence was required, there was another

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considerable delay later, occasioned by the application brought by the plaintiffs for leave to appeal to the Supreme Court of Canada from the order granting the defendants leave to broaden their grounds of appeal to this Court so as to attack the award of damages by the trial Judge. In all the circumstances, we do not think this is a case in which delay should be a factor in our decision whether to make a special order regarding interest.

Once judgment in an action has been "given", which in this case means when the reasons for judgment were released on October 7, 1976, the judgment bears interest from the time of "giving the judgment": the Judicature Act, R.S.O. 1970, c. 228, s. 40. The rate is 5%: Rule 548 and Form 115 [am. O. Reg. 307/72, s. 12].

The amended s. 38 of the Judicature Act, permitting the allowance of interest at the prime rate in the circumstances specified in the amended section, applies only to judgments delivered after the section came into force on November 25, 1977: see 1977 (Ont.), c. 51, s. 3(2). Although s. 39 of the Judicature Act was repealed on the same date, it was in force when the trial judgment was delivered, but it was not suggested in argument that s. 39 had any relevance to the facts of this case.

The plaintiff's further submission was that the calculation of the sum needed to produce the required annual amount to look after the plaintiff was made and given in evidence in July, 1976. It assumed that the requisite capital payment would be made at once. It assumed also the obvious mathematical fact that if the fund were invested at once at an average return of 10% per annum, the encroachments on the fund in the initial years would have a much greater content of interest than of capital. Later the capital portion of each payment would eventually exceed the interest portion, and towards the end of the plaintiff's lifetime, the payments to her would be mostly all capital. The annual payments out of the fund will have to be increased year by year because of the impact of inflation. The payment in 1979 will have to be greater than the $15,000 estimated for the year commencing in 1976.

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It is now two and a half years since the evidence was given. The fund has not yet been set up. The interest that should have accumulated in that period has not been received. Hence the fund will be exhausted sooner than the judgment contemplates. In Mr. Murray's colourful phrase, "Mr. Walker's evidence becomes a myth if the fund doesn't get set up until 1979." The defendants who are ultimately found liable will have had the benefit of this money since October, 1976, at a cost to them of 5% per annum if the submissions of the defendants are accepted.

Mr. Mueller's submissions on interest on the award may be summarized as follows:

(1) The specific provisions of the Judicature Act and Rule 548 relating to interest should be resorted to, and not the general powers of the Court of Appeal conferred on it by s. 30 of the Act. If s. 40 and Rule 548 do not fix the rate at 5%, s. 3 of the Interest Act, R.S.C. 1970, c. I-18, fixes the rate at 5%.
(2) The power of the trial Judge to award interest at a rate other than 5% was (before 1977) confined to interest up to the date of giving of judgment; thereafter, only 5% interest was payable: Sidan Investments Ltd. v. W.B. Sullivan Construction Ltd. (1974), 3 O.R. (2d) 121 at p. 131, 44 D.L.R. (3d) 641 at p. 651; Babineau v. MacDonald (1974), 9 N.B.R. (2d) 382 at p. 389.
(3) The powers of the Court of Appeal are to pronounce the judgment the trial Judge should have pronounced. Those powers are as set out in point (2).

The recent judgment of the House of Lords in Pickett v. British Rail Engineering Ltd., [1978] 3 W.L.R. 955, has some bearing, by analogy only, to Mr. Murray's point that the defendants found liable have had the use of the money, at the statutory rate of 5% since the date of the trial judgment. In Pickett the trial Judge had allowed interest from the date of the writ to the date of judgment, as the English Rule permitted him to do. The Court of Appeal increased the damages from (STERLING)7,500 to (STERLING)10,000 but disallowed the interest "on the theory that as damages are now normally subject to increase to take account of inflation, there is no

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occasion to award interest as well" (the quoted words are those of Lord Wilberforce at p. 963). The House of Lords restored the provision for interest. Lord Wilberforce, id. cit., said: "Increase for inflation is designed to preserve the 'real' value of money: interest to compensate for being kept out of that 'real' value. The one has no relation to the other." Lord Edmund-Davies, after quoting (and finding fallacious) the reasoning of Lord Denning, M.R., in Cookson v. Knowles, [1977] Q.B. 913 at p. 921, which the Court of Appeal in Pickett had followed, also emphasized at pp. 975-6 the aspect of the defendant having the use of the money, and therefore not being prejudiced by being required to pay interest on it.

In the present case the governing provisions respecting interest, as such, on a judgment are s. 40 of the Judicature Act and Rule 548 (and Form 115). The prescribed rate is 5% (unless there is a written contract making interest payable at a higher rate, after judgment, in which case the judgment may so provide). We agree with the judgment of Lerner, J., in Sidan Investments Ltd. v. W.B. Sullivan Construction Ltd., supra. However, we think it is clear that with respect to the cost of future care the evidence on behalf of the plaintiff was designed to prove what capital sum, paid at once, would be required to make available to the plaintiff the necessary amount per annum for the rest of her life, presuming a rate of 10% per annum on the amount of capital from time to time in the plaintiff's hands. We accept the argument that if payment of the required capital sum is delayed for two and a half years, the calculations made by the trial Judge are no longer valid. The plaintiff will run out of money while she still needs care.

This could have been guarded against if the trial Judge had ordered that the capital sum awarded for future care should bear interest at 10% per annum from the date of his judgment to the date of payment -- not as interest on the sum awarded but as part of the sum awarded. Thereby the requisite capital sum, when eventually paid, would be sufficient to provide for the plaintiff's care for life. The trial Judge was not asked to do so, and could not have foreseen the delay in payment that has in fact occurred (and may become greater if there is a further appeal).

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We can make such an award now, and in the circumstances, justice requires that we do so. The judgment should be amended to provide that the sum of $351,354.63 awarded for present value of future care shall bear interest at 10% per annum from October 7, 1976, to the date of payment.

The same principle applies to the award of $154,105 as the present cost of future basic living allowance or lost earning capacity. We have selected a figure of $6,000 per year as a reasonable estimate of the plaintiff's earning capacity, and have said that the same figure is a reasonable estimate of her basic living expenses. In arriving at the present value of the capital amount required to produce $6,000 per annum, we have again used an investment return of 10%, minus the inflation rate of 7%, to produce a discount factor of 3%. Hence, the award of $154,105 should bear interest at the rate of 10% per annum from the date of the judgment (October 7, 1976), to the date of payment.

In each case the allowance of 10% interest is in lieu of the 5% provided for by Rule 548 and Form 115.

As to the award of $50,000 for the future cost to OHIP of insured services, while undoubtedly there is some discount element involved, OHIP did not cross-appeal, and when its counsel addressed us in support of the $50,000 award, he did not suggest that any special consideration of the interest on it should be given. That part of the award will, therefore, bear interest at the usual rate of 5% from the date of judgment.

The plaintiff has received $135,000 from the defendants, or some of them, and Mr. Murray told us he was not claiming interest on that amount. We do not know whether the payment was specified by the defendants to be made in respect of some particular head of damage. We propose to treat it as paid in respect of heads of damage other than future economic loss and future basic living allowance or lost earning capacity. We are not allowing interest on those other heads of damage at a rate higher than 5%. The parties can work out the arithmetic, based

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on the dates of payment and in the light of these reasons.

Summary of our conclusions and the disposition of costs

The appeals of Consumers and the Commission with regard to liability and damages are dismissed with costs (with one set of counsel fees) payable to the plaintiffs. These costs are to be paid equally by these appellants. The plaintiffs are, however, to have judgment with costs against the City as well as the Commission, on the basis of the City's vicarious liability. Contribution and indemnity as between the City and the Commission on the one hand and Consumers on the other will take place on the basis that the City and the Commission were 75% at fault and Consumers 25% at fault. The City is to have judgment against the Commission in the third party proceedings for the amount the City is required to pay to the plaintiffs by way of damages and costs together with the City's costs of its defence in the main action and its costs of the third party proceedings. The City is also to recover the costs of the appeal in the third party proceedings as of one-half day's proceedings. The appeals with relation to the damages awarded to OHIP are dismissed without costs.

The cross-appeal of the plaintiffs seeking to impose liability on the City under Rylands v. Fletcher is dismissed but under the circumstances without costs.

The cross-appeal of the plaintiffs with regard to the damages awarded to the plaintiff Sandra Fenn is allowed with costs and the damages increased to $773,179.43, being the sum of the $766,522.56 already itemized, plus $2,500 (one-half of the award of $5,000 under the Fatal Accidents Act) plus $4,156.87 (one-half of the agreed joint out-of-pocket expenses of Gerard Fenn and Sandra Fenn of $8,313.75). These costs, which, as between Consumers and the Commission are to be paid equally, include the costs of the motion before Houlden, J.A., on December 21, 1977. The plaintiff is to have interest at 10% on the sum of $505,459.63 from October 7, 1976, to the day of payment. This allowance of 10%, as stated, is in lieu of the 5% provided by Rule 548. The cross-appeal of the plaintiffs with regard to damages under the Fatal Accidents Act, which took

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very little time, is dismissed without costs.

The costs in the interlocutory proceedings before this Court on June 6, 1978, were finally dealt with at that time, and nothing more need be said about them.

Appeals by defendants, Peterborough Utilities Commission and Consumers' Gas Company dismissed; cross-appeal by plaintiffs allowed; appeal by Consumers' Gas Company from dismissal of its third party action dismissed; appeal by City of Peterborough from dismissal of its third party action dismissed as against Consumers' Gas Company and allowed as against Peterborough Utilities Commission.

MVRT

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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.

[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?

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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.

[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

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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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Court of Queen's Bench of Alberta

Citation: Paramount Resources Ltd v Grey Owl Engineering Ltd, 2022 ABQB 333

2022 ABQB 333 (CanLII)

Date: 20220509
Docket: 1909 00014
Registry: Peace River

Between:

Paramount Resources Ltd

Plaintiff/Respondent/Applicant

- and -

Grey Owl Engineering Ltd., Keith Osmond, WF Holdings Ltd., Chad Sletten, 2088752 Alberta Ltd. carrying on business as Custom Fiberglass Contractors Ltd., P.G.T. Holdings Ltd. carrying on business as Chief Pipeline Contractors Limited, and Crossfire Energy Services Inc.

Defendant/Applicant/Respondent

Memorandum of Decision
of the
Honourable Madam Justice S.L. Kachur

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[1] The Plaintiff, Paramount Resources Ltd. ("Paramount"), is a pipeline owner and operator. In early 2018, Paramount became aware of an environmental leak from its pipeline that it was required to remediate, allegedly at a cost of some $20 million. The Defendants were involved in the construction of the pipeline or the insertion of a fiberglass liner into the pipeline in 2004.

[2] On February 6, 2019, Paramount commenced an action against the Defendants for negligence related to alleged deficiencies in the construction of the pipeline. In particular, Paramount alleges that some or all of the Defendants failed to bury the pipeline deep enough

underground to avoid exposure to frost, as was necessary to prevent damage to the fiberglass material used in construction, and further that the Defendants failed to inform Paramount of this failure.

[3] The Defendants apply for summary dismissal of the negligence claim on the grounds that it was filed after the 10-year ultimate limitation date in section 3(1)(b) of the *Limitations Act*, RSA 2000, c L-12, and further that the claim warrants summary dismissal on the merits.

[4] Paramount denies that the 10-year drop-dead date in the *Limitations Act* has passed or, in the alternative, cross-applies for an extension to the limitation period under section 218 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("*EPEA*"). Paramount also opposes summary dismissal on the merits.

[5] For the reasons that follow, I grant Defendants' application and summarily dismiss Paramount's claim.

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Factual Background

[6] In 2004, Paramount (under its previous name "Apache") undertook a project to convert its pipeline from a simple steel pipe to a "carrier" pipe. This involved inserting a fiberglass liner into the existing pipeline.

[7] The Defendants were involved in this project in various ways. Grey Owl Engineering and its project manager Keith Osmond (collectively "Grey Owl") acted as project manager and submitted the necessary regulatory application on behalf of Paramount. WF Holdings and its quality control supervisor Chad Sletten (collectively "WF") supplied and installed the fiberglass liner. 2088752 Alberta Ltd. and P.G.T. Holdings Ltd. assisted in the installation of the liner.

[8] The project was completed in 2004 and the pipeline operated for 11 years without incident until it was discontinued in 2015. In 2017, Paramount began taking steps to re-activate the pipeline. A successful hydro pressure test was completed in December 2017 and pipeline operation resumed, but in April 2018 two environmental leaks were found and the operation was discontinued.

[9] In order avoid damage that can be caused by water freezing inside the pipeline, the technical specifications of the fiberglass liner stipulate that it must be buried below the frost line. The evidence suggests an appropriate depth of between 1.5m-1.8m. Subsequent investigation revealed several places where the pipeline was not buried deep enough. In some places, it was as shallow as 0.4m.

[10] Paramount was forced to remediate the environmental damage, the cost of which has already been significant and is expected to rise further.

Issues

[11] The issues before me are:

1. Has the 10-year ultimate limitation period expired?
2. If so, should an extension be granted under section 218 of the *EPEA*?
3. If the action is not limitation-barred, should Paramount's action be summarily dismissed for lack of merit?

Has the 10-year drop-dead limitation period expired?

[12] The relevant passages from section 3 of the *Limitations Act* are:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> …
>
> (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.
>
> …
>
> (3) For the purposes of subsections (1)(b) and (1.1)(b),
>
> (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;
>
> …
>
> (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 to impose a liability on which the claim for contribution can be based, whichever occurs first;

[13] Paramount argues the 10-year ultimate limitation clock only started running when the pipeline leak was discovered in April 2018. The basis for its argument is its interpretation of section 3(3)(e).

[14] Paramount says that the negligence claim is, at its heart, a claim for contribution and indemnity. Paramount has remediation obligations under the *EPEA* which it says result from negligent construction work done by the Defendants. It claims only for the remediation expenses, not for any other damage done to Paramount's pipeline or operations. Therefore, it is essentially making claim for contribution to its statutory remediation obligations.

[15] Once it has been established that this is a contribution claim, Paramount says section 3(3)(e) of the *Limitations Act* applies, and the 10-year limitation period thus began when Paramount became liable under the *EPEA* in April 2018.

[16] A similar interpretation of section 3(3)(e) was advanced in ***Addison & Leyen Ltd v Fraser Milner Casgrain LLP***, 2014 ABCA 230, though I note the decision mistakenly refers to it as section 3(3)(b) at para 14. An allegedly negligent tax opinion led to a statutory obligation to the Minister of National Revenue the plaintiff's tax filing was re-assessed. The plaintiffs brought a claim against the lawyers who had prepared the opinion, attempting to characterize it as a contribution claim for limitation purposes.

[17] While the Court of Appeal did not foreclose the possibility of section 3(3)(e) applying to equitable contribution claims, the panel rejected the characterization of the claim as one of contribution. The Court noted that equitable contribution has narrow application, at para 29:

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[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.)

[18] The Court identified three major issues with the plaintiffs' argument, at paras 34, 39, and 40-43:

> [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).
>
> ...
>
> [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).
>
> ...
>
> [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

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> 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.
>
> [Emphasis added]

[19] A key point in ***Addison*** was that the negligent law firm could never have been liable directly to the Minister. On this issue, Paramount advances an interpretation of the *EPEA* to argue that the Defendants could have been directly liable to for the environmental damage.

[20] Section 107 is found at the beginning of Part 5 of the *EPEA*, which concerns the release of substances. The following is taken directly from Paramount's brief:

> 107(1) In this Part,
>
> …
>
> (c) "person responsible for the contaminated site" means
>
> (i) a **person responsible for the substance** that is in, on or under the contaminated site,
>
> …
>
> Section 1(tt) defines "person responsible", when used with reference to a substance or a thing containing a substance, as including "every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing". The Defendants had charge or responsibility for ensuring that the Pipeline installation was properly done and complied with the CSA. The Pipeline was used to transport the emulsion in Paramount's Zama field.
>
> [Emphasis in original]

[21] Paramount points to ***Lakeview Village Professional Centre Corporation v Suncor Energy Inc***, 2016 ABQB 288 as support for a broad interpretation of sections 218 and 107, that would include the Defendants as "persons responsible" under the *EPEA*.

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[22] On the facts before me, I cannot accept Paramount's position. To suggest that "person responsible" includes everyone who was ever involved in construction of a pipeline is not, in my view, what the *EPEA* contemplates. I am not persuaded that, having been contracted to build a pipeline to carry a potentially polluting substance, the Defendants ever had "charge" of the substances transported within the pipeline. In my view, only Paramount ever had charge of the substances.

[23] Therefore, even if they had committed negligence that resulted in the leak, it has not been made clear that the Defendants could have been liable under the *EPEA*. They would certainly be liable in negligence to Paramount, but ***Addison*** is clear: that alone is not enough for equitable contribution.

[24] Absent clear legislative language or appellate guidance, I believe it would be an unwarranted expansion of equitable indemnity to allow it in this case. The policy concerns raised in ***Addison*** are also relevant here. I am greatly concerned about exposing contractors and subcontractors to limitless liability simply because their work carries environmental risk. Exceptions to limitation periods are few, and they should not be expanded lightly.

[25] I find that Paramount's claim is simple negligence, not contribution, and section 3(3)(e) therefore does not apply. The claim arose when the alleged negligent act occurred in 2004, per section 3(3)(a) of the *Limitations Act*, and the 10-year ultimate limitation period has passed.

[26] Therefore, subject to an extension under section 218 of the *EPEA*, I would summarily dismiss the claim on limitation grounds.

Should an extension be granted under section 218 of the *EPEA*?

[27] Section 218 reads:

> 218 (1) A judge of the Court of Queen's Bench may, on application, extend a limitation period provided by a law in force in Alberta for the commencement of a civil proceeding where the basis for the proceeding is an alleged adverse effect resulting from the alleged release of a substance into the environment.
>
> (2) An application under subsection (1) may be made before or after the expiry of the limitation period.
>
> (3) In considering an application under subsection (1), the judge shall consider the following factors, where information is available:
>
> (a) when the alleged adverse effect occurred;
>
> (b) whether the alleged adverse effect ought to have been discovered by the claimant had the claimant exercised due diligence in ascertaining the presence of the alleged adverse effect, and whether the claimant exercised such due diligence;
>
> (c) whether extending the limitation period would prejudice the proposed defendant's ability to maintain a defence to the claim on the merits;

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> (d) any other criteria the court considers to be relevant.

[28] As noted in Paramount's brief, applying section 218 requires a balancing of the competing policy objectives of the *Limitations Act* and the *EPEA*.

[29] The 10-year time limit in section 3(1)(b) of the *Limitations Act* favours finality. It is important that potential liabilities are eventually put to rest so that people can move forward without having to keep reserves in case an ancient claim rears its head. It is also a recognition of the practical problems that arise from lost records and faded memories, which only add to the difficulties associated with proof at trial: ***Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited,*** 2019 ABCA at para 12.

[30] By contrast, section 218 of the *EPEA* accords with the broader environmental objectives of the Act. It places primacy on the societal benefit of having a polluter to pay for cleanup, and recognizes the practical reality that environmental damage can sometimes go undetected for many years and place a substantial burden on innocent parties: ***Brookfield*** at para 13.

[31] Paramount correctly notes that the extension it requests is quite small in the context of the section 218 jurisprudence. The statement of claim was filed on February 6, 2019, approximately five years after the 10-year limitation period expired in 2014. Much longer extensions have been granted, see for example ***Wainwright Equipment Rentals Ltd. v Imperial Oil Limited***, 2003 ABQB 898.

[32] However, it is not the length of the requested extension but rather the facts of this case that distinguish Paramount's request from the jurisprudence on section 218 extensions.

[33] I have been offered no case law where a property owner has attempted, let alone succeeded, in using section 218 make claims against other alleged contributors. The section is aimed at ensuring that there is someone to pay for the cost of environmental damage that would otherwise be borne by society. Whether there is *anyone* to bear the cost is not at issue here, this dispute is about *who* will pay.

[34] This is also not a case of a long-undetected emission that became a problem for an innocent party many years later, as was the case in every decision on section 218 that was provided to me. According to Paramount, it conducted a flyover examination of the pipeline on April 3, 2018 and found nothing out of the ordinary, and then the leak was discovered on April 11. This would appear to indicate, to Paramount's credit, that the leak was detected after only a few days.

[35] If the leak truly was caused the Defendants' negligence, then dismissing the claim on the basis of the *Limitations Act* will result in unfairness. This is a necessary side effect of limitations legislation, counterbalanced by other policy considerations as discussed above. But section 218 does not exist as a remedy to the inherent unfairness that can result from claims being limitation-barred. Rather, the *EPEA* intervenes to balance this against the societal injustice that can result when polluters escape expensive environmental remediation bills which, by their very nature, often go undetected for long periods of time: ***Lakeview Village*** at para 7.

[36] In sum, it is not clear to me that granting an extension on these facts would accord whatsoever with the purposes of section 218. There was no long-undetected leak, and there is no question that a "person responsible" is available to pay. Absent these factors, and bearing in

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mind that section 218 applications are about balancing the competing objectives of the *EPEA* and the *Limitations Act*, I can find no path to granting an extension.

[37] On this basis, I decline to grant an extension under section 218 of the *EPEA*. In the result, Paramount's claim against the Defendants is time-barred, and I grant the Defendants' application for summary dismissal.

If the action is not time-barred, should Paramount's action be summarily dismissed for lack of merit?

[38] My decisions on the issues above are sufficient to dispose of this application. However, in the event that I am wrong, I will briefly address the merits issue.

[39] Summary dismissal on the merits is appropriate where there is no genuine issue requiring trial, as explained in ***Hryniak v Mauldin***, 2014 SCC 7 at para 49:

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

[40] The key considerations of this test were articulated in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47:

> [47] The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

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> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[41] The record before me leaves too much uncertainty to be resolved on a summary basis. There are credibility issues as to how much Paramount knew about the depth of the pipeline. The Defendants raise a potential intervening cause, namely the hydro pressure test conducted prior to the re-activation of the pipeline, which would require competing expert testimony to resolve.

[42] Some of the uncertainty is a result of the time that has passed. One of the Defendant's key witnesses has passed away. There appear to be documents missing which might have helped explain the issues, but they have been lost due to the passage of time. These problems further support my decision that the policy considerations of the *Limitations Act* indicate against an extension under the *EPEA*.

[43] If I am incorrect about the claim being limitation-barred, I would decline to grant summary dismissal on the merits.

Conclusion

[44] I grant the Defendants' application for summary dismissal. The Plaintiff's claim is dismissed. If the parties cannot agree on costs, they may write to me within 30 days of this decision.

Heard on the 14th and 15th days of October, 2021.
Dated at the City of Calgary, Alberta this 9th day of May, 2022.

S. L. Kachur
J.C.Q.B.A.

2022 ABQB 333 (CanLII)

Appearances:

Raj Datt
for the Plaintiff, Paramount Resources Ltd.

Geoffrey Duckworth
for the Defendants, Grey Owl Engineering Ltd. and Keith Osmond

David M. Pick
for the Defendant, 2088752 Alberta Ltd. carrying on business as Custom Fibreglass Contractors Ltd.

Don Dear, Q.C.
for the Defendants, WF Holdings Ltd. and Chad Sletten

David M. Stults
for the Defendant, P.G.T. Holdings Ltd. carrying on business as Chief Pipeline Contractors Limited

2022 ABQB 333 (CanLII)

Court of Queen's Bench of Alberta

Citation: Isfeld v. Petersen Pontiac Buick GMC (Alta.) Inc., 2012 ABQB 444

Date: 20120710
Docket: 0403 01390
Registry: Edmonton

2012 ABQB 444 (CanLII)

Between:

Lawrence Robert Isfeld and 257353 B.C. Ltd.

Plaintiffs

- and -

Petersen Pontiac Buick GMC (Alta.) Inc. and John J.K. Campbell

Defendants

Corrected judgment: A corrigendum was issued on June 10, 2013; the corrections have been made to the text and the corrigendum is appended to this judgment.

Supplemental Reasons
of the
Honourable Mr. Justice R.A. Jerke

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[1] Oral reasons for Judgment were given on May 17, 2012. The parties have requested clarification on four matters.

Several Liability

[2] In my Reasons I stated as follows:

> Mr. Campbell and Petersen Pontiac were not acting in concert or in furtherance of a common purpose. The causes of action against them are separate and distinct, and therefore their liability to the Plaintiffs is several. This is the case even though

> the nature and quantum of the damages claimed against each defendant are identical.
>
> Here, both Petersen Pontiac's breach of contract and Mr. Campbell's negligence and breach of contract led to the same result: the Easement amendments are not effective against the Purchaser of Lot 4A.
>
> I am of the view that where one defendant is found liable for professional malpractice in a case where separate causes of action lead to the same consequence, plaintiffs who are the defendant's former clients are not bound to exhaust all remedial efforts against the other contracting party before claiming from their professional advisor.
>
> Therefore, as in ***789538 Ontario Ltd v Gambin Associates***, I find that the nature of Mr. Campbell's liability is secondary, but this does not prohibit the Plaintiffs from collecting judgment against him first. Once Mr. Campbell makes the Plaintiffs whole, he is entitled to an assignment of the Plaintiffs' Judgment against Petersen Pontiac.

[3] Paragraph 5 of the draft Judgment Roll as proposed by Mr. Cranston, Q.C. is appropriate.

Commencement Date for Interest

[4] In my Reasons I stated as follows:

> Petersen Pontiac moved off Lot 4B in July 2003, and Park Mazda moved in. Mr. Isfeld testified that when Park Mazda took possession of Lot 4B in July 2003, it would not agree to purchase at that time due to the existence of the unamended Easement. ...
>
> The Plaintiffs are entitled to Pre-judgment Interest from August 1, 2003.

[5] The commencement date for interest is August 1, 2003.

The Rate of Interest

[6] In my Reasons I stated as follows:

> The Plaintiffs are entitled to Pre-judgment Interest from ...

[7] After delivery of my Reasons a question was raised concerning interest. I directed that interest would be as per the rate prescribed by the Regulation. While my intention was to make an award of interest under s. 4 of the *Judgment Interest Act*, further analysis is required to

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determine whether the award is non-pecuniary (so s. 4(1) applies) or pecuniary (so s. 4(2) applies). While no definition is found in the *Judgment Interest Act*,

> Pecuniary loss refers to loss of financial benefit such as loss of future income or loss of support. Non-pecuniary loss refers to those losses traditionally viewed as intangible ones. ...
>
> ***Ferraiuolo Estate v Olson***, (2004), 357 AR 68 (Alta CA), para 18

[8] Applying this definition, the diminution in value due to the easement ($108,333.00) and the loss due to Operational Impact ($50,000.00) are pecuniary, where s. 4(2) applies to them. The intangible losses ($50,000.00) are non-pecuniary where s. 4(1) applies to them.

Costs

[9] After delivery of my Reasons there was discussion about costs. I directed that the usual rules would apply and costs were awarded under the appropriate column in accordance with the award. Accordingly, the Plaintiffs are not entitled to costs for first or second counsel for the 9.5 estimated trial days not used for trial.

Heard on the 17th day of May, 2012.
Dated at the City of Lethbridge, Alberta this 6th day of July, 2012

R.A. Jerke
J.C.Q.B.A.

2012 ABQB 444 (CanLII)

Appearances:

Fraser Milner Casgrain LLP
Richard J. Cotter, Q.C.
For the Plaintiffs

Nicholl & Akers
George H. Akers
for the Defendant Petersen Pontiac Buick GMC (Alta.) Inc.

Bennett Jones LLP
Donald Cranston, Q.C.
for the Defendant John J.K. Campbell

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Corrigendum of the Supplemental Reasons
of
The Honourable Mr. Justice R.A. Jerke

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1. On page 1, in the style of cause and throughout the Judgment changed the spelling of the Defendant “Peterson” to “Petersen”.

2012 ABQB 444 (CanLII)

Court of Queen's Bench of Alberta

Citation: RBC Life Insurance Company v Heritage Insurance & Consulting Ltd, 2014 ABQB 595

2014 ABQB 595 (CanLII)

Date: 20140929
Docket: 1103 19632
Registry: Edmonton

Between:

RBC Life Insurance Company

Appellant (Plaintiff)

- and -

Heritage Insurance & Consulting Ltd. v Dennis M. Erker

Respondents (Defendants)

Reasons for Judgment
of the
Honourable Mr. Justice K.G. Nielsen

I. Introduction

[1] RBC Life Insurance Company (RBC Life) claims indemnity of, or in the alternative, contribution to the amount of $866,000 plus interest against Heritage Insurance and Consulting Ltd. (Heritage) and Dennis M. Erker (Erker) (collectively the Defendants).

[2] A Master concluded that the action is barred by s. 3(1)(b) of the *Limitations Act*, RSA 2000, c L-12 and granted summary judgment dismissing RBC Life's claim (2014 ABQB 130).

[3] RBC Life appeals that decision.

II. Background

[4] Two affidavits are in evidence before the Court: the Affidavit of Erker, dated December 6, 2012, and the Affidavit of Kim Prestidge, Director, Client Services of RBC Life, dated May 30, 2013. The questioning of each affiant is also before the Court.

[5] Erker is an insurance agent employed by an insurance broker, Heritage. Erker is licenced to sell life and disability insurance products in the Province of Alberta. In 1991 and 1995, Heritage and Erker entered into separate Agent Agreements with The Prudential of America Life Insurance Company (Canada) (Prudential). Under those agreements, the Defendants were appointed as agents of Prudential for the purposes of soliciting applications for Prudential products, and servicing the resulting contracts and insurance policies.

[6] Erker, through Heritage, provided services as an insurance agent to Mr. and Mrs. S (the Clients). Erker assisted the Clients in obtaining a Prudential life insurance policy, effective November 16, 1999 (the Policy). Both Clients were insured pursuant to the Policy which provided for a basic life benefit of $6,000,000 at an annual premium of $127,952.41, payable over 10 years.

[7] The premium payable for the Policy is based on what is referred to as the Mortality Charge Method (MCM). The Policy provided that the MCM options included: Level For Life also referred to as Level Cost of Insurance (LCOI), and Yearly Renewable Term (YRT). The MCM chosen affects the amount of premium payable and the length of the term over which the premiums are to be paid. The premiums are determined in part by the rate of return on the premiums paid which is expected to be earned as at the inception of the Policy. The rate of return actually achieved over the course of the Policy could result in the insurer demanding that the insureds make additional premium contributions during the currency of the Policy to maintain it in good standing.

[8] When the Policy was initially issued, the Clients chose YRT as the MCM. This resulted in a premium of $127,952.41 payable over 10 years.

[9] In examination on his affidavit, Erker stated that shortly after receipt of the Policy, the Clients elected to change the MCM to LCOI with payments of $47,125 over life.

[10] On December 29, 1999, Prudential received an Application for Policy Change (the Application). The Application was prepared by Heritage and requested a change "from annual premium $127,952.41 over 10 years to annual premium $47,125 over life". The attached illustration described the "Cost of Insurance" as being LCOI.

[11] A representative of Prudential reviewed the Application and noted: "Agent's illustration sent not valid as showing Policy LCOI (it is YRT)". This conclusion was not communicated to Heritage or Erker.

[12] On January 1, 2000, RBC Life assumed Prudential's contractual duties, obligations and liabilities with respect to the Policy.

[13] Ms. Prestidge acknowledged in questioning on her affidavit that Prudential or RBC Life made an administrative error in failing to carry out the instruction that the annual premium of $47,126 would continue "over life" as requested in the Application, but that such a change would not have necessitated a change to the MCM. She stated that the Defendants should have recorded

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on the Application that they wanted to reissue the Policy, and requested a change in the MCM to LCOI "so that everybody was clear".

[14] On January 20, 2000, RBC Life issued a Policy Change Summary, which changed the premium for the Policy from $127,952.41 for 10 years to $47,125 for 10 years.

[15] Ms. Prestidge acknowledged during questioning that RBC Life did not send the Policy Change Summary to the Defendants.

[16] She further stated that PPI Financial Group (PPI) was a Managing General Agent which performed services for agents including the Defendants. Those services included obtaining policy information from RBC Life. She could not confirm that the Policy Change Summary was sent to PPI.

[17] On February 1, 2000, RBC Life issued a Confirmation Notice which stated that "the new scheduled premium shall be $47,125 payable annually for Policy Years 1 through 10", effective as of the initial date of the Policy.

[18] On February 12, 2003, March 25, 2003 and June 16, 2003, RBC Life received Client Services Request forms with respect to the Policy from PPI. Following receipt of these Client Service Requests from PPI, RBC Life did not receive any requests from the Defendants or the Clients to make any changes to the Policy.

[19] In questioning on his Affidavit, Erker stated that PPI provided local service to Heritage for insurers including RBC Life, and from time to time PPI would look at Heritage's "block of business" for opportunities to increase revenue for both PPI and Heritage. Erker further testified that neither he, nor to his knowledge anyone else from Heritage, requested any of the changes referred to in the Client Services Requests in early 2003.

[20] On December 18, 2009, Heritage advised RBC Life that the Clients had not received a premium notice from RBC Life for the current year. It was determined at that time that, upon receipt of the Application, RBC Life had changed the premium from $127,952.41 to the amount of $47,125 but the period for payment of the premium had not been changed from 10 years to life.

[21] On January 6, 2010, RBC Life advised the Clients that effective November 16, 2009 the premium of $47,125 for the Policy would be payable for policy years 11 through 48 which would take the Policy to the 100th birthday of the youngest of the two Clients. The effect of this change was to extend the term for payment of the premium but not to change the MCM.

[22] On March 22, 2010, the Policy was assigned from the Clients to a numbered company.

[23] On August 27, 2010, RBC Life wrote to the Defendants, putting them on notice of a potential claim in respect of the Policy.

[24] On October 14, 2011, RBC Life wrote to the Clients advising that RBC Life was prepared to retroactively change the MCM from YRT to LCOI.

[25] On November 10, 2011 the Clients sent RBC Life a letter and Investment Allocation Form requesting amendment of the Policy to change the MCM from YRT to LCOI effective December 22, 1999. This request was accepted by RBC Life. The effect of this change was to retroactively issue the Policy effective December 22, 1999 on an LCOI basis and to charge premiums therefor at the rates applicable as at December 22, 1999.

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[26] On December 14, 2011, RBC filed the Statement of Claim naming Heritage and Erker as defendants. RBC Life claims the sum of $866,000, being the losses it alleges it has suffered as a result of converting the MCM from YRT to LCOI in the fall of 2011.

[27] Since 2000, RBC Life has received annual premium payments from the Clients in the sum of $47,125.

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III. Statement of Claim

[28] RBC Life advances two types of claim in the Statement of Claim filed on December 14, 2011: a contribution claim relating to breach of duties owed by the Defendants to the Clients, and a direct claim relating to breach of duties owed by the Defendants to RBC Life and its predecessor.

[29] RBC Life claims that the Defendants:

- owed a duty of care to the Clients to apply for the policy changes they desired and to properly inform the Clients of the ongoing status of their Policy (para 19);

- owed RBC Life a duty of care to convey, clearly and unambiguously, any policy change request, and furthermore to properly notify RBC Life on a timely basis that the life insurance currently in force did not reflect what the client intended (para 20);

- negligently failed to inform RBC Life (and Prudential), that the Clients intended to change the MCM under the policy from YRT to LCOI in December 1999 (para 21);

- negligently failed to take any subsequent steps to submit a proper policy change request to RBC Life, when they knew or ought to have known from and after December 1999, that the MCM under the Policy continued to be YRT with an annual premium payable of $47,125 (para 21).

IV. Positions of the Parties

[30] RBC Life argues that the agent has an ongoing duty to the insured and the insurer during the currency of the Policy. The claim is based on a number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, and the claim arose when the conduct terminated or the last act or omission occurred. Therefore, it falls within the exception in s. 3(3)(a) of the *Limitations Act*. The Defendants committed an act or omission as recently as 2003 in failing to advise RBC Life that the Clients wanted the MCM to be changed from YRT to LCOI.

[31] Further, RBC Life argues that it did not incur any liability until it reached a settlement with the Clients on November 10, 2011. As the claim for contribution arose when it incurred that liability, it falls within the exception in s. 3(3)(e) of the *Limitations Act*. RBC Life submits that it is doubtful that the Clients would have been out of time to commence legal proceedings against the agent for damages, had RBC Life not corrected the error.

[32] RBC Life also argues that it is unsettled whether its claim against Heritage and Erker would be barred, as RBC Life and the Defendants each had separate contracts with the Clients.

[33] The Defendants argue that the direct claim in relation to the Defendants' submission of the Application on December 29, 1999 is barred by the ultimate 10 year limitation period in s. 3(1)(b) of the *Limitations Act* (the ultimate limitation period). Section 3(3)(b) provides that for the purposes of s. 3(1)(b), a claim based on breach of a duty arises when the conduct, act or omission occurs. The fact that RBC Life was not aware of the potential for the direct claim until December 2009 does not enable RBC Life to avoid the ultimate limitation period.

[34] The Defendants further argue that RBC Life's claim for "contribution" is actually a direct claim based on RBC Life's own lost opportunity, as the "damages" claimed appear to be the difference between what it could have charged the Clients if they had made the change to LCOI in 2011, and the amount charged based on a change to LCOI as at December 1999.

[35] The Defendants also argue that the ability to make a claim in contribution from an alleged joint tort-feasor for duties owed to another is available only under the *Tort-feasors Act*, RSA 2000, c T-5, and only for contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage. The contribution claim relates to the alleged duty of care owed by the Defendants to the Clients to submit the Application correctly. Again, the ultimate limitation period applies. At the time the Statement of Claim was filed, any claim filed by the Clients against the Defendants would have been statute-barred. RBC Life may have been within time to file a contribution claim. However, the real issue is whether the Defendants could have been liable to the Clients in relation to any breach of a duty to them at the time the Statement of Claim was filed. If a procedural bar protects the Defendants from judgment in favour of the Clients, they have no liability to the Clients and no statutory liability to contribute to the second tortfeasor.

[36] The Defendants submit that there are no allegations in the Statement of Claim of a breach by the Defendants of a contract between them and the Clients. Therefore, no common law claim in contribution has been advanced based on such separate contracts. The basis of RBC Life's claim is that the Application did not reflect the desired change, which can only be a negligence claim. If the Client's claim against RBC Life is in negligence, and the claim against the Defendants is for breach of contract, there can be no contribution. Breaches of separate contracts by RBC Life and by the Defendants would be mutually exclusive.

[37] Finally, the Defendants argue that the alleged damages resulted from the Application submitted on December 29, 1999, not from a series of acts occurring over time. The uncontroverted evidence is clear that neither of the Defendants had knowledge that the MCM had not been changed. RBC Life alleges a continuing duty on the part of the Defendants to discover a breach by RBC Life, which would import a discoverability requirement into the limitation period for every claim. That is what the ultimate limitation period was enacted to avoid. This is not a case of concealment under s. 4 of the *Limitations Act*.

V. Issues

[38] The Court must decide whether the Master erred in concluding that the action is barred by s. 3(1)(b) of the *Limitations Act*. Specifically, the Court must determine whether:

1. the claim is based on a continuing course of conduct or a series of related acts or omissions;

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2. the claim for contribution arose when RBC Life incurred a liability through settlement;

3. the principle that would bar a claim for contribution under the *Tort-feasors* Act would bar a claim for contribution at common law, where RBC Life and the Defendants had separate contracts with the Clients.

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VI. Standard of Review

[39] The standard of review on an appeal from a Master to a Judge is correctness on all issues: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166, 5 24 AR 382.

VII. Legislation

A. *Alberta Rules of Court*, Alta Reg 124/2010

[40] Rule 7.3(1) of the *Alberta Rules of Court* provides in part:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> ... (b) there is no merit to a claim or part of it...

B. *Limitations Act*

[41] The following sections of the *Limitations Act* are relevant to this appeal:

> **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.
>
> ...
>
> **(3)** For the purposes of subsection (1)(b),

(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

(b) a claim based on a breach of a duty arises when the conduct, act or omission occurs;

...

(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 to impose a liability on which the claim for contribution can be based, whichever first occurs;

...

(5) Under this section,

...

(b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b).

C. *Tort-feasors Act*

[42] Section 3(1)(c) of the *Tort-feasors Act* is relevant to this appeal:

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 the person first mentioned in respect of the liability regarding which the contribution is sought.

VIII. Test for Summary Judgment

[43] The Supreme Court of Canada recently considered the matter of summary judgement in the context of the *Ontario Rules of Court* in ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87. The Court held that summary judgment rules must be interpreted broadly, favoring proportionality and fair access to the affordable, timely and just adjudication of claims. Summary judgment is appropriate where there is no genuine issue to be tried. The Court outlined when no genuine issue exists:

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

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> (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[44] Our Court of Appeal in ***Windsor v Canada Pacific Railway Ltd***, 2014 ABCA 108 confirmed that the principles enunciated in ***Hryniak*** are applicable to summary judgment applications pursuant to Rule 7.3:

> **14** While ***Hryniak v Mauldin*** applied Ontario R. 20, the principles stated in it are consistent with modern Alberta summary judgment practice as set out in Alberta R. 7.3:
>
> > 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
> >
> > (a) there is no defence to a claim or part of it;
> >
> > (b) there is no merit to a claim or part of it;
> >
> > (c) the only real issue is the amount to be awarded.
>
> ... New R. 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of "a genuine issue for trial" found in the previous rules. ...
>
> **15** The theory that disputes eventually "went to trial" was always something of a legal fiction. Even when the court implied that a trial was called for, and declined to grant summary judgment, or declined to strike pleadings, it was well known that trials were a rarity. ***Hryniak v. Mauldin*** refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure. It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication. ***Hryniak v. Mauldin*** rejected the ruling by the Ontario Court of Appeal to the effect that the old test for summary judgment should continue to apply even in the face of the newly amended Ontario rule.

[45] Therefore, if a judge on a summary judgment application can make the necessary findings of fact, is able to apply the law to the facts and the process is proportionate, more expeditious and less expensive than a trial, summary judgment is appropriate. If a fair and just adjudication can be made in determining whether a claim has merit, it is appropriate for a court to consider summary judgment.

IX. Analysis

A. *Limitations Act* – s. 3(1)(a)

[46] RBC Life alleges that it first learned of the problem with respect to the Policy upon receipt of an email from Heritage on December 18, 2009. The Statement of Claim was filed December 14, 2011, within the two year limitation period set out in s. 3(1)(a) of the *Limitations Act*. The Defendants agree that the action was commenced within the limitation period applicable pursuant to s. 3(1)(a). However, they argue that the ultimate limitation period bars the action.

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B. *Limitations Act* – s. 3(3)(a)

[47] RBC Life argues that the ultimate limitation period does not bar its action against the Defendants, as the Defendants had an ongoing relationship with both the Clients and Prudential/RBC Life from 1999 to 2011, and they had the opportunity and the responsibility to notify RBC Life that the MCM for the policy had not been changed from YRT to LCOI. RBC Life claims that the Defendants breached their duties to RBC Life on a continuous basis by failing to advise of the problem with the Policy prior to December 2009.

[48] In my view, s. 3(3)(a) of the *Limitations Act* does not apply merely by virtue of the fact of a continuing relationship between a professional and a client. If it did, in cases where a specific act of the professional which was in breach of any duties owed to the client could be identified, the ultimate limitation period would never arise. Section 3(3)(a) was intended to cover situations where damage does not result from a single act, but rather from the effect of many related acts occurring over time. In such cases, difficulty is created in determining when the action arose and when the damage became apparent: ***Meek (Trustee of) v San Juan Resources Inc***, 2005 ABCA 448 at para 46, 376 AR 202.

[49] The other difficulty in this regard is that the undisputed evidence indicates that RBC Life was in possession of the Application, which indicated on its face that the request was a change to an "annual premium over life", along with an illustration indicating "Level Cost of Insurance". It was RBC Life who decided that the Application, which did not specifically address MCM, was inconsistent with the "illustration", which indicated LCOI. It was also RBC Life who decided, unilaterally, that the inconsistency must be resolved so as to maintain the Policy as YRT. Finally, it was RBC Life who failed to carry out the instruction that the annual premium of $47,125 would continue "over life" as requested in the Application.

[50] Ms. Prestidge stated that the Defendants should have recorded on the Application that they wanted to reissue the contract and request a change in the MCM to LCOI "so that everybody was clear". However, this does not detract from the fact that RBC Life was aware in 1999 of what it perceived as an inconsistency in the Application and accompanying illustration. RBC Life clearly had knowledge that the policy change was not in accordance with the Application as a whole, as reflected in the note: "Agent's illustration sent not valid as showing Policy LCOI (it is YRT)". Ms. Prestidge acknowledged that RBC Life did not send its own Policy Change Summary to the Defendants, and she could not confirm that it was sent to PPI.

[51] Ms. Prestidge confirmed on questioning that Prudential did not advise the Defendants that it considered the agent's illustration to be invalid. There is simply no evidence that this conclusion was communicated to the Defendants. The Confirmation Notice dated February 1, 2000 acknowledged the request and indicated a new premium of $47,125 payable annually for policy years 1 through 10. It makes no mention of the MCM. During questioning, Erker stated he assumed that his office would have received confirmation that the requested change was made to the Policy, but could not swear to that, and there was nothing in his file reflecting receipt of the document.

[52] The e-mail from Heritage dated December 18, 2009 advised RBC Life of a problem with the Policy, in that the Clients had not received an annual premium notice. In questioning, Erker stated that the e-mail did not mention anything at that time about changing the MCM because his office assumed that the Policy had been changed pursuant to the Application in 1999.

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[53] RBC Life purports to place a continuous burden on the Defendants to determine and advise RBC Life of a problem with the policy, where RBC Life had construed the Application as containing a material inconsistency, had unilaterally chosen to ignore the illustration based on LCOI, and further had failed to change the premiums to $47,125 "over life", none of which it communicated to the Defendants.

[54] Assuming that Heritage and Erker did commit an error, it occurred in December 1999 when the Application was submitted to Prudential. Any damages would have resulted from that single act, and not from any ongoing duty.

[55] During questioning, Ms. Prestidge, testified as follows (at pp 45 and 46):

> Q [...] And what, if anything, do you say was the error that was made by the defendants [Heritage and Erker] in this case?
>
> A You want my opinion as to what would have made this go right?
>
> Q What would have made it go away?
>
> A Go right?
>
> Q Go right.
>
> A It would have been recording on the Policy Change Form that they wanted to reissue the contract and request a mortality charge change to LCOI so everybody was clear what was actually discussed with the client. And had the client – sorry. And had the client sign that.
>
> Q And if that error was made, that was made at the time of the application for the policy change in December 1999, correct?
>
> A Yes.

While obviously not determinative of the date that the error occurred, her testimony, in my view, undermines RBC Life's own positon in this regard.

[56] The sole fact that the Defendants had ongoing relationships with both the Clients and RBC Life between December 1999 and December 2009 does not extend the commencement date of the limitation period pursuant to s. 3(1)(b) of the *Limitations Act* to December 2009 when Heritage advised RBC Life of the problem with respect to the Policy. Discoverability principles do not apply to the ultimate limitation period: ***Meek (Trustee of) v San Juan Resources Inc***, 2005 ABCA 448, 376 AR 202. There is no suggestion here of fraudulent concealment.

[57] RBC Life also argues that even if there were not multiple breaches of a continuous duty or course of conduct by the Defendants, the commencement date for the running of the ultimate limitation period must be June 2003 when the last Client Services Request with respect to the Policy was submitted to it.

[58] RBC Life relies on a Client Services Request from Tim Clooney, Life Insurance Consultant with PPI dated June 16, 2003, stating:

> Can I please get 2 quotes on the above policy.
> Assuming switching to level cost of insurance beginning of year 6 in both instances.

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> 1. Assume credited rate 5%, calculate to pay up as quickly as possible without raising the face amount.
> 2. Assume credited rate 2.5%, calculate minimum premium for life.
> Let me know if you have questions.
> Can we get this as soon as possible as the agent has meeting with the client next Tuesday.

[59] It is clear that PPI had a relationship with both RBC Life and Heritage. Based on the evidence before the Court, it appears that communications between Heritage and RBC Life flowed through PPI. Ms. Prestidge described PPI as the Managing General Agent although she did not elaborate on PPI's duties and responsibilities.

[60] Erker on questioning indicated that from time to time, PPI would review the Heritage "block of business" for opportunities to increase revenue for both PPI and Heritage. Sometimes PPI would share information received with Heritage and sometimes it would not. Further, Erker did not initiate any of the Client Services Requests submitted by PPI to RBC Life in early 2003, and to his knowledge no one else on behalf of Heritage initiated such requests. Erker was the agent involved in the Policy and would, therefore, have known about the initiation of such requests by Heritage.

[61] During questioning, Mr. Erker testified as follows (at pp 18 and 19):

> Q Okay. At that time [June 2003], were you aware that the policy still had a mortality charge method of YRT?
>
> A Absolutely not.
>
> Q Okay. And you had – and you don't recall any discussion about changing the policy mortality charge method to LCOI in 2003?
>
> A Absolutely not.

[62] RBC Life submits that the Client Services Request dated June 16, 2003, is evidence that the request was initiated by Heritage. The Client Services Request dated June 16, 2003 does suggest that Tim Clooney had knowledge of an upcoming appointment between the agent and the Clients. However, this Request identifies Tim Clooney of PPI Edmonton as the requestor. There is no mention of Erker on the Request. The Inforce Illustration Requests attached to the Client Services Requests dated February 12, 2003 and March 25, 2003 do indicate Erker as the agent. There is no mention at all of Erker in the Client Services Request or attached Inforce Illustration dated June 16, 2003.

[63] It is true that s. 3(5)(b) of the *Limitations Act* places the burden on the Defendants to prove that the action of RBC Life was not commenced within the applicable limitation period provided for by s. 3(1)(b).

[64] Ms. Prestidge presumed in questioning that the information generated by RBC Life in response to the Client Services Requests dated February 12, 2003, March 25, 2003 and June 16, 2003, would have been shared by PPI with Heritage. However, she could point to no evidence to this effect. There is simply no evidence before the Court to support a finding that there is any issue of merit in this regard that genuinely requires a trial. Speculation that such evidence may be forthcoming at trial is not sufficient: ***Windsor*** at para 21.

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[65] Therefore, based on the evidence on this Application, I am left to conclude that PPI undertook a review of the Policy in early 2003. The review suggests that it understood that the MCM on the Policy continued to be based on YRT as opposed to LCOI. Further, it appears to have been aware of an upcoming appointment between the agent and the Clients. However, there is nothing to suggest that Heritage or Erker had knowledge as of June 2003 that the MCM on the Policy continued to be based on YRT.

[66] There is no evidence to support the position that PPI's involvement in 2003 somehow extended the commencement date for the ultimate limitation period for the purposes of RBC Life's claim against Heritage and Erker.

C. *Limitations Act* – s. 3(3)(e), *Tort-feasors Act* – s. 3(1)(c)

[67] RBC Life further argues that it has a claim for contribution in relation to damages suffered by the Clients and, therefore, s. 3(3)(e) of the *Limitations Act* applies. RBC Life alleges that this claim for contribution arose when it reached a settlement with the Clients to retroactively change the MCM to LCOI from YRT effective December 22, 1999. RBC Life argues that the limitation period for the claim for contribution commenced when this retroactive change was effected in the fall of 2011.

[68] It is true that on August 27, 2010, RBC Life wrote to the Defendants, putting them on notice of a potential claim in respect of the Policy. However, there is nothing before the Court to indicate in any way that there was a settlement between RBC Life and the Clients. J. Yogis' *Barron's Canadian Law Dictionary* (Hauppauge, NY: Barron's Educational Series, 2009) (QL) defines "settlement" as:

> Generally, the conclusive fixing or resolving of a matter; the arrangement of a final disposition of it. A compromise achieved by the adverse parties in a civil suit before final judgment whereby they agree between themselves upon their respective rights and obligations, thus eliminating the necessity of judicial resolution of the controversy. Compare plea bargaining in the criminal context ...

[69] There is no evidence that RBC Life paid the Clients any damages, that there was a final disposition of any claims the Clients may have had against RBC Life or that the Clients released RBC Life in respect of any such claims.

[70] Further, in her letter of October 14, 2011 to the Clients, Ms. Prestidge acknowledged that the Clients on December 22, 1999 had requested a change in the MCM from YRT to LCOI. On the face of it, RBC Life was simply rectifying an error in the processing of the Application, not responding to a claim. RBC Life did reduce the Clients' current cash value on the Policy of $290,789.50 as at October 13, 2011 to $0 as reflecting the difference in rates between December 22, 1999 and October 13, 2011. However, that cash value was a windfall to the Clients resulting from the mistake, and the Clients essentially acknowledged that they were ultimately getting what they had bargained for in 1999.

[71] Given the foregoing, in my view, the steps taken by RBC Life in October 2011 do not constitute a settlement as that term is used in s 3(3)(e) of the *Limitations Act*.

[72] However, even if there was a settlement, the Defendants would be entitled to immunity from liability in tort pursuant to s. 3(1)(c) of the *Tort-feasors Act*. It provides that damages may

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be recovered from a contributing tort-feasor only if that tort-feasor would have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise, if sued.

[73] As previously indicated, any error on the part of Heritage and Erker occurred on or before December 29, 1999. This is not a situation in which the claim is based on a continuing course of conduct by the Defendants. If the Clients had sued the Defendants after December 29, 2009, the Defendants would have had an absolute defence to such claim.

[74] In ***Dean v Kociniak***, 2001 ABQB 412, 289 AR 201, Slatter J. (as he then was) held that the law changed under the *Limitations Act*. He opined that the defendant who is the claimant is the one who suffers the "injury" under s. 3(1)(a) of the *Limitations Act*, by having to pay more than its share to the plaintiff if another party fails to contribute for the loss it caused to the plaintiff. He concluded that the 2 year limitation period runs from when the defendant tort-feasor knew or ought to have known of the contribution claim against the other tort-feasor. Slatter J.'s decision has been followed in other Queen's Bench cases: see, for example, ***Whitecourt Power Limited Partnership v Interpro Technical Services Ltd***, 2014 ABQB 135, 95 Alta LR (5th) 415, ***Campbell v Calgary (Police Service)***, 2009 ABQB 58, 467 AR 244; ***Pagcnucco v Sears Canada Inc***, 2011 ABQB 810, 528 AR 209.

[75] However, the Court of Appeal in ***Howalta Electrical Services Inc v CDI Career Development Institutes Ltd***, 2011 ABCA 234, 515 AR 163 observed that it is a condition precedent under the *Tort-feasors Act* that the contribution is from a tort-feasor who "is or would, if sued, have been liable in respect of the same damage". The Court confirmed previous case law to the effect that a tort-feasor's claim for contribution is barred if the plaintiff's claim against the other tort-feasor is barred by a limitation:

> **27** The first tortfeasor has no "liability" to the plaintiff, and so no statutory liability to contribute to a second tortfeasor, no matter how great its own fault, if procedural bars protect the first tortfeasor from a judgment in favor of the plaintiff. What bars? For example, an expired limitation period, whether statutory or contractual: ***Giffels Assoc (Dom Chain Co) v E Constr Co*** [1978] 2 SCR 1346, 19 NR 298; ***CDIC v Prisco*** (1996) 181 AR 161 (CA) (paras 20-35); *dicta* in ***Parkland v Stetar***, *infra* (para 17) ; *dicta* in ***JR Paine & Assoc v Strong Lamb & Co*** (1979) 18 AR 112, 116 (CA) (para 10). Another example is statutory protection because of the plaintiff's failure to give timely notice: ***Parkland (Cty) v Stetar*** [1975] 2 SCR 884, [1975] 1 WWR 441, 449-51, 3 NR 311 (paras 16-18). All those bars are purely procedural, and in no way negative fault. But they do prevent granting a judgment. These authorities all bind all courts in Alberta. See also ***HSBC Securs v Davies Ward & Beck*** (2005) 194 OAC 1, 249 DLR (4th) 571, *lv den* [2005] S.C.C.A. No. 145, (SCC 2005) 345 NR 394. All these cases are about co-tortfeasors' claims.

[76] See also ***Arcelormittal Tubular Products Roman SA v Fluor Canada Ltd***, 2013 ABCA 279, 556 AR 188, leave denied [2013] SCCA No 403.

[77] The Defendants had immunity from any claim by the Clients against them as at the date of the Statement of Claim. Therefore, RBC Life has no claim for contribution against Heritage or Erker. Section 3(3)(e) of the *Limitations Act* does not apply, and the limitation period pursuant to s. 3(1)(b) of the *Limitations Act* did not start to run on the date that matters were resolved between RBC Life and the Clients, even assuming that resolution constituted a "settlement".

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[78] As for RBC Life's arguments based on breach of contract, the Court of Appeal in ***Arcelormittal*** confirmed that the *Tort-feasors Act* does not allow contribution between a person liable to a plaintiff for breach of contract and a tort-feasor.

[79] RBC Life cites ***Petersen Pontiac Buick GMC (Alta) Ltd v Campbell***, 2013 ABCA 251, 556 AR 118, in which the Court saw no impediment in contract law to dividing liability between two parties who have breached two different contracts, causing the same damages to a plaintiff.

[80] The Defendants note that the claim in ***Petersen*** was not a contribution claim between defendants, but apportionment of liability between two defendants who were found to be liable in contract to the plaintiff for the same damages. However, the Court of Appeal in ***Arcelormittal*** at para 37 indicated that its decision in ***Petersen*** confirmed that there may be a claim for contribution at common law as between parties where each had its own separate contract with the plaintiff. The Defendants argue that the comment was made in the context of an application to strike pleadings.

[81] The Statement of Claim appears to be framed entirely in negligence. It refers to the Agent Agreements between Erker and Heritage and RBC Life/Prudential, and the Policy between Prudential and the Clients. Specifically, no common law claim in contribution appears to have been advanced based on separate contracts between the Clients and RBC Life on one hand, and the Clients and the Defendants, or either of them, on the other.

[82] Even if the Court were to infer the content of a contract between the Clients and the Defendants, I am not satisfied that it could be said on this basis that the insurer and the agent both contributed to the same damage suffered by the Clients.

[83] There are no particulars of the alleged contractual breaches. However, the Policy which was rectified by RBC Life had an MCM of YRT, not LCOI. If that were the contract, RBC Life would not have been in breach in relation to the MCM, as it was acting in compliance with the Policy. Rectification would not have been necessary because RBC Life had acted in accordance with the instructions which it had received.

[84] Alternatively, if the instructions had been to issue the Policy on the basis of an MCM of LCOI, RBC Life's rectification would have been to reflect those instructions and the true intention of the Clients. Heritage and Erker would not be liable to the Clients in breach of contract.

[85] In the result, RBC Life and the Defendants would be alternatively liable to the Clients and not jointly and severally liable. The same reasoning would apply if the potential claims by the Clients were for negligent breach of separate contracts.

[86] In ***Petersen***, the Court of Appeal also notes that contribution may be available on equitable principles. At para 54 the Court states that a claimant for contribution must show:

1. the claimant and the defendant were both liable to the third party,
2. who was forbidden to accumulate full recoveries from both of them, but
3. who could choose to recover in full from either of them, and that
4. some or all of the burden of paying him should ultimately be borne by the defendant.

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[87] Unlike the situation in ***Petersen***, all of the conditions are not met in the case now before the Court. In this case, the Claimant (RBC Life) and the Defendants (Erker and Heritage) are not both liable to the third party (the Clients). Erker and Heritage have immunity from any claim by the Clients pursuant to s. 3(1)(b) of the *Limitations Act*. Therefore, contribution pursuant to equitable principles is not available to RBC Life.

D. *Limitations Act* – s. 3(1)(b)

[88] As previously indicated, if Heritage or Erker breached any duty owed to either the Clients or RBC Life, it occurred when the Defendants completed and submitted the Application to Prudential on December 29, 1999. This date is the commencement date of the limitation period pursuant to s. 3(1)(b) of the *Limitations Act*.

[89] There is nothing before the Court to support the position that ss. 3(3)(a) or (e) of the *Limitations Act* applies in this case so as to extend the commencement date of that limitation period to some date beyond December 29, 1999. Therefore, it was imperative that any action by RBC Life against Heritage and Erker be commenced on or before December 29, 2009.

[90] The Statement of Claim was filed on December 14, 2011 which is outside the ultimate limitation period. Therefore, Heritage and Erker are entitled to immunity from liability in respect of this claim.

E. Damages

[91] Finally, I would note that RBC Life's alleged damages apparently resulted from conversion of the Policy in order to provide a basis for the Clients to continue to pay to RBC Life $47,125 annually, beyond the 10 year period, for life.

[92] Ms. Prestidge explained that if the Clients had converted to LCOI in 2010, they would have paid higher premiums than they would have paid in 1999 because they were older in 2010. Ms. Prestidge was unable to explain how the damages were calculated, but she did indicate in questioning that the reserves had to be changed to LCOI.

[93] However, RBC Life reduced the current cash value of $290,789.50 as at October 13, 2011 to $0 as reflecting the difference in rates between December 22, 1999 and October 13, 2011.

[94] RBC Life characterizes the damages in the Statement of Claim as a loss resulting from the conversion, not the settling of a loss to the Clients. It is not clear, on the basis of the material before the Court, how the Clients' continued payment of $47,125, and RBC Life's reduction of the cash value for which the Clients had not bargained, could equate to RBC Life having "settled" the matter in the amount of $866,000.

[95] In effect, the remedy to the Clients on a suit against RBC Life would have been rectification, which is what RBC Life provided to the Clients. It was the rectification which allegedly created a loss to RBC Life. Therefore, the damages claimed reflect the possibility of a direct claim by RBC Life against the Defendants, not a contribution claim for an amount paid to the Clients in settlement of a claim.

F. Application of the Summary Judgment Test

[96] This is an appropriate case for summary judgment. A fair and just determination of the merits of the claim is possible on the motion for summary judgment. I am able to make the

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necessary findings of fact, apply the law to the facts and the findings are proportionate, expeditious and less expensive than having this matter proceed to trial. Applying a holistic analysis to the claim before me, I am satisfied that there is no merit to the claim advanced by RBC Life against Heritage and Erker. The claim is barred by limitations. Summary judgment is therefore granted, and the claim of RBC Life is dismissed.

X. Conclusion

[97] The Master was correct in the decision under appeal. The appeal is dismissed.

XI. Costs

[98] The parties may speak to me within 30 days of the date of these Reasons for Judgment if they are otherwise unable to agree on costs in this matter.

Heard on the 30th day of July, 2014.
Dated at the City of Edmonton, Alberta this 29th day of September, 2014.

K.G. Nielsen
J.C.Q.B.A.

Appearances:

James T. Neilson, QC
Parlee McLaws LLP
for the Appellant (Plaintiff)

W.J. Kenny, Q.C. and Alisha L. Hurley
Miller Thomson LLP
for the Respondents (Defendants)

2014 ABQB 595 (CanLII)

In the Court of Appeal of Alberta

Citation: Swift v Tomecek Roney Little & Associates Ltd., 2014 ABCA 49

Date: 20140204
Docket: 1301-0042-AC
1301-0056-AC
Registry: Calgary

Docket: 1301-0042-AC

Between:

Philip Swift and Cindy McInnis-Swift

Cross-Respondents on Cross-Appeal
Appellants on Appeal
(Plaintiffs)

- and -

Tomecek Roney Little & Associates Ltd. and Brian Tomecek

Cross-Appellants on Cross-Appeal
Respondents on Appeal
(Defendants)

- and -

Eleven Eleven Architecture Inc., McKinley Dang
Burkart Design Group Inc.

Cross-Respondents on Cross-Appeal
Appellants on Appeal
(Defendants)

Docket: 1301-0056-AC

Between:

Philip Swift and Cindy McInnis-Swift

2014 ABCA 49 (CanLII)

Respondents
(Plaintiffs)

- and -

Tomecek Roney Little & Associates Ltd. and Brian Tomecek

Appellants
(Defendants)

- and -

Eleven Eleven Architecture Inc., McKinley Dang
Burkart Design Group Inc.

Respondents
(Defendants)

2014 ABCA 49 (CanLII)

Corrected judgment: A corrigendum was issued on February 6, 2014; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Alan Macleod

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice Bruce A. Millar
Dated the 14th day of December, 2012
Filed on the 25th day of February, 2013
(Docket: 0801-08299)

Memorandum of Judgment

The Court:

2014 ABCA 49 (CanLII)

Introduction

[1] As a result of defective structural design, a new home on Vancouver Island has become dangerous to its occupants. This appeal considers who must bear the cost of remediation. In making that determination we must also determine the scope of a limitation of liability clause in an architectural design agreement, including who is bound by the clause and who is entitled to take the benefit of it.

Background

[2] In 2004, Mr. and Ms. Swift (the Swifts) purchased land on Vancouver Island for the purpose of building a family home. Mr. Swift engaged Eleven Eleven Architecture Inc. (Eleven Eleven) and McKinley Dang Burkart Design Group Inc. (collectively, the Architects) to design the home. On April 29, 2005, Mr. Swift and Eleven Eleven entered into an agreement (Agreement) which contained the following limitation of liability clause (Limitation Clause):

> 3.8.1 With respect to the provision of services by the Designer to the Client under this Agreement, the Client agrees that any and all claims which the Client has or hereafter may have against the Designer which arise solely and directly out of the Designer's duties and responsibilities pursuant to this Agreement (hereinafter referred to in this Article 3 as "claims"), whether such claims sound in contract or in tort, shall be limited to the amount of $500,000.00.
>
> The Designer in this paragraph includes officers, directors, his or her employees, representatives and consultants.

[3] The Agreement defines both "Designer" and "Prime Consultant/Designer" as Eleven Eleven and the "Client" as Mr. Swift.

[4] Ms. Swift was not a signatory to the Agreement.

[5] The Agreement specified that the home was to be approximately 6,375 square feet. The structural engineering aspect of the design was subcontracted by the Architects to the respondent Tomecek Roney Little & Associates Ltd. and performed by its principal, Mr. Tomecek (Engineers). The Agreement states:

> 3.8.2 The Prime Consultant/Designer agrees to enlist the services of a registered Professional Engineer (whose fees for services are included within the contract amount of this agreement) whose professional stamp will be included on all relevant drawings and who shall certify to the structural soundness of the design.

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[6] A building permit was issued in October 2005, and construction began shortly thereafter. The home design was required to comply with the 1998 *British Columbia Building Code* (Code) which categorized buildings as Part 9 or Part 4. Part 9 buildings must generally be under 600 square metres in area and no more than 3 stories in height. If the building exceeds those limits, it is categorized as a Part 4 building. Part 4 buildings must comply with more stringent rules regarding, among other things, seismic design requirements.

[7] Mr. Tomecek's initial design treated the home as a Part 9 building, and was not designed with seismic issues in mind. However, during the summer of 2006, the building contractor raised concerns about the adequacy of the structural design and another structural engineer, Mr. Galloway, was retained to review the Tomecek design. Mr. Galloway wrote a letter outlining his concerns about the seismic stability of the home as designed. The Chief Building Inspector sent a letter to the Engineers expressing his opinion that the home needed to be designed under Part 4 of the Code.

[8] The Architects met with Mr. Tomecek shortly thereafter. Mr. Tomecek spent several days doing a "Part 4 analysis" and agreed to redo the design in compliance with Part 4. He confirmed to the Architects that he had in fact done so.

[9] It later became apparent that there were serious deficiencies in the seismic design of the home, and the Swifts filed claims against both the Architects and the Engineers, with Mr. Swift claiming in contract and tort and Ms. Swift claiming only in tort.

[10] The trial judge held that the structural engineering failed to satisfy Part 4, the relevant portion of the Code, and in particular certain seismic design criteria. He found that the Engineers were negligent in the performance of their obligation to provide a suitable structural design for the residence and that this failure created a real and substantial danger to the Swifts. The trial judge found no negligence on the part of the Architects, but concluded that, to the extent the structural engineering work done by their subcontractor was deficient, the Architects were in breach of the Agreement.

[11] The trial judge concluded that the Swifts suffered damages of approximately $1.9 million arising from the breach of the Agreement and the negligent structural engineering. However, he also concluded that the Limitation Clause applied to the Swifts' claims so as to limit the total amount payable to $500,000.

[12] The trial judge further determined that the Limitation Clause bound not only Mr. Swift, as signatory to the Agreement, but Ms. Swift as well. In this regard, he said, "the evidence is sufficient to establish that Mr. Swift, in executing the Architect Agreement, was acting both on his own behalf and on behalf of Mrs. Swift": para 66. The trial judge determined that the fact that Ms. Swift was not a signatory to the Agreement was of "no moment" as this was typical of the Swifts' family arrangements.

[13] Finally, the trial judge had to consider whether the Architects were entitled to an indemnity from the Engineers. He concluded that they were entitled to be indemnified, but that the Limitation Clause applied to limit the amount of that indemnity to $500,000, notwithstanding that the Architects had already paid $1,000,000 to the Swifts under a settlement agreement.

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Grounds of Appeal

[14] The Swifts and the Architects appeal the trial judge's order. The Engineers have submitted a contingent cross-appeal. The arguments of all the parties may be summarized as follows.

The Swifts

[15] The Swifts submit that the trial judge erred, first, in finding that Mr. Swift was acting as Ms. Swift's agent in signing the Agreement and, second, that the Limitation Clause applied to Ms. Swift. They further submit that the trial judge erred in failing to address Mr. Swift's claim of negligent misrepresentation against the Engineers.

[16] The Swifts also submit that the trial judge erred in ruling that the Limitation Clause in the Agreement, if applicable, limits the liability of the Engineers to $500,000 in total rather than to each individual claim of the Swifts. They do not argue that the Engineers are not party to the Limitation Clause.

The Architects

[17] The Architects argue that the trial judge erred in his interpretation of the Limitation Clause and that it should have been construed more narrowly so as to not shelter the Engineers from liability, and that the Limitation Clause does not disentitle the Architects to a full indemnity from the Engineers.

The Engineers

[18] The Engineers respond that the finding that Mr. Swift acted as agent for Ms. Swift is a question of fact and the trial judge's reasons reveal no palpable error. This finding, they say, was based on ample evidence and the trial judge made a finding of credibility that Ms. Swifts' evidence on this point was "suspect". The Engineers argue that the Limitation Clause is unambiguous and that it can bear no interpretation other than that found by the trial judge. Finally, they say there was no negligent misrepresentation giving rise to an independent tort and if there was, it too would be subject to the Limitation Clause.

[19] Finally, the Engineers say that if this Court allows any part of the appeal, they cross-appeal the trial judge's conclusion that they were negligent in the performance of the structural engineering service as the trial judge misapprehended the engineering evidence on all the determinative issues.

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Analysis

Who is party to the Agreement?

[20] The crux of this appeal is, who is party to the Agreement and who is bound by or can benefit from the Limitation Clause? First, is Ms. Swift a party to the Agreement, and if so, on what basis? Second, are the Engineers entitled to benefit from a Limitation Clause contained in an Agreement to which they are not party? This aspect of the appeal requires us to resolve whether one non-party, the Engineers, can bind another non-party, Ms. Swift, to the Agreement, thereby limiting any liability on the part of the Engineers to $500,000.

Agency

[21] The analysis must begin with the Agreement. The only express parties to the Agreement are Eleven Eleven and Mr. Swift, respectively defined as the Prime Consultant/Designer and the Client. The Swifts argue that the trial judge did not consider or apply the correct legal principles relating to agency in concluding that Mr. Swift had executed the Agreement on behalf of his wife. This raises a question of law reviewable on the correctness standard. For the reasons that follow, we conclude that there is nothing in the Agreement or in the conduct of the parties that would make Ms. Swift a party to the Agreement. Mr. Swift did not have express authority to bind Ms. Swift to the contract, nor is it possible on the record before us to draw any inference of apparent authority.

[22] An agency relationship arises when one person gives another the power to affect his or her legal relationships: *Rockland Industries v Amerada Minerals Corp of Canada Ltd*, [1980] 2 SCR 2. Most agency relationships arise from an express contract between the agent and principal. Actual authority may be implied, but the implied authority is actual authority to perform "all subordinate acts which are necessary or ordinarily incidental to the exercise of ... express authority": see *Auer v Lionstone Holdings Inc*, 2005 ABCA 78, 363 AR 84 at para 14, citing *McDonald v Lawlor* (1908), 7 WLR 639 at 642 (Sask KB). Some courts have found the existence of implied authority in the absence of express authority (see, for example, *Williams (Litigation guardian of) v BC Conference of the Mennonite Brethren Churches*, 2010 BCSC 791, [2010] BCJ No 1065). However, as noted by Fridman, "[w]here such an implication can be made, it is made on the basis that the principal has in fact consented to the agent's having authority to act in such a manner or as regards such a transaction. If there is evidence that the principal has not consented to this ... no implication of authority permitting the agent to act can be made" (GHL Fridman, *Canadian Agency Law*, 2d ed (Markham, Ont: LexisNexis Canada, 2012) at 70). Implied authority does not exist in a vacuum. In the absence of express authority, courts should be extremely reluctant to find implied authority unless there is clear unequivocal evidence that demonstrates that a principal has in fact consented to the agent's having authority to act on his or her behalf.

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[23] An agency relationship can also be apparent, arising from the impression of authority that the principal has created: see *Auer* at para 15 citing *Deer Valley Shopping Centre Ltd v Sniderman Radio Sales and Services Ltd* (1989), 96 AR 321 (QB). A finding of apparent authority arises when there is a representation by the principal to the third party and reliance on that representation by the third party: *Auer* at para 15 citing *Keddie v Horne*, 1999 BCCA 541 at para 28, 179 DLR (4th) 1.

[24] The trial judge here concluded that, although Ms. Swift did not sign the Agreement, there was sufficient evidence to establish that in executing it Mr. Swift was acting both on his own behalf and on behalf of Ms. Swift. Although the trial judge noted some of the applicable agency principles, those dealing with both express and apparent authority, he did not articulate on what basis he found that Mr. Swift was acting as agent for Ms. Swift.

[25] The Swifts submit that the trial judge incorrectly found agency on the sole basis that the Swifts are spouses and joint owners of the relevant property. The Engineers respond that the trial judge relied on numerous factors that, in the aggregate, established an agency relationship between the Swifts.

[26] The trial judge's conclusions with respect to agency are reproduced in full below. He stated at para 66:

> The case law indicates that such an agency can be found between spouses in appropriate circumstances and I am satisfied that such circumstances exist in this case. While the Residence may have been Mr. Swift's "vision", it is apparent from all of the evidence that Mrs. Swift was "on board" with it. This was to be their family home and was to be built on land of which she was the joint owner. It was to be designed by architects they previously had engaged in respect of family properties. While Mr. Swift clearly took the lead in the process, that was typical of their family arrangements and the evidence shows that Mrs. Swift did have some input in the design process. Mr. Swift testified that the move to the Residence was intended to be "a joyous, happy event". Had Mrs. Swift been opposed to the project, I consider it unlikely that Mr. Swift would have proceeded with it in the face of that opposition. I find that this was, in effect, their joint project.

[27] And at para 67:

> The fact that Mrs. Swift was not a signatory to the Architect Agreement is of no moment. Again, this was typical of the Swifts' family arrangements and Mrs. Swift's signature on the document as witness indicates that she was aware that Mr. Swift was engaging the Architects; indeed, she testified that she was aware of that. The Plaintiffs point out that she did not have independent legal advice in respect of the Architect Agreement. That, however, is also true of other documents Mr. Swift signed without her,

> including the listing agreement for their Calgary home. I find that Mrs. Swift was aware of the Architect Agreement. Had she wished to seek legal advice in respect of it, there is nothing in the evidence that indicates she could not have done so. Instead, I find that she simply relied on her husband as she had often done. There is nothing untoward in that, but it does not permit Mrs. Swift to escape the legal consequences of agreements entered into by Mr. Swift on her behalf.

[28] As noted above, there are two types of authority found in the law of agency: express or apparent authority. The trial judge stated there was no express authority. We agree. Mr. Swift testified that he was signing the Agreement on his own behalf only. Ms. Swift testified that Mr. Swift did not have authority to sign an agreement or the Agreement on her behalf. The Architects testified that they did not believe that Mr. Swift was executing the Agreement on Ms. Swift's behalf. This evidence, together with the language of the Agreement defining only Mr. Swift as the "client", ought to have ended the discussion on actual authority.

[29] No argument on apparent authority was advanced. It was not suggested that Ms. Swift had held out to the Architects that her husband was acting as her agent, and no evidentiary basis for that argument can be found in the record.

[30] Having concluded that there was no express authority one can only assume that the trial judge found there was implied authority based on the parties' conduct. This is an error in law. As noted above, implied authority is normally incidental to express authority. Implying this type of authority based on conduct is inherently problematic in the absence of clear and unequivocal evidence to support it. Why this is so is highlighted by considering the conduct used to establish the purported agency relationship here.

[31] The trial judge relied on the following in finding an agency relationship between the Swifts: they are spouses; Ms. Swift was "on board" with the project; they are joint tenants; it was typical of the Swifts' family arrangements that Mr. Swift would sign on Ms. Swift's behalf; Ms. Swift was aware of the Agreement and had relied on her husband.

[32] There are several problems with the trial judge's inferences. First, marriage and/or cohabitation cannot, without more, give rise to an agency relationship. To do so anachronistically ignores the separate legal identity of each spouse, a fundamental legal concept that courts in the 21st century should not easily trample upon or dismiss. The same is true of joint tenants. As stated in *Griffiths v Zambosco* (2001), 54 OR (3d) 397 at para 43 (CA): "[o]ne joint tenant is not, by the existence of the joint tenancy, the agent of the other ... Joint tenants have a separate, albeit indivisible, interest in the jointly held asset."

[33] That Ms. Swift was "on board" with the project cannot equate to authorizing Mr. Swift to bind her to a contract. Similarly, the fact that Ms. Swift knew about the Agreement does not establish that she represented to anyone, let alone her husband, that he had the authority to legally bind her to the Agreement.

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[34] Finally, the trial judge relied on the fact that it was typical of the Swifts' family arrangements for Mr. Swift to sign on Ms. Swift's behalf. This conclusion is not supported on the record. The trial judge noted at para 67 that there were other documents besides the Agreement that had been signed solely by Mr. Swift to illustrate such a practice, such as the building permit authorization and the listing agreement. But the record includes other equally relevant evidence: when Ms. Swift signs agreements, such as the mortgage on the house and a matrimonial property agreement, she reads the agreements and obtains independent legal advice if required. There is therefore no clear evidence of Mr. Swift "typically" signing on Ms. Swift's behalf. The trial judge failed to advert to the evidence that contradicted the existence of a "practice". This includes the specific documents referred to above and the testimony of both the Swifts that there was no authority given by Mr. Swift to Ms. Swift. The failure to consider relevant evidence amounts to palpable and overriding error.

[35] Looking at these factors in the aggregate cannot lead to a finding of agency. Courts should be cautious in relying on inferences to find agency between spouses and must recognize the pitfalls of relying on subjective assumptions about marital relationships. Here the trial judge relied on three trial decisions where agency was found: *Ryan v Kaukab*, 2011 ONSC 6826; *Century 21 Maritime Realty Ltd v LeClerc* (1994), 144 NBR (2d) 87 (QB); and *Hadley v Venetian Blind Service Centre*, 2000 BCSC 1321. This Court is not asked to opine on the correctness of those decisions or the agency analysis undertaken in each. We do note, however, that in *Ryan*, the trial judge found an express agency relationship relying on the testimony of each spouse to that effect. In *Century 21 Maritime Realty Ltd*, the court relied on the concept of apparent authority and subsequent ratification. In *Hadley*, the nature of the agency was not addressed. In this case, the trial judge erred in finding that Mr. Swift was acting as agent for Ms. Swift and that Ms. Swift was bound by the Agreement.

[36] From a policy perspective, relying on equivocal conduct to impose legal liability in the face of a contract is problematic. Inferences are subjective and lead to uncertain results, all the more so when inferences are used to contradict the express terms of an agreement.

The Parol Evidence Rule

[37] The Swifts submit that, given the clear language of the Agreement, the parol evidence rule precluded the trial judge from going beyond its four corners. They say that in finding agency the trial judge incorrectly permitted extrinsic evidence to be used to contradict the express terms of the Agreement.

[38] This argument highlights the tension between two concepts: that of undisclosed principal on the one hand, and on the other, the principle of contract law that extrinsic evidence may not be admitted absent ambiguity within the contract. As explained by Fridman at 164, "[a]n undisclosed principal … is one of whose existence the third party is unaware, so that the third party does not know that the person with whom he is dealing is somebody's agent, and believes that he is contracting with that person acting on his own behalf and in his own name." Under this

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doctrine, a person who is not overtly party to a contract can acquire rights and be subjected to liabilities under it. Fridman notes that this doctrine is anomalous and is inconsistent with the elementary rules of contract and agency.

[39] The Supreme Court in *Friedmann Equity Developments v Final Note Ltd*, 2000 SCC 34 at paras 15-18, [2000] 1 SCR 842 recognized the criticism associated with the undisclosed principal rule, stating at para 16:

> The rule which allows an undisclosed principal to sue or be sued on a simple contract has been criticized. Some argue that the doctrine is anomalous and that it violates some of the basic tenets of the laws of contract and of agency: see, e.g., J. B. Ames, "Undisclosed Principal – His Rights and Liabilities" (1909), 18 *Yale L.J.* 443; M. Schiff, "The Undisclosed Principal: An Anomaly in the Laws of Agency and Contract" (1983), 88 *Com. L.J.* 229. Critics of the rule argue that contracts are premised upon the agreement of two or more persons to be bound to each other and to the terms pursuant to which they will be so bound. It appears to be inconsistent with this fundamental principle to bind the third parties to principals with whom they did not contract.

[40] Bastarache J, writing for the court, went on to state at para 18 that:

> Regardless of the criticism of the rule, **it is firmly established that undisclosed principals may sue or be sued on simple contracts entered into by their agents.** Parties are presumed to be aware of the possibility that those with whom they are bargaining are acting on behalf of an unnamed principal. **The parties to a contract can avoid the application of the rule, either by including an express term in the contract which limits liability to the parties named in the contract itself, or by executing the contract under seal.** [emphasis added]

[41] The extent to which an undisclosed principal can sue and be sued in his own name on any contract made on his behalf remains fluid. The Nova Scotia Court of Appeal recently concluded that there are several important qualifications to the rule pertaining to an undisclosed principal in *CNH Capital Canada Ltd v Canadian Imperial Bank of Commerce*, 2013 NSCA 35, [2013] NSR (2d) 213. They are: a) the terms of the contract and the surrounding circumstances must permit the possibility of identifying the undisclosed principal, by showing that the agent was not acting as the real and only principal; b) the personality of the principal was a matter of indifference to the third party; and c) the agent acted with authority in making the contract in issue. Writing for the court, Fichaud JA states at para 61 that:

> I do not read *Friedmann* as rejecting the qualifications to the undisclosed principal rule that are discussed in the passages I have quoted from Fridman's *Canadian Agency Law*. *Friedmann* focussed on whether a sealed contract should remain as a qualification to the undisclosed principal rule. The Supreme Court neither reviewed nor purported to re-state exhaustively all the

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> detailed principles that govern the other qualifications to the undisclosed principal rule. Professor Fridman's 2009 text, from which I have quoted, postdated *Friedmann* by nine years. In my view, the qualifications to the undisclosed principal rule, quoted above from Fridman's *Canadian Agency Law*, remain on the current menu of governing principles.

[42] We agree. In particular, we agree that the admissibility of parol evidence to identify an undisclosed principal should depend on the type of description in the agreement. For example, where an agreement is clear and expressly or impliedly excludes the possibility of an undisclosed principal, there should be no room for admission of evidence to establish another principal. If, however, there is ambiguity within the contract as to who the parties are, extrinsic evidence may be admissible to show the existence of an undisclosed principal. As stated by Fridman at 167, in such circumstances "the evidence would explain the contract, not vary or contradict it, and would not produce a result that was inconsistent with the terms of the contract."

[43] The Agreement here does not permit the identification of Ms. Swift as a possible principal. Moreover, the evidence at trial established that the Architects intended to contract with Mr. Swift only and that Mr. Swift had no express authority to bind Ms. Swift.

The Scope of the Limitation Clause

[44] The trial judge interpreted the Limitation Clause in a manner that allowed the Engineers to shelter under it, thereby limiting the damages payable by them. The appellants submit this was an error in law and put forward three arguments in support.

[45] First, the Architects argue that there is a distinction between the term "Designer" as used in the Limitation Clause and the term "Prime Consultant/Designer" as used in other parts of the Agreement. They submit that the trial judge erred in not examining the Agreement as a whole and in failing to apply the presumption of consistent expression.

[46] The Limitation Clause, by its wording, applies to any and all claims that arise "against the Designer which arise solely and directly out of the Designer's duties and responsibilities". The Architects submit that the use of the term "Designer" in the Limitation Clause was no error. Eleven Eleven as "Prime Consultant/Designer", was acting in its capacity as "Prime Consultant" when it retained the Engineers to do structural engineering design work, not in its capacity as "Designer". The use of the term "Designer" in the Limitation Clause meant that the Swifts could only recover in respect of Eleven Eleven's architectural design work, not the Engineers' work. In other words, the Architects when acting as "Prime Consultant" are not liable for the Engineers' negligence.

[47] We disagree. The distinction put forward by the Architects is not supported when one looks at the Agreement, which clearly defines "Designer" and "Prime Consultant" as Eleven Eleven. In substituting "Designer" for Eleven Eleven in the Limitation Clause, it becomes clear

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that the Limitation Clause applies to the liability of the Architects or those retained by them to carry out the prescribed services under the Agreement.

[48] The second argument advanced by the Architects and the Swifts is that the that the wording "any and all claims … shall be limited to the amount of $500,000.00" means that each individual claim should be limited to $500,000, but if there are several distinct claims the aggregate amount that could be claimed is $500,000 for each such claim. The absence of the word "aggregate" before "amount", they argue, is fatal to the trial judge's conclusion that the Limitation Clause applied to the totality of the Swifts' claims. This argument may have merit, particularly where, as here, the causes of action are separate claims in relation to: (1) the gravity load resisting system, and (2) the seismic load resisting system. The phrase "any and all" does not necessarily import the meaning of an aggregate sum. This ought to have been considered by the trial judge and may have led to a narrow interpretation of the Limitation Clause, as mandated by *Hunter Engineering v Syncrude Canada Ltd*, [1989] 1 SCR 426 at 497, [1989] SCJ No 23. However, given our findings on the issue of negligent misrepresentation, dealt with below, it is unnecessary for us to opine on the issue.

The claim for negligent misrepresentation

[49] The Swifts argue that the trial judge erred in ruling that the Limitation Clause applied to limit Mr. Swift's recovery in total as the trial judge had failed to address Mr. Swift's claim against the Engineers for negligent misrepresentation. Even if the tort claims contemplated within the contract were limited by the Limitation Clause, the negligent misrepresentation claim was not so limited.

[50] The foundation of the negligent misrepresentation claim is as follows. Mr. Tomecek represented, in late 2006 or thereabouts, that certain seismic redesign work would be or had been done. Mr. Swift relied on these representations and completed the construction of the home before doing the necessary remedial work. Since it costs more to do such remedial work as the construction process progresses, the delay in starting the remedial work caused by Mr. Tomecek's misrepresentations directly caused certain damages that are separate from (but overlapping with) the damage caused by his negligent engineering work. Mr. Swift submits that this claim was not contemplated by the Limitation Clause as it does not arise "solely and directly out of the Designer's duties and responsibilities" pursuant to the Agreement.

[51] The trial judge failed to address the negligent misrepresentation claim altogether, although it was put forward in the pleadings and in oral and written submissions. The Engineers state that while the trial judge gave no express reasons on this claim, it had no merit and was inferentially properly dismissed. They argue that there was no representation, and that it would be unreasonable to restrict the application of the Limitation Clause in this way because service providers will almost invariably represent that their services meet an acceptable standard at the time that the services are rendered. Exclusion clauses would be of little value if a separate claim could be made in respect of a service provider's assertion that his work was done properly.

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[52] We disagree. On the record before us, we conclude the claim does have merit and the trial judge ought to have considered it. For the reasons that follow, we also conclude that the Limitation Clause does not apply to the negligent misrepresentation.

[53] In order to find negligent misrepresentation, the following criteria must be met: (1) there must be a duty of care based upon a "special relationship" between the representor and representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said representation; (4) the representee must have relied, in a reasonable manner, on said negligent representation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted: see *Queen v Cognos Inc*, [1993] 1 SCR 87 at 110, 99 DLR (4th) 626.

[54] There was clearly a "special relationship" between the parties such that a duty of care exists. Indeed, the trial judge found at para 72 that: "there seems to me to be little doubt that a duty of care was owed by the TRL Defendants in the circumstances of this case".

[55] The representation in question is that Mr. Tomecek promised the Architects that he would do a full Part 4 analysis and provide structural engineering to Part 4 of the Code as it related to live earthquake loads. The Engineers argue that Mr. Tomecek believed he was working within the parameters of Part 4 as he understood it. This argument is not a defence. The trial judge found the following at para 34:

> In September 2006, in response to concerns raised by Mr. Galloway and by the Chief Building Inspector about the seismic stability of the Residence, Mr. Taylor of Eleven Eleven requested that the TRL Defendants revise the structural design to comply with Part 4 of the [Code]. Mr. Tomecek testified that he asked Mr. Taylor to confirm with Mr. Swift that he wanted the structural engineering for the Residence to be done to the Part 4 standard; Mr. Taylor obtained that confirmation and testified **that Mr. Tomecek promised to bring the structural engineering up to Part 4.** The Plaintiffs submit that Mr. Tomecek acknowledged the importance of doing the Part 4 design before the Residence was "closed in". [emphasis added]

[56] Mr. Tomecek effectively stated: "I have complied with Part 4". He did not do so. This representation was reasonably relied upon by Mr. Swift given the Engineers' expertise. Mr. Swift suffered damage resulting from the representation. The deficiencies in the structural design of the home presented a real and substantial danger to its occupants. Mr. Tomecek's representation caused a delay in starting the needed remedial work and as construction progressed, it became more expensive to undertake the required work.

[57] In our view, the Limitation Clause did not contemplate Mr. Tomecek's representation that he had complied with Part 4. It would be unreasonable to conclude that such negligent misrepresentation was contemplated as being something that "arises solely and directly" out of Eleven Eleven's duties and responsibilities. This is particularly so given that the structural

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defects presented a real and substantial danger to its occupants. As stated in *Winnipeg Condominium Corporation No 36 v Bird Construction Co Ltd*, [1995] 1 SCR 85 at para 37: "[a]part from the logical force of holding contractors liable for the cost of repair of dangerous defects, there is also a strong underlying policy justification for imposing liability in these cases."

[58] The negligent misrepresentation in these circumstances fell outside the parameters of the Limitation Clause.

[59] Given the above, we conclude that Mr. Swift is entitled to recover fully in tort for the negligent misrepresentation of the Engineers. Ms. Swift would also have been entitled to recover in full in tort for the Engineers' negligent design. The trial judge concluded that the total amount of damages amounted to $1,905,318.70. The Swifts have received $1,000,000 pursuant to a settlement agreement with the Architects. We therefore conclude that they should receive a further $905,318.70 from the Engineers.

Indemnity

[60] The Architects seek to increase their right of indemnity against the Engineers from $500,000 to the $1,000,000 they paid to the Swifts pursuant to the settlement agreement entered into prior to trial. The terms of the settlement are set out in the settlement agreement dated March 5, 2012. The amount of the payment has been redacted but it is common ground that the settling defendants paid to the Swifts the sum of $1,000,000. The parties agreed to absorb their own legal costs and reserved the right to proceed further against the Engineers. The Architects and their insurers were released from any further exposure.

[61] The trial judge limited the Architects' right of indemnity to $500,000 because of his interpretation of the Limitation Clause. However, he failed to consider the Engineers' independent liability for negligent misrepresentation, which we have concluded falls outside that Clause. Given that we have found the Engineers entirely liable for the loss arising from their negligence, it follows that the Architects should be indemnified in full.

[62] There are other principles at play, including the fair apportionment of liability. The Architects find themselves in this position because they settled their differences with the Swifts prior to trial and discharged their liability by paying the agreed amount. The courts encourage settlement.

[63] Regardless of whether or not the respondent's liability arises out of tort or breach of contract, the parties ought to be required to contribute their fair share of the judgment commensurate with their share of fault. In this case, the trial judge found that the fault which gave rise to the loss lay squarely with the Engineers, notwithstanding that the Architects were also liable to the Swifts on a contractual basis. That finding is amply supported by the record. This Court in the past has used restitutionary principles to resolve issues of contribution: see

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Petersen Pontiac Buick GMC (Alta) Ltd v Campbell, 2013 ABCA 251. In that case Hunt JA for this court said at para 54:

> I consider that this result can also be justified on the basis of equitable principles. According to Charles Mitchell, Paul Mitchell & Stephen Watterson, eds, *Goff & Jones The Law of Unjust Enrichment*, 8th ed (Common Law Library, Sweet & Maxwell, 2011) at para 20-1, a claimant for contribution must show:
>
> (1) the claimant and the defendant were both liable to the third party,
> (2) who was forbidden to accumulate full recoveries from both of them, but
> (3) who could choose to recover in full from either of them, and that
> (4) some or all of the burden of paying him should ultimately be borne by the defendant.

[64] In this case, the Architects effectively discharged $1,000,000 of the defendants' liability pursuant to the settlement agreement entered into prior to trial. The Swifts, by virtue of this judgment, will have recovered more than that and the responsibility for the loss rests with the Engineers.

[65] Accordingly, the Architects' judgment for indemnity against the Engineers is increased from $500,000 to $1,000,000.

Cross-Appeal

[66] The Engineers have filed a contingent cross-appeal. Having allowed the appeal we now address their arguments. They submit the trial judge erred in accepting the evidence of the appellants' experts as to the requirements of the Code and the deficiency of the design.

[67] Specifically, the Engineers take issue with the trial judge's wholesale acceptance of Mr. Galloway's expert evidence and his rejection of the evidence of their expert, Mr. Lam, who testified was that it was appropriate to design the home based on a "hybrid" approach to Parts 4 and 9 of the Code. The Engineers also argue that Mr. Galloway's interpretation of the Code was incorrect, as he misinterpreted the "fundamental period" under the Code. Finally, the Engineers argue that the trial judge erred in his analysis of the duty of care and in the calculation of damages.

[68] A trial judge is entitled to a high degree of deference with respect to the weight and scope given to expert evidence: *Canadian 88 Energy Corp v Union Carbide Canada*, 2009 ABCA 126 at para 11, 457 AR 47. In our view, the trial judge's rejection of Mr. Lam's hybrid approach withstands appellate scrutiny. He clearly stated at para 134 that the home should have been built to satisfy Part 4 of the Code. The Engineers have not persuaded us that the home could

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have, or should have, properly been categorized as a Part 9 building. As such, the rejection of the expert that put forth a "hybrid approach" was not an overriding and palpable error. The home was either built to satisfy the requirements of Part 4, or it was not. The trial judge's conclusion on this point was clearly reasonable.

[69] The Engineers submit that Mr. Galloway relied on certain calculations that were inconsistent with reality. Specifically, he erroneously used the entire length of the building as one of the variables in calculating the fundamental period of the building and he "introduced, or perhaps invented, the concept of 'equivalent length'". As such, argue the Engineers, the trial judge should have rejected his testimony.

[70] The trial judge carefully considered the expert evidence and preferred that of Mr. Galloway. This is the role of the trial judge we see no overriding and palpable error in his preference. He concluded at para 134:

> Having said that, I find on all of the evidence before me that, given its architectural design and the risk of a seismic event, the Residence should have been built to satisfy Part 4 of the BCBC. With respect to the seismic load issues, I prefer the evidence of Mr. Galloway to that of Mr. Lam. In my view, Mr. Lam attempted to walk too fine a line and I am satisfied that his hybrid approach is not appropriate in this case.

This was a reasonable conclusion. This ground of the cross-appeal is dismissed.

[71] We must also dismiss the Engineers' argument that the trial judge failed to determine the standard of care. The trial judge explicitly found that the standard of care with which the Engineers were required to comply necessitated that the home be built to meet the Part 4 standard. The evidence he accepted supported the conclusion that the Engineers failed to meet this standard. The Engineers' own expert witness, Mr. Lam, stated that there were "obvious deficiencies" in the home even at the time of trial, after Mr. Tomecek had done redesign work in response to the concerns that had been raised in 2006.

[72] We also dismiss the Engineers' argument on the quantification of damages. They challenge the trial judge's calculation of damages under eight categories and submit that in total, the trial judge overestimated the damages by $415,837. We have reviewed these arguments and cannot find any overriding and palpable error. The trial judge was entitled, for example, to calculate a contingency and did not exaggerate the amount, nor did he commit overriding and palpable errors in quantifying the remaining damages. The calculation of complicated damages can sometimes be more akin to an art than to a science. The trial judge carefully calculated the relevant damages and his conclusion is entitled to deference.

[73] The Engineers also appeal the June 2013 costs order. Ten days prior to the trial, the Architects and the Engineers made a joint settlement offer to the Swifts in which the Swifts would receive $645,000 plus interest (Joint Offer). This was not accepted and the Swifts and

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Architects settled shortly before the trial. The Engineers argue: (1) the Swifts were not a "successful party" at trial, therefore, they are entitled to costs for all steps taken after the service of the Joint Offer; (2) the Joint Offer was a valid formal offer because it was made at least 10 days before the scheduled start date of the trial; and (3) the Joint Offer was a "*Calderbank* offer" that the trial judge was required by law to consider even if it was not a valid formal offer under the Rules.

[74] This aspect of the cross-appeal must also be dismissed. The rules only give the Engineers an entitlement to costs if they succeed at trial, as measured relative to the offer that they made. The Engineers were clearly not the successful party at trial. They were found negligent, and liable to pay more than they would have been required to pay under the terms of the Joint Offer.

[75] The parties have 30 days to make submissions as to costs, failing which this Court's default rule will apply.

Appeal heard on December 4, 2013

Memorandum filed at Calgary, Alberta
This 4th day of February, 2014

Paperny J.A.

Martin J.A.

Authorized to sign for: Macleod J.

2014 ABCA 49 (CanLII)

Appearances:

D.T. Gallagher, Q.C.
D.K. Docheva
for the Appellant/Cross-Respondents on Cross-Appeal No. 1301-0042-AC and Respondents on Appeal No. 1301-0056-AC, Philip Swift and Cindy McInnis-Swift

S.J. Hammel, Q.C.
P.A. Carson
for the Respondents/Cross-Appellants on Cross-Appeal No. 1301-0042-AC and Appellants on Appeal No. 1301-0056-AC, Tomecek Roney Little & Associates Ltd. and Brian Tomecek

T.C. Hagg, Q.C.
for the Appellants/Cross-Respondents on Cross-Appeal No. 1301-0042-AC and Respondents on Appeal No. 1301-0056-AC, Eleven Eleven Architecture Inc. and McKinley Dang Burkart Design Group Inc.

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Corrigendum of the Memorandum of Judgment

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The appearance page now reads:

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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

2012 ABQB 489 (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: 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: . . .

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[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?

[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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Her Majesty The Queen in Right of the Province of Newfoundland and Labrador *Appellant*

v.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders) *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty The Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada *Interveners*

Indexed as: Newfoundland and Labrador *v.* AbitibiBowater Inc.

2012 SCC 67

File No.: 33797.

2011: November 16; 2012: December 7.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and Insolvency — Provable claims — Contingent claims — Corporation filing for insolvency protection — Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order — Whether environmental protection orders are monetary claims that

Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador *Appelante*

c.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., comité ad hoc des créanciers obligataires, comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Sa Majesté la Reine du chef de la Colombie-Britannique, Ernst & Young Inc., en sa qualité de contrôleur, et Les Ami(e)s de la Terre Canada *Intervenants*

Répertorié : Terre-Neuve-et-Labrador *c.* AbitibiBowater Inc.

2012 CSC 67

N^o^ du greffe : 33797.

2011 : 16 novembre; 2012 : 7 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Réclamations prouvables — Réclamations éventuelles — Demande de protection contre l'insolvabilité par une société — Ordonnances environnementales émises par la province contre la société et demande, par la province, d'un jugement déclarant que les ordonnances ne constituent pas des « réclamations » aux termes de la Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985,

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can be compromised in corporate restructuring under CCAA — Whether CCAA is ultra vires or constitutionally inapplicable by permitting court to determine whether environmental order is a monetary claim.

A was involved in industrial activity in Newfoundland and Labrador (the "Province"). In a period of general financial distress, it ended its last operation there, filed for insolvency protection in the United States and obtained a stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Province subsequently issued five orders under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, requiring A to submit remediation action plans for five industrial sites it had occupied, three of which had been expropriated by the Province, and to complete the remediation actions. The Province also brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to A's proposed reorganization did not bar the Province from enforcing the environmental protection orders. The Province argued that the environmental protection orders were not "claims" under the *CCAA* and therefore could not be stayed and subject to a claims procedure order. It further argued that Parliament lacked the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that were validly made in the exercise of a provincial power. A contested the motion, arguing that the orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order. The *CCAA* court dismissed the Province's motion. The Court of Appeal denied the Province leave to appeal.

Held (McLachlin C.J. and LeBel J. dissenting): The appeal should be dismissed.

Per Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: Not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified

ch. C-36 (« LACC »), et qu'elles ne sont pas assujetties à l'ordonnance relative à la procédure de réclamations — Les ordonnances environnementales constituent-elles des réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration sous le régime de la LACC? — La LACC est-elle ultra vires ou constitutionnellement inapplicable en permettant au tribunal de déterminer si une ordonnance environnementale constitue une réclamation pécuniaire?

A a poursuivi des activités industrielles à Terre-Neuve-et-Labrador (la « province »). Dans une période de grandes difficultés financières, elle a mis un terme à ses activités dans la province, elle a présenté une demande de protection contre l'insolvabilité aux États-Unis et elle a obtenu une suspension des procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). La province a par la suite prononcé cinq ordonnances environnementales en vertu de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2, contraignant A à présenter des plans de restauration pour cinq sites industriels qu'elle avait occupés, dont trois avaient été expropriés par la province, et à réaliser les plans de restauration approuvés. La province a également demandé par requête un jugement déclarant qu'une ordonnance relative à la procédure de réclamations rendue aux termes de la *LACC* dans le cadre de la réorganisation proposée de A n'empêchait pas la province d'exécuter les ordonnances environnementales. La province a plaidé que les ordonnances environnementales ne constituent pas des « réclamations » au sens de la *LACC* et que leur exécution ne peut donc être suspendue ni être assujettie à une ordonnance relative à la procédure de réclamations. Elle a de plus fait valoir que le pouvoir du Parlement de légiférer en matière de faillite et d'insolvabilité ne lui confère pas la compétence constitutionnelle pour suspendre l'application des ordonnances prononcées dans l'exercice valide de pouvoirs provinciaux. A a contesté la requête et a soutenu que les ordonnances étaient de nature pécuniaire et qu'elles étaient donc visées par la définition du terme « réclamation » utilisé dans l'ordonnance relative à la procédure de réclamations. Le juge chargé d'appliquer la *LACC* a rejeté la requête de la province et la Cour d'appel a rejeté la demande d'autorisation d'appel de la province.

Arrêt (la juge en chef McLachlin et le juge LeBel sont dissidents) : Le pourvoi est rejeté.

Les juges Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis : Les ordonnances des organismes administratifs ne sont pas toutes de nature pécuniaire, et donc des réclamations prouvables dans le cadre de procédures d'insolvabilité, mais

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at the outset of the proceedings. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims or orders on the basis of form alone. If the order is not framed in monetary terms, the *CCAA* court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process in a case such as the one at bar. First, there must be a debt, a liability or an obligation to a creditor. In this case, the first criterion was met because the Province had identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred as of a specific time. This requirement was also met since the environmental damage had occurred before the time of the *CCAA* proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. The present case turns on this third requirement, and the question is whether orders that are not expressed in monetary terms can be translated into such terms.

A claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred. 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. In the context of an environmental protection order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim. If there is sufficient certainty in this regard, the court will conclude that the order can be subject to the insolvency process.

certaines peuvent l'être en dépit du fait qu'elles ne sont pas quantifiées dès le début des procédures. En matière environnementale, le tribunal chargé de l'application de la *LACC* doit déterminer s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers l'organisme administratif qui a prononcé l'ordonnance. En pareil cas, la question pertinente ne se résume pas à déterminer si l'organisme a formellement exercé son pouvoir de réclamer une dette. Le tribunal qui évalue une réclamation ou une ordonnance ne se limite pas à un examen de sa forme. Si l'ordonnance n'est pas formulée en termes pécuniaires, le tribunal doit déterminer, en fonction des faits en cause et du cadre législatif applicable, si elle constitue une réclamation qui sera assujettie au processus de réclamation.

Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité dans une affaire telle celle en l'espèce, les ordonnances doivent satisfaire à trois conditions. Premièrement, il doit s'agir d'une dette, d'un engagement ou d'une obligation envers un créancier. En l'espèce, il a été satisfait à la première condition puisque la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance à un moment précis. Il a également été satisfait à cette condition puisque les dommages environnementaux sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. La présente affaire est centrée sur cette troisième condition, et la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes.

Il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu. Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural. Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

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Certain indicators can guide the *CCAA* court in this assessment, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. The analysis is grounded in the facts of each case. In this case, the *CCAA* court's assessment of the facts, particularly its finding that the orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

Subjecting such orders to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay a debt. It merely ensures that the Province's claim will be paid in accordance with insolvency legislation. Full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third party creditors and replace the polluter-pay principle with a "third-party-pay" principle. Moreover, to subject environmental protection orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities. Reorganization made necessary by insolvency is hardly ever a deliberate choice, and when the risks corporations engage in materialize, the dire costs are borne by almost all stakeholders.

Because the provisions on the assessment of claims in insolvency matters relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. The interjurisdictional immunity doctrine is also inapplicable, because a finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities; its claim is simply subject to the insolvency process.

Per McLachlin C.J. (dissenting): Remediation orders made under a province's environmental protection

Certains indicateurs permettent de guider le tribunal dans cette analyse, notamment si les activités se poursuivent, si le débiteur exerce un contrôle sur le bien et s'il dispose des moyens de se conformer à l'ordonnance. Il est également possible pour le tribunal de prendre en compte les conséquences qu'entraînerait sur le processus d'insolvabilité le fait d'exiger du débiteur qu'il se conforme à l'ordonnance. L'analyse est fondée sur les faits propres à chaque cas. En l'espèce, l'appréciation des faits par le tribunal, plus particulièrement sa constatation que les ordonnances constituaient la première étape en vue de la décontamination des sites par la province, ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire.

Le fait d'assujettir ces ordonnances au processus de réclamations n'éteint pas les obligations environnementales qui incombent au débiteur, pas plus que le fait de soumettre à ce processus les réclamations des créanciers n'éteint l'obligation du débiteur de payer ses dettes. Le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. Le respect intégral des ordonnances dont la nature pécuniaire est reconnue transférerait le coût de la décontamination aux tiers créanciers et substituerait au principe du pollueur-payeur celui du « tiers-payeur ». En outre, l'assujettissement des ordonnances environnementales à la procédure de réclamations n'équivaut pas à convier les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales. Une réorganisation rendue nécessaire par l'insolvabilité de la société peut difficilement être assimilée à un choix délibéré, et lorsque les risques auxquels s'exposent les sociétés se concrétisent, la quasi-totalité des personnes ayant des intérêts dans la société en supportent les terribles coûts.

L'application de la doctrine des pouvoirs accessoires n'est pas pertinente en l'espèce car les dispositions régissant l'évaluation des réclamations en matière d'insolvabilité sont directement reliées à la compétence du législateur fédéral. La doctrine de la protection des compétences exclusives ne s'applique pas non plus parce qu'une conclusion selon laquelle un créancier œuvrant dans le domaine de l'environnement détient une réclamation pécuniaire ne modifie en rien les activités de ce créancier; sa réclamation est simplement assujettie au processus d'insolvabilité.

La juge en chef McLachlin (dissidente) : Les ordonnances exigeant la décontamination émises aux termes

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legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They may only be reduced to monetary claims which can be compromised under *CCAA* proceedings in narrow circumstances where a province has done the remediation work, or where it is "sufficiently certain" that it will do the work. This last situation is regulated by the provisions of the *CCAA* for contingent or future claims. The test is whether there is a likelihood approaching certainty that the province will do the work. "Likelihood approaching certainty" recognizes that the government's decision is discretionary and may be influenced by competing political and social considerations, which are not normally subject to judicial consideration. Insofar as this determination touches on the division of powers, I am in substantial agreement with Deschamps J.

Apart from the orders related to the work done or tendered for on the Buchans property, the orders for remediation in this case are not claims that can be compromised. The *CCAA* maintains the fundamental distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy. The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. His failure to consider that question requires this Court to answer it in his stead. There is nothing on the record to support the view that the Province will move to remediate the properties. It has not been shown that the contamination poses immediate health risks which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. The Province retained a number of options, including leaving the sites contaminated, or calling on Abitibi to remediate following its emergence from restructuring. There is nothing in the record that makes it more probable, much less establishes "sufficient certainty", that the Province will opt to do the work itself.

d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. Ces ordonnances ne peuvent être converties en réclamations pécuniaires pouvant faire l'objet de transactions dans le cadre de procédures engagées aux termes de la *LACC* que dans certaines circonstances particulières, lorsqu'une province a exécuté les travaux ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux. Cette deuxième situation est prévue par les dispositions de la *LACC* relatives aux réclamations éventuelles ou futures. Le critère consiste à déterminer s'il existe une probabilité proche de la certitude que la province exécutera les travaux. Une « probabilité proche de la certitude » reconnaît que la décision du gouvernement est discrétionnaire et peut être influencée par des considérations politiques et sociales concurrentes qui sont normalement soustraites à l'examen judiciaire. Dans la mesure où cette décision touche le partage des pouvoirs, je souscris pour l'essentiel à l'opinion exprimée par la juge Deschamps.

À l'exception des ordonnances relatives aux travaux sur le site de Buchans déjà exécutés ou à l'égard desquels des appels d'offres ont été lancés, les ordonnances exigeant la décontamination en l'espèce ne constituent pas des réclamations pouvant faire l'objet de transactions dans le cadre d'une restructuration. La *LACC* établit une distinction fondamentale entre les exigences réglementaires découlant d'une loi d'application générale visant la protection du public, d'une part, et les réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration engagée sous le régime de la *LACC* ou en matière de faillite, d'autre part. Le juge de première instance ne s'est jamais posé la question cruciale de savoir s'il était « suffisamment certain » que la province exécuterait elle-même les travaux. Le fait qu'il n'ait pas examiné cette question oblige notre Cour à y répondre à sa place. Aucune preuve au dossier ne laisse croire que la province entreprendra la décontamination des sites. Il n'a pas été démontré que la contamination pose pour la santé des risques immédiats exigeant la prise de mesures dans les plus brefs délais. Il n'a pas été démontré que la province a pris quelque mesure que ce soit pour réaliser des travaux. Et il n'a pas été démontré que la province a prévu des sommes d'argent pour ces travaux ou qu'elle a même songé à en prévoir. La province a conservé un certain nombre de choix, notamment laisser les sites contaminés, ou demander à Abitibi d'exécuter les travaux lorsqu'elle aura complété sa restructuration. Rien au dossier n'indique qu'il est plus probable, et encore moins qu'il est « suffisamment certain », que la province choisira d'exécuter elle-même la décontamination.

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Per LeBel J. (dissenting): The test proposed by the Chief Justice according to which the evidence must show that there is a "likelihood approaching certainty" that the Province would remediate the contamination itself is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J. best reflects how both the common law and the civil law view and deal with contingent claims. Applying that test, the appeal should be allowed on the basis that there is no evidence that the Province intends to perform the remedial work itself.

Cases Cited

By Deschamps J.

Distinguished: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **referred to:** *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624.

By McLachlin C.J. (dissenting)

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

Statutes and Regulations Cited

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, c. A-1.01.

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 9.

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12.

Le juge LeBel (dissident) : Le critère que propose la Juge en chef, selon lequel la preuve doit démontrer une « probabilité proche de la certitude » que la province se chargerait de la décontamination, ne constitue pas le critère établi pour déterminer si, et de quelle façon, une réclamation éventuelle peut être liquidée en droit de la faillite et de l'insolvabilité. Le critère de ce qui est « suffisamment certain » qu'énonce la juge Deschamps reflète mieux la façon dont la common law et le droit civil envisagent et traitent les réclamations éventuelles. En appliquant ce critère, il y aurait lieu d'accueillir le pourvoi puisqu'aucune preuve ne confirme l'intention de la province d'exécuter elle-même les travaux de décontamination.

Jurisprudence

Citée par la juge Deschamps

Distinction d'avec l'arrêt : *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **arrêts mentionnés :** *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624.

Citée par la juge en chef McLachlin (dissidente)

Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) c. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

Lois et règlements cités

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, ch. A-1.01.

Code civil du Québec, L.Q. 1991, ch. 64, art. 1497, 1508, 1513.

Environmental Protection Act, S.N.L. 2002, ch. E-14.2, art. 99, 102(3).

Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des

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Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36, s. 65.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 "claim provable in bankruptcy", "creditor", 14.06(8), 121(1), (2), 135(1.1).

Civil Code of Québec, S.Q. 1991, c. 64, arts. 1497, 1508, 1513.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(1) "claim", 11, 11.1, 11.8(5), (7), (8), (9), 12(1), (2).

Environmental Protection Act, S.N.L. 2002, c. E-14.2, ss. 99, 102(3).

Treaties and Other International Instruments

North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can. T.S. 1994 No. 2.

Authors Cited

Baird, Douglas G., and Thomas H. Jackson. "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199.

Canada. House of Commons. *Evidence of the Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996.

Hohfeld, Wesley Newcomb. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, new ed. by David Campbell and Philip Thomas, eds. Burlington, Vt.: Ashgate, 2001.

MacCormick, D. N. "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart*. Oxford: Clarendon Press, 1977, 189.

Saxe, Dianne. "Trustees' and Receivers' Environmental Liability Update" (1998), 49 C.B.R. (3d) 138.

APPEAL from a judgment of the Quebec Court of Appeal (Chamberland J.A.), 2010 QCCA 965, 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, [2010] Q.J. No. 4579 (QL), 2010 CarswellQue 4782, dismissing the appellant's motion for leave to appeal a decision of Gascon J., 2010 QCCS 1261, 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, [2010] Q.J. No. 4006 (QL), 2010 CarswellQue 2812. Appeal dismissed, McLachlin C.J. and LeBel J. dissenting.

David R. Wingfield, *Paul D. Guy* and *Philip Osborne*, for the appellant.

compagnies et la Loi de l'impôt sur le revenu, L.C. 1997, ch. 12.

Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005), L.C. 2007, ch. 36, art. 65.

Loi modifiant la Loi sur la faillite et la Loi de l'impôt sur le revenu en conséquence, L.C. 1992, ch. 27, art. 9.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 2 « créancier », « réclamation prouvable en matière de faillite », 14.06(8), 121(1), (2), 135(1.1).

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 2(1) « réclamation », 11, 11.1, 11.8(5), (7), (8), (9), 12(1), (2).

Traités et autres instruments internationaux

Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis d'Amérique et le gouvernement des États-Unis du Mexique, R.T. Can. 1994 nº 2.

Doctrine et autres documents cités

Baird, Douglas G., and Thomas H. Jackson. « Comment : *Kovacs* and Toxic Wastes in Bankruptcy » (1984), 36 *Stan. L. Rev.* 1199.

Canada. Chambre des communes. *Témoignages du Comité permanent de l'industrie*, nº 16, 2e sess., 35e lég., 11 juin 1996.

Hohfeld, Wesley Newcomb. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, new ed. by David Campbell and Philip Thomas, eds. Burlington, Vt. : Ashgate, 2001.

MacCormick, D. N. « Rights in Legislation », in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society : Essays in Honour of H. L. A. Hart*. Oxford : Clarendon Press, 1977, 189.

Saxe, Dianne. « Trustees' and Receivers' Environmental Liability Update » (1998), 49 C.B.R. (3d) 138.

POURVOI contre une décision de la Cour d'appel du Québec (le juge Chamberland), 2010 QCCA 965, 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, [2010] Q.J. No. 4579 (QL), 2010 CarswellQue 4782, qui a rejeté la requête de l'appelante pour permission d'en appeler d'un jugement du juge Gascon, 2010 QCCS 1261, 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, [2010] Q.J. No. 4006 (QL), 2010 CarswellQue 2812. Pourvoi rejeté, la juge en chef McLachlin et le juge LeBel sont dissidents.

David R. Wingfield, *Paul D. Guy* et *Philip Osborne*, pour l'appelante.

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Sean F. Dunphy, *Nicholas McHaffie*, *Joseph Reynaud* and *Marc B. Barbeau*, for the respondents.

Christopher Rupar and *Marianne Zoric*, for the intervener the Attorney General of Canada.

Josh Hunter, *Robin K. Basu*, *Leonard Marsello* and *Mario Faieta*, for the intervener the Attorney General of Ontario.

R. Richard M. Butler, for the intervener the Attorney General of British Columbia.

Roderick Wiltshire, for the intervener the Attorney General of Alberta.

Elizabeth J. Rowbotham, for the intervener Her Majesty The Queen in Right of British Columbia.

Robert I. Thornton, *John T. Porter* and *Rachelle F. Moncur*, for the intervener Ernst & Young Inc., as Monitor.

William A. Amos, *Anastasia M. Lintner*, *Hugh S. Wilkins* and *R. Graham Phoenix*, for the intervener the Friends of the Earth Canada.

The judgment of Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

[1] DESCHAMPS J. — The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[2] Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body

Sean F. Dunphy, *Nicholas McHaffie*, *Joseph Reynaud* et *Marc B. Barbeau*, pour les intimés.

Christopher Rupar et *Marianne Zoric*, pour l'intervenant le procureur général du Canada.

Josh Hunter, *Robin K. Basu*, *Leonard Marsello* et *Mario Faieta*, pour l'intervenant le procureur général de l'Ontario.

R. Richard M. Butler, pour l'intervenant le procureur général de la Colombie-Britannique.

Roderick Wiltshire, pour l'intervenant le procureur général de l'Alberta.

Elizabeth J. Rowbotham, pour l'intervenante Sa Majesté la Reine du chef de la Colombie-Britannique.

Robert I. Thornton, *John T. Porter* et *Rachelle F. Moncur*, pour l'intervenante Ernst & Young Inc., en sa qualité de contrôleur.

William A. Amos, *Anastasia M. Lintner*, *Hugh S. Wilkins* et *R. Graham Phoenix*, pour l'intervenant Les Ami(e)s de la Terre Canada.

Version française du jugement des juges Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis rendu par

[1] LA JUGE DESCHAMPS — La question soulevée dans le présent pourvoi est de savoir si des ordonnances d'un organisme administratif relatives à des travaux de décontamination peuvent être traitées comme des réclamations pécuniaires aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »).

[2] Un organisme administratif peut être appelé à intervenir dans le cadre de procédures de réorganisation lorsqu'il prononce une ordonnance intimant au débiteur de se conformer à une règle prescrite par la loi. En principe, une réorganisation ne permet pas à une personne d'ignorer ses obligations légales. Par ailleurs, en certaines circonstances, une ordonnance valable et exécutoire sera assujettie

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makes an environmental order that explicitly asserts a monetary claim.

[3] In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the *CCAA* if the order does not require the debtor to make a payment. I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

[4] The case at bar concerns contamination that occurred, prior to the *CCAA* proceedings, on property that is largely no longer under the debtor's possession and control. The *CCAA* court found on the facts of this case that the orders issued by Her Majesty the Queen in right of the Province of Newfoundland and Labrador ("Province") were simply a first step towards remediating the contaminated property and asserting a claim for the resulting costs. In the words of the *CCAA* court, "the intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to

à un arrangement conclu en vertu de la *LACC*. C'est le cas notamment lorsqu'un organisme administratif prononce une ordonnance environnementale qui est explicitement formulée en termes pécuniaires.

[3] En d'autres circonstances, il est plus difficile de savoir si une ordonnance peut être traitée comme une réclamation pécuniaire. L'appelante et certains des intervenants affirment qu'une ordonnance émise par un organisme de protection de l'environnement ne constitue pas une réclamation au sens de la *LACC* si elle n'exige pas du débiteur qu'il lui paye un montant d'argent. Je conviens que les ordonnances des organismes administratifs ne constituent pas toutes des réclamations pécuniaires, et donc des réclamations prouvables dans le cadre de procédures d'insolvabilité, mais certaines peuvent l'être en dépit du fait qu'elles ne sont pas quantifiées dès le début des procédures. En matière environnementale, le tribunal chargé de l'application de la *LACC* doit déterminer s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers l'organisme administratif qui a prononcé l'ordonnance. En pareil cas, la question pertinente ne se résume pas à déterminer si l'organisme a formellement exercé son pouvoir de réclamer une dette. Lorsque le tribunal évalue une réclamation (ou une ordonnance) il ne se limite pas à un examen de sa forme. Si l'ordonnance n'est pas formulée en termes pécuniaires, le tribunal doit déterminer, en fonction des faits en cause et du cadre législatif applicable, si elle constitue une réclamation qui sera assujettie au processus de réclamation.

[4] Le présent pourvoi a trait à des dommages environnementaux survenus avant que les procédures sous le régime de la *LACC* ne soient engagées, des dommages causés à des terrains qui, en majeure partie, ne sont plus en la possession du débiteur ni sous son contrôle. Le tribunal de première instance a conclu, selon les faits en l'espèce, que les ordonnances émises par Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador (« province ») ne constituaient que la première étape en vue de restaurer les sites contaminés et de réclamer les coûts engagés. Comme l'a exprimé le juge de

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recover amounts of money to be eventually used for the remediation of the properties in question" (2010 QCCS 1261, 68 C.B.R. (5th) 1, at para. 211). As a result, the *CCAA* court found that the orders were clearly monetary in nature. I see no error of law and no reason to interfere with this finding of fact. I would dismiss the appeal with costs.

I. Facts and Procedural History

[5] For over 100 years, AbitibiBowater Inc. and its affiliated or predecessor companies (together, "Abitibi") were involved in industrial activity in Newfoundland and Labrador. In 2008, Abitibi announced the closure of a mill that was its last operation in that province.

[6] Within two weeks of the announcement, the Province passed the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 ("*Abitibi Act*"), which immediately transferred most of Abitibi's property in Newfoundland and Labrador to the Province and denied Abitibi any legal remedy for this expropriation.

[7] The closure of its mill in Newfoundland and Labrador was one of many decisions Abitibi made in a period of general financial distress affecting its activities both in the United States and in Canada. It filed for insolvency protection in the United States on April 16, 2009. It also sought a stay of proceedings under the *CCAA* in the Superior Court of Quebec, as its Canadian head office was located in Montréal. The *CCAA* stay was ordered on April 17, 2009.

[8] In the same month, Abitibi also filed a notice of intent to submit a claim to arbitration under NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*,

première instance, [TRADUCTION] « les ordonnances avaient pour effet attendu, pratique et réaliste d'établir le fondement d'une réclamation permettant à la province de récupérer des sommes d'argent qui seraient utilisées pour procéder aux travaux de décontamination » (2010 QCCS 1261, 68 C.B.R. (5th) 1, par. 211). Par conséquent, pour le tribunal, les ordonnances étaient clairement de nature pécuniaire. Je ne vois aucune erreur de droit ni aucune raison de modifier ces conclusions de fait. Je suis d'avis de rejeter le pourvoi avec dépens.

I. Faits et historique judiciaire

[5] Pendant plus d'une centaine d'années, AbitibiBowater Inc., et ses auteurs ou sociétés filiales (ensemble, « Abitibi ») ont poursuivi des activités industrielles à Terre-Neuve-et-Labrador. En 2008, Abitibi a annoncé la fermeture de la dernière des scieries qu'elle exploitait dans cette province.

[6] Dans les deux semaines qui ont suivi cette annonce, la province a adopté l'*Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, ch. A-1.01 (« *Abitibi Act* »), qui transférait immédiatement à la province la plus grande partie des biens d'Abitibi situés à Terre-Neuve-et-Labrador et privait la société de tous recours judiciaires en relation avec cette expropriation.

[7] La fermeture de sa scierie à Terre-Neuve-et-Labrador est l'une des nombreuses décisions prises par Abitibi dans une période où de grandes difficultés financières touchaient ses activités au Canada et aux États-Unis. Le 16 avril 2009, elle a présenté une demande de protection contre l'insolvabilité aux États-Unis. Elle a également demandé à la Cour supérieure du Québec, à Montréal, où elle a son siège social au Canada, une suspension des procédures en vertu de la *LACC*. La suspension a été ordonnée le 17 avril 2009.

[8] Au cours du même mois, Abitibi a aussi déposé un avis d'intention de soumettre une plainte à l'arbitrage en vertu de l'ALENA (*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis d'Amérique et le gouvernement des États-Unis du Mexique*,

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Can. T.S. 1994 No. 2) for losses resulting from the *Abitibi Act*, which, according to Abitibi, exceeded $300 million.

[9] On November 12, 2009, the Province's Minister of Environment and Conservation ("Minister") issued five orders (the "*EPA* Orders") under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). The *EPA* Orders required Abitibi to submit remediation action plans to the Minister for five industrial sites, three of which had been expropriated, and to complete the approved remediation actions. The *CCAA* judge estimated the cost of implementing these plans to be from "the mid-to-high eight figures" to "several times higher" (para. 81).

[10] On the day it issued the *EPA* Orders, the Province brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to Abitibi's proposed reorganization did not bar the Province from enforcing the *EPA* Orders. The Province argued — and still argues — that non-monetary statutory obligations are not "claims" under the *CCAA* and hence cannot be stayed and be subject to a claims procedure order. It further submits that Parliament lacks the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that are validly made in the exercise of a provincial power.

[11] Abitibi contested the motion and sought a declaration that the *EPA* Orders were stayed and that they were subject to the claims procedure order. It argued that the *EPA* Orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order.

R.T. Can. 1994 nº 2) relativement à des pertes découlant de l'application de l'*Abitibi Act*, lesquelles totalisaient, selon Abitibi, une somme supérieure à 300 millions de dollars.

[9] Le 12 novembre 2009, le ministre provincial de l'Environnement et de la Conservation (« ministre ») a prononcé, en vertu de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2 (« *EPA* »), cinq ordonnances (les « ordonnances *EPA* ») contraignant Abitibi à présenter au ministre des plans de restauration pour cinq sites industriels, dont trois avaient été expropriés, et à réaliser les plans de restauration approuvés. Le juge chargé de l'instance instituée sous le régime de la *LACC* a évalué les coûts de la mise en œuvre de ces plans à une somme se situant [TRADUCTION] « entre cinquante et cent millions de dollars », ou « plusieurs fois plus élevée » (par. 81).

[10] Le jour même où elle émettait les ordonnances *EPA*, la province a demandé par requête un jugement déclarant qu'une ordonnance relative à la procédure de réclamations rendue aux termes de la *LACC* dans le cadre de la réorganisation proposée d'Abitibi n'empêchait pas la province d'exécuter les ordonnances *EPA*. La province a soutenu — et soutient toujours — que des obligations légales de nature non pécuniaire ne constituent pas des « réclamations » au sens de la *LACC* et que leur exécution ne peut donc être suspendue ni être assujettie à une ordonnance relative à la procédure de réclamations. Elle fait de plus valoir que le pouvoir du Parlement de légiférer en matière de faillite et d'insolvabilité ne lui confère pas la compétence constitutionnelle pour suspendre l'application des ordonnances prononcées dans l'exercice valide de pouvoirs provinciaux.

[11] Abitibi a contesté la requête et a demandé un jugement déclarant que les ordonnances *EPA* avaient été suspendues et qu'elles étaient assujetties à l'ordonnance relative à la procédure de réclamations. Abitibi a soutenu que les ordonnances *EPA* étaient de nature pécuniaire et qu'elles étaient donc visées par la définition du terme « réclamation » utilisé dans l'ordonnance relative à la procédure de réclamations.

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[12] Gascon J. of the Quebec Superior Court, sitting as a *CCAA* court, dismissed the Province's motion. He found that he had the authority to characterize the orders as "claims" if the underlying regulatory obligations "remain[ed], in a particular fact pattern, truly financial and monetary in nature" (para. 148). He declared that the *EPA* Orders were stayed by the initial stay order and were not subject to the exception found in that order. He also declared that the filing by the Province of any claim based on the *EPA* Orders was subject to the claims procedure order, and reserved to the Province the right to request an extension of time to assert a claim under the claims procedure order and to Abitibi the right to contest such a request.

[13] In the Court of Appeal, Chamberland J.A. denied the Province leave to appeal (2010 QCCA 965, 68 C.B.R. (5th) 57). In his view, the appeal had no reasonable chance of success, because Gascon J. had found as a fact that the *EPA* Orders were financial or monetary in nature. Chamberland J.A. also found that no constitutional issue arose, given that the Superior Court judge had merely characterized the orders in the context of the restructuring process; the judgment did not "'immunise' Abitibi from compliance with the EPA Orders" (para. 33). Finally, he noted that Gascon J. had reserved the Province's right to request an extension of time to file a claim in the *CCAA* process.

II. Positions of the Parties

[14] The Province argues that the *CCAA* court erred in interpreting the relevant *CCAA* provisions in a way that nullified the *EPA*, and that the interpretation is inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity. The Province further submits

[12] Le juge Gascon de la Cour supérieure du Québec, siégeant aux termes de la *LACC*, a rejeté la requête de la province. Il a statué qu'il avait le pouvoir de qualifier les ordonnances de « réclamations » si les obligations légales sous-jacentes [TRADUCTION] « demeur[aient], dans une situation factuelle particulière, de nature véritablement financière et pécuniaire » (par. 148). Il a déclaré que les ordonnances *EPA* avaient été suspendues en vertu de l'ordonnance de suspension initiale et qu'elles n'étaient pas visées par l'exception énoncée dans cette ordonnance. Il a également déclaré que la présentation, par la province, de toute réclamation fondée sur les ordonnances *EPA* était assujettie à l'ordonnance relative à la procédure de réclamations; il a réservé à la province le droit de demander par requête une prorogation du délai pour présenter une réclamation en vertu de la procédure de réclamations et a confirmé le droit d'Abitibi de contester une telle requête.

[13] En Cour d'appel, le juge Chamberland a rejeté la demande d'autorisation d'appel présentée par la province (2010 QCCA 965, 68 C.B.R. (5th) 57). À son avis, l'appel n'avait aucune chance raisonnable de succès parce que le juge Gascon avait conclu, comme question de faits, que les ordonnances *EPA* étaient de nature financière ou pécuniaire. Le juge Chamberland a également estimé qu'aucune question constitutionnelle ne se posait, car le juge de la Cour supérieure n'avait fait que qualifier les ordonnances dans le contexte du processus de restructuration; le jugement ne [TRADUCTION] « "soustrayait" pas Abitibi à son obligation de se conformer aux ordonnances *EPA* » (par. 33). Enfin, il a fait remarquer que le juge Gascon avait réservé à la province le droit de demander la prorogation de délai pour produire une réclamation en vertu de la *LACC*.

II. Thèses des parties

[14] La province soutient que le tribunal de première instance a commis l'erreur d'interpréter les dispositions applicables de la *LACC* de façon à invalider l'*EPA* et que cette interprétation est incompatible tant avec la doctrine des pouvoirs accessoires qu'avec celle de la protection des compétences

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that, in any event, the *EPA* Orders are not "claims" within the meaning of the *CCAA*. It takes the position that "any plan of compromise and arrangement that Abitibi might submit for court approval must make provision for compliance with the *EPA* Orders" (A.F., at para. 32).

[15] Abitibi contends that the factual record does not provide a basis for applying the constitutional doctrines. It relies on the *CCAA* court's findings of fact, particularly the finding that the Province's intent was to establish the basis for a monetary claim. Abitibi submits that the true issue is whether a province that has a monetary claim against an insolvent company can obtain a preference against other unsecured creditors by exercising its regulatory power.

III. Constitutional Questions

[16] At the Province's request, the Chief Justice stated the following constitutional questions:

1. Is the definition of "claim" in s. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this definition includes statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

2. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to bar or extinguish statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

3. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to

exclusives. La province fait de plus valoir que, de toute façon, les ordonnances *EPA* ne constituent pas des « réclamations » au sens de la *LACC*. Elle soutient que [TRADUCTION] « tout plan de transaction et d'arrangement qu'Abitibi pourrait soumettre à l'approbation du tribunal doit prévoir qu'[Abitibi] doit se conformer aux ordonnances *EPA* » (m.a., par. 32).

[15] Abitibi soutient que l'application des doctrines constitutionnelles ne trouve aucun fondement dans les faits du dossier. Elle appuie sa position sur les conclusions de fait tirées par le tribunal de première instance, plus particulièrement celles où le tribunal conclut que l'intention de la province était d'établir le fondement d'une réclamation pécuniaire. Abitibi plaide que la véritable question est de savoir si, par l'exercice de son pouvoir de réglementation, une province ayant une réclamation pécuniaire à faire valoir contre une entreprise insolvable peut obtenir une préférence à l'encontre d'autres créanciers non garantis.

III. Questions constitutionnelles

[16] À la demande de la province, la Juge en chef a formulé les questions constitutionnelles suivantes :

1. La définition d'une « réclamation » énoncée au par. 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-elle les pouvoirs du Parlement du Canada ou est-elle constitutionnellement inapplicable dans la mesure où elle englobe les obligations légales auxquelles le débiteur est assujetti en application de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

2. L'article 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-il les pouvoirs du Parlement du Canada ou est-il constitutionnellement inapplicable dans la mesure où il confère aux tribunaux la compétence pour libérer le débiteur des obligations légales auxquelles il est ou pourrait être assujetti en application de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

3. L'article 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-il les pouvoirs du Parlement du Canada ou est-il constitutionnellement inapplicable dans la mesure

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review the exercise of ministerial discretion under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

[17] I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However, the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 65) (the "2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

[18] Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament. Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process. There is no need to perform a detailed analysis of the pith and substance of the provisions on the assessment of claims in insolvency matters to conclude that the federal legislation governing the characterization of an order as a monetary claim is valid. Because the provisions relate directly to Parliament's jurisdiction,

où il confère aux tribunaux la compétence pour réviser l'exercice du pouvoir discrétionnaire conféré au ministre par l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

[17] Je souligne que la question de savoir si, aux termes de la *LACC*, un tribunal a compétence constitutionnelle pour suspendre l'application d'une ordonnance provinciale qui *ne* constitue *pas* une réclamation pécuniaire ne se pose pas en l'espèce parce que l'ordonnance de suspension en cause ne visait pas ces ordonnances. La question pourrait toutefois se poser dans d'autres affaires. En 2007, par l'ajout du par. 11.1(3) de la *LACC*, le législateur fédéral a explicitement conféré aux tribunaux compétents aux termes de la *LACC* le pouvoir de suspendre l'application des ordonnances d'un organisme administratif qui ne constituent pas des réclamations pécuniaires (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)*, L.C. 2007, ch. 36, art. 65) (les « modifications de 2007 »). Ainsi, les tribunaux auront l'occasion d'analyser la question soulevée par la province lorsque le contexte factuel s'y prêtera. La seule question constitutionnelle qui requiert une réponse en l'espèce a trait à la compétence d'un tribunal, aux termes de la *LACC*, de déterminer si une ordonnance environnementale qui n'est pas formulée en termes pécuniaires constitue, en fait, une réclamation pécuniaire.

[18] Le traitement équitable et ordonné des réclamations présentées par des créanciers contre un débiteur insolvable se situe au cœur même de la législation en matière d'insolvabilité, un domaine de compétence attribué au législateur fédéral. L'établissement de règles relatives à l'évaluation des réclamations des créanciers, comme celle permettant de déterminer si un créancier fait valoir une réclamation pécuniaire, concerne directement le traitement équitable et ordonné des créanciers dans le cadre d'un processus établi en matière d'insolvabilité. Il n'est pas nécessaire d'analyser en détail le caractère véritable des dispositions régissant l'évaluation des réclamations en matière d'insolvabilité pour conclure à la validité du texte législatif fédéral

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the ancillary powers doctrine is not relevant to this case. I also find that the interjurisdictional immunity doctrine is not applicable. A finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process.

[19] What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process. Environmental claims do not have a higher priority than is provided for in the *CCAA*. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453). Environmental claims are given a specific, and limited, priority under the *CCAA*. To exempt orders which are in fact monetary claims from the *CCAA* proceedings would amount to conferring upon provinces a priority higher than the one provided for in the *CCAA*.

IV. Claims Under the *CCAA*

[20] Several provisions of the *CCAA* have been amended since Abitibi filed for insolvency

permettant d'établir qu'une ordonnance constitue une réclamation pécuniaire. L'application de la doctrine des pouvoirs accessoires n'est pas pertinente en l'espèce car les dispositions en cause sont directement reliées à la compétence du législateur fédéral. J'estime également que la doctrine de la protection des compétences exclusives ne s'applique pas en l'espèce. Une conclusion selon laquelle un créancier œuvrant dans le domaine de l'environnement détient une réclamation pécuniaire ne modifie en rien les activités de ce créancier. La réclamation de ce dernier est simplement assujettie au processus d'insolvabilité.

[19] Ce que soutient en fait la province, c'est que les tribunaux devraient examiner la forme des ordonnances plutôt que leur substance. Je ne vois aucune raison empêchant l'examen du choix par la province d'un type d'ordonnance donnée afin de déterminer si la forme choisie concorde avec l'objectif véritable qui se dégage des gestes qu'elle a posés. Si ces gestes indiquent qu'elle fait effectivement valoir une réclamation prouvable au sens de la législation fédérale, alors cette réclamation peut être assujettie au processus d'insolvabilité. Les réclamations en matière d'environnement ne bénéficient pas d'un rang supérieur à celui prévu par les dispositions de la *LACC*. Privilégier l'examen de la substance d'une ordonnance plutôt que de sa forme permet d'éviter qu'un organisme administratif obtienne de façon artificielle une priorité de rang supérieure à celle que la législation fédérale attribue à la réclamation. Notre Cour a depuis longtemps reconnu qu'une province ne pouvait perturber les priorités établies par le régime fédéral d'insolvabilité (*Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453). La *LACC* établit une priorité précise et limitée à l'égard des réclamations en matière environnementale. Le fait de soustraire aux procédures d'insolvabilité les ordonnances qui sont en fait des réclamations pécuniaires équivaudrait à accorder aux provinces une priorité d'un rang supérieur à celui prévu par la *LACC*.

IV. Réclamations sous le régime de la *LACC*

[20] Plusieurs dispositions de la *LACC* ont été modifiées depuis qu'Abitibi a présenté une demande

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protection. Except where otherwise indicated, the provisions I refer to are those that were in force when the stay was ordered.

[21] One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

[22] Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

12. (1) [Definition of "claim"] For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act.*

(2) [Determination of amount of claim] For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(*a*) the amount of an unsecured claim shall be the amount

. . .

(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 shall be determined by the court on summary application by the company or by the creditor; . . .

de protection contre l'insolvabilité. À moins d'indication contraire de ma part, les dispositions que je cite sont celles qui étaient en vigueur lorsque la suspension des procédures a été ordonnée.

[21] Une des caractéristiques principales du régime créé par la *LACC* est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis.

[22] L'article 12 de la *LACC* énonce les règles de base pour déterminer si une ordonnance constitue une réclamation pouvant être assujettie au processus applicable en matière d'insolvabilité :

12. (1) [Définition de « réclamation »] Pour l'application de la présente loi, « réclamation » s'entend de toute dette, tout engagement ou toute obligation d'un genre quelconque qui, s'il n'était pas garanti, constituerait une dette prouvable en matière de faillite au sens de la *Loi sur la faillite et l'insolvabilité.*

(2) [Détermination du montant de la réclamation] Pour l'application de la présente loi, le montant représenté par une réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :

a) le montant d'une réclamation non garantie est le montant :

. . .

(iii) dans le cas de toute autre compagnie, dont la preuve pourrait être établie en vertu de la *Loi sur la faillite et l'insolvabilité*, mais si le montant ainsi prouvable n'est pas admis par la compagnie, ce montant est déterminé par le tribunal sur demande sommaire par la compagnie ou le créancier;

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[23] Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

[24] This definition is completed by s. 121(1) of the *BIA*:

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.

[25] Sections 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

121. . . .

(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 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.

[26] These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

[23] L'article 12 de la *LACC* renvoie aux règles de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). L'article 2 de la *LFI* définit ainsi une réclamation prouvable en matière de faillite :

« réclamation prouvable en matière de faillite » ou « réclamation prouvable » Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité de la présente loi par un créancier.

[24] Cette définition est complétée par le par. 121(1) de la *LFI* :

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

[25] Les paragraphes 121(2) et 135(1.1) de la *LFI* donnent des indications additionnelles lorsqu'il s'agit de déterminer si une ordonnance constitue une réclamation prouvable :

121. . . .

(2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

135. . . .

(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.

[26] Ces dispositions font ressortir trois conditions pertinentes à la présente affaire. Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. Je vais examiner chacune de ces conditions à tour de rôle.

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[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. 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.

[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". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

11.8 . . .

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

[29] The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases,

[27] La définition de réclamation prouvable établie par la *LFI* et incorporée par renvoi à la *LACC* exige qu'une personne ait qualité de créancier. Les lois régissant l'environnement pourvoient généralement à la création d'un organisme chargé de voir au respect des obligations qui y sont prévues. La plupart des organismes administratifs peuvent agir à titre de créanciers en relation avec les obligations pécuniaires ou non pécuniaires imposées par ces lois. À cette première étape qui consiste à déterminer si un organisme administratif est un créancier, il n'est pas encore pertinent de décider si l'obligation peut être formulée en termes pécuniaires. Cette question sera abordée à un stade ultérieur. À cette étape, la seule question à trancher est de savoir si l'organisme administratif a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi. Lorsqu'il le fait, il s'identifie alors comme créancier et la condition de cette étape est espectée.

[28] L'examen de la seconde condition repose sur le par. 121(1) de la *LFI* qui impose que la réclamation ait pris naissance dans un délai donné. Celle-ci doit se fonder sur une obligation « contractée antérieurement à cette date [la date à laquelle le failli devient failli] ». Comme il est souvent difficile d'établir la date à laquelle un dommage lié à l'environnement est survenu, le par. 11.8(9) de la *LACC* prévoit une certaine flexibilité pour ce qui est des réclamations en matière d'environnement :

11.8 . . .

(9) La réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un bien immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

[29] La réclamation du créancier sera exemptée de l'exigence découlant de la procédure unique si l'obligation correspondante du débiteur n'a pas pris naissance dans le délai fixé pour que la réclamation soit incluse dans le processus d'insolvabilité. À titre d'exemple, cela pourrait s'appliquer aux obligations que la loi impose à un débiteur concernant

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the damage continues to be sustained after the reorganization has been completed.

[30] With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

[31] However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update" (1998), 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

[32] Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Evidence of the Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority (s. 11.8(8) *CCAA*). Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably.

ses activités polluantes qui se poursuivent après la réorganisation, parce qu'en pareilles circonstances, des dommages sont encore causés après que la réorganisation ait été complétée.

[30] En ce qui concerne la troisième condition, soit qu'il doit être possible d'attribuer à l'obligation une valeur pécuniaire, la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes. Je souligne que lorsqu'un organisme administratif réclame une somme qui est due à la date pertinente, il formule ainsi son ordonnance en termes pécuniaires. Le tribunal n'a alors aucune détermination à faire à cette étape car ce qui est réclamé est une « dette » et est, par conséquent, clairement visé par la définition d'une « réclamation » prévue au par. 12(1) de la *LACC*.

[31] Toutefois, parce qu'elles sont utilisées pour traiter divers enjeux environnementaux, les ordonnances peuvent se présenter sous plusieurs formes et peuvent viser notamment la cessation ou le contrôle d'une activité, la prévention et la décontamination (D. Saxe, « Trustees' and Receivers' Environnmental Liability Update » (1998), 49 C.B.R. (3d) 138, p. 141). Lorsqu'ils analysent une ordonnance qui n'est pas formulée en des termes pécuniaires, les tribunaux doivent en examiner la substance et appliquer les règles régissant l'évaluation des réclamations.

[32] Le législateur fédéral reconnaît que les organismes administratifs doivent à l'occasion exécuter des travaux de décontamination (voir Chambre des communes, *Témoignages du Comité permanent de l'industrie*, n^{o} 16, 2^{e} sess., 35^{e} lég., 11 juin 1996). En pareil cas, la réclamation relative aux frais de décontamination est assujettie à la procédure de réclamations en matière d'insolvabilité mais elle est garantie par une charge réelle grevant l'immeuble contaminé et certains immeubles connexes et bénéficie d'un rang prioritaire (par. 11.8(8) *LACC*). Ainsi, le législateur a établi un équilibre entre l'intérêt du public à l'égard de l'application de la réglementation environnementale et les intérêts des tiers créanciers qui doivent être traités de façon équitable.

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[33] If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) of the *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

[33] Si le législateur fédéral avait eu l'intention d'obliger le débiteur à supporter dans tous les cas tous les coûts des travaux de décontamination, il aurait accordé à l'État une priorité applicable à la totalité des actifs du débiteur. Compte tenu de l'historique des dispositions législatives et des objectifs du processus de réorganisation, le fait que la priorité de l'État aux termes du par. 11.8(8) de la *LACC* soit limitée au bien contaminé et à certains biens liés m'amène à conclure qu'une exemption à l'égard des ordonnances environnementales serait incompatible avec la législation en matière d'insolvabilité. Aussi respectueux soient-ils des mesures prises par les organismes administratifs, les tribunaux sont tenus d'appliquer les règles générales.

[34] Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

[34] Contrairement à l'approche qui prévaut dans le contexte des procédures régies par la common law ou le droit civil, il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu (en common law, voir *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79, par. 17-18; en droit civil, voir les art. 1497, 1508 et 1513 du *Code civil du Québec*, L.Q. 1991, ch. 64). Ainsi, la définition générale de « réclamation » de la *LFI* englobe des réclamations éventuelles et *futures* qui seraient inexécutoires en common law ou en droit civil. En ce qui concerne les réclamations non liquidées, le tribunal chargé de l'application de la *LACC* a le même pouvoir d'évaluer leur montant qu'un tribunal saisi d'une affaire sous le régime de la common law ou du droit civil.

[35] The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to

[35] C'est pour assurer l'équité entre les créanciers ainsi que, pour le débiteur, le caractère définitif de la procédure d'insolvabilité que la *LFI* et la *LACC* englobent un large éventail de réclamations. Dans le cadre de la liquidation d'une société, il est plus équitable de permettre au plus grand nombre possible de créanciers de participer au processus et de se partager le produit de la liquidation. Cela permet d'inclure les créanciers dont les réclamations ne sont pas venues à échéance lorsque le débiteur corporatif devient failli, et ainsi éviter que, ayant cessé ses activités, le débiteur ne puisse pas satisfaire à un jugement rendu en leur faveur. L'approche est quelque peu différente dans

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ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

le contexte d'une proposition concordataire présentée par une société ou d'une réorganisation. Dans ces cas, l'objectif que sous-tend une interprétation large est non seulement de garantir l'équité entre créanciers, mais aussi de permettre au débiteur de prendre un nouveau départ dans les meilleures conditions possibles à la suite de l'approbation d'une proposition ou d'un arrangement.

[36] 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 (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a 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.

[36] Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural (*Confederation Treasury Service Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire afin d'obtenir le remboursement de ses débours. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

[37] The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude

[37] Lorsqu'il détermine si une ordonnance constitue une réclamation prouvable, le tribunal chargé de l'application de la *LACC* doit, dans une certaine mesure, examiner les actes posés par l'organisme administratif. Cet examen se rapproche à certains égards de celui d'un contrôle judiciaire. La différence se situe, toutefois, au niveau de l'objet de l'évaluation que doit faire le tribunal. Son examen ne porte pas sur l'exercice du pouvoir discrétionnaire par l'organisme administratif. Il doit plutôt déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Par exemple, si le débiteur continue d'exercer les activités faisant l'objet de l'intervention de l'organisme administratif, il est fort possible que le tribunal conclue que l'ordonnance ne peut être incorporée au processus d'insolvabilité parce que ces activités et les dommages en découlant se poursuivront après la réorganisation et qu'elles excéderont donc le délai prescrit pour la production d'une

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that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain that the regulatory body will have to perform the work.

[38] Certain indicators can thus be identified from the text and the context of the provisions to guide the *CCAA* court in determining whether an order is a provable claim, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The *CCAA* court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

[39] Having highlighted three requirements for finding a claim to be provable in a *CCAA* process that need to be considered in the case at bar, I must now discuss certain policy arguments raised by the Province and some of the interveners.

[40] These parties argue that treating a regulatory order as a claim in an insolvency proceeding extinguishes the debtor's environmental obligations, thereby undermining the polluter-pay principle discussed by this Court in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24. This objection

réclamation. Par contre, si l'organisme administratif, n'ayant aucune solution réaliste autre que celle d'effectuer lui-même les travaux de décontamination, ne fait que retarder la production d'une réclamation pécuniaire dans le but d'améliorer sa position par rapport à celle des autres créanciers, le tribunal pourrait conclure que cette démarche n'est pas compatible avec le régime d'insolvabilité et décider que l'ordonnance doit être traitée dans le cadre du processus de réclamations. De même, si le débiteur n'exerce aucun contrôle sur le bien et ne dispose pas, ni ne disposera, de façon réaliste, des moyens pour effectuer les travaux de décontamination, le tribunal pourrait conclure de façon suffisamment certaine que l'organisme administratif devra exécuter les travaux.

[38] Il est ainsi possible de discerner, grâce au libellé des dispositions et à leur contexte, certains indicateurs qui permettent de guider le tribunal au moment de déterminer si l'ordonnance constitue une réclamation prouvable, notamment si les activités se poursuivent, si le débiteur exerce un contrôle sur le bien et s'il dispose des moyens de se conformer à l'ordonnance. Il est également possible pour le tribunal de prendre en compte les conséquences qu'entraînerait sur le processus d'insolvabilité le fait d'exiger du débiteur qu'il se conforme à l'ordonnance. Puisque l'analyse qu'il convient de réaliser est fondée sur les faits propres à chaque cas, il n'est pas nécessaire que tous ces indicateurs soient présents, et d'autres peuvent également devenir pertinents.

[39] Après avoir souligné les trois conditions qui permettent en l'espèce de conclure qu'une ordonnance constitue une réclamation prouvable dans le cadre d'un processus régi par la *LACC*, il me faut examiner certains arguments de principe que la province et certains intervenants ont fait valoir.

[40] Ils ont plaidé que le fait d'assimiler une ordonnance d'un organisme administratif à une réclamation dans le cadre de procédure en insolvabilité éteint les obligations environnementales auxquelles le débiteur est tenu, minant par le fait même le principe du pollueur-payeur examiné par notre Cour dans l'arrêt *Cie pétrolière Impériale*

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demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third-party-pay" principle in place of the polluter-pay principle.

[41] Nor does subjecting the orders to the insolvency process amount to issuing a licence to pollute, since insolvency proceedings do not concern the debtor's future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colourful analogy of two American scholars, "Debtors in bankruptcy have — and should have — no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute" (D. G. Baird and T. H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199, at p. 1200).

[42] Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure

ltée c. Québec (Ministre de l'Environnement), 2003 CSC 58, [2003] 2 R.C.S. 624, par. 24. Cet argument démontre une mauvaise compréhension de la nature des procédures en matière d'insolvabilité. Le fait d'assujettir une ordonnance au processus de réclamations n'éteint pas les obligations environnementales qui incombent au débiteur, pas plus que le fait de soumettre à ce processus les réclamations des créanciers n'éteint l'obligation du débiteur de payer ses dettes. Le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. De plus, le respect intégral des ordonnances dont la nature pécuniaire est reconnue transférerait le coût de la décontamination aux tiers créanciers, y compris aux créanciers involontaires, par exemple les créanciers en responsabilité délictuelle ou extra-contractuelle. Dans un contexte d'insolvabilité, la position de la province aurait comme résultat de lui accorder non seulement une super-priorité, mais aussi de reconnaître l'application d'un principe du « tiers-payeur » plutôt que celui du pollueur-payeur.

[41] Par ailleurs, l'assujettissement des ordonnances au processus d'insolvabilité n'autorise pas une personne à polluer, car la procédure en insolvabilité ne touche pas les actes que le débiteur posera dans le futur. Le débiteur réorganisé doit se conformer pour l'avenir à la réglementation environnementale, comme le ferait toute autre personne. Pour citer une analogie haute en couleurs de deux universitaires américains, [TRADUCTION] « [l]es débiteurs en faillite n'ont pas — et ne devraient pas avoir — une autorisation plus étendue de polluer en violation d'une loi qu'ils n'en ont de vendre de la cocaïne » (D. G. Baird et T. H. Jackson, « Comment : *Kovacs* and Toxic Wastes in Bankruptcy » (1984), 36 *Stan. L. Rev.* 1199, p. 1200).

[42] En outre, il arrive que des sociétés exercent des activités comportant des risques. Peu importe les risques en cause, une réorganisation rendue nécessaire par l'insolvabilité de la société peut difficilement être assimilée à un choix délibéré. Lorsque les risques se concrétisent, la quasi-totalité des personnes ayant des intérêts dans la société en

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in order to rid themselves of their environmental liabilities.

[43] And the power to determine whether an order is a provable claim does not mean that the court will necessarily conclude that the order before it will be subject to the *CCAA* process. In fact, the *CCAA* court in the case at bar recognized that orders relating to the environment may or may not be considered provable claims. It stayed only those orders that were monetary in nature.

[44] The Province also argues that courts have in the past held that environmental orders cannot be interpreted as claims when the regulatory body has not yet exercised its power to assert a claim framed in monetary terms. The Province relies in particular on *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), and its progeny. In *Panamericana*, the Alberta Court of Appeal held that a receiver was personally liable for work under a remediation order and that the order was not a claim in insolvency proceedings. The court found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim.

[45] The first answer to the Province's argument is that courts have never shied away from putting substance ahead of form. They can determine whether the order is in substance monetary.

[46] The second answer is that the provisions relating to the assessment of claims, particularly those governing contingent claims, contemplate instances in which the quantum is not yet established when the claims are filed. Whether, in the

supportent les terribles coûts. L'assujettissement des ordonnances à la procédure de réclamations n'équivaut pas à convier les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales.

[43] Et le pouvoir de déterminer si une ordonnance constitue une réclamation prouvable ne signifie pas que le tribunal jugera nécessairement que l'ordonnance sera soumise au processus de réorganisation. En fait, le tribunal en l'espèce a reconnu que les ordonnances environnementales pouvaient être ou ne pas être considérées comme des réclamations prouvables. Il n'a rendu une ordonnance de suspension qu'à l'égard des ordonnances de nature pécuniaire.

[44] La province plaide aussi que selon la jurisprudence, les ordonnances environnementales ne peuvent pas être assimilées à des réclamations lorsque l'organisme administratif n'a pas encore exercé son pouvoir de faire valoir une réclamation formulée en termes pécuniaires. La province s'appuie particulièrement sur l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), et les jugements rendus dans sa foulée. Dans l'arrêt *Panamericana*, la Cour d'appel de l'Alberta a tenu le séquestre personnellement responsable de l'exécution des travaux ordonnés et a statué que l'ordonnance ne constituait pas une réclamation visée par les procédures en insolvabilité. La cour a conclu que l'obligation d'entreprendre les travaux de décontamination est due au public en général jusqu'à ce que l'organisme administratif exerce son pouvoir de faire valoir une réclamation pécuniaire.

[45] La première réponse à cet argument de la province est que les tribunaux n'ont jamais hésité à privilégier le fond à la forme. Les tribunaux peuvent déterminer si, en substance, l'ordonnance est de nature pécuniaire.

[46] La seconde réponse est que les dispositions concernant l'évaluation des réclamations, en particulier celles régissant les réclamations éventuelles, n'exigent pas que la valeur pécuniaire soit établie au moment où elles sont produites. Un

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regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (new ed. 2001); D. N. MacCormick, "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (1977), 189). However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged. Rather, the question is whether it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim.

[47] The third answer to the Province's argument is that insolvency legislation has evolved considerably over the two decades since *Panamericana*. At the time of *Panamericana*, none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in *Panamericana* (*An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9, amending s. 14 of the *BIA*). The 1997 amendments provided additional protection to trustees and monitors (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12). The 2007 amendments made it clear that a *CCAA* court has the power to determine that a regulatory order may be a claim and also provided criteria for staying regulatory orders (s. 65, amending the *CCAA* to include the current version of s. 11.1). The purpose of these amendments was to balance the creditor's

certain nombre d'auteurs ont examiné la question de savoir si, dans un contexte réglementaire, l'existence d'une obligation implique toujours en corrélation celle d'un droit. Diverses théories relatives aux droits ont été avancées (voir W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (nouvelle éd. 2001); D. N. MacCormick, « Rights in Legislation », dans P. M. S. Hacker et J. Raz, dir., *Law, Morality, and Society : Essays in Honour of H. L. A. Hart* (1977), 189). Toutefois, comme en l'espèce la province a prononcé les ordonnances, elle serait reconnue comme créancière d'un droit en vertu de l'une ou l'autre de ces théories. Par conséquent, malgré l'intérêt que peut susciter ce débat, il n'est pas nécessaire de déterminer la théorie qui prévaut. La véritable question n'est pas de savoir à qui est due l'obligation, puisque la loi y répond en indiquant qui peut en exiger l'exécution. La question est plutôt de savoir s'il est suffisamment certain que l'organisme administratif effectuera les travaux de décontamination et pourra ainsi faire valoir une réclamation pécuniaire.

[47] La troisième réponse à l'argument soulevé par la province est que la législation en matière d'insolvabilité a considérablement évolué au cours des deux décennies écoulées depuis l'arrêt *Panamericana*. À l'époque où l'arrêt *Panamericana* a été prononcé, aucune des dispositions concernant les obligations liées à l'environnement n'était en vigueur. Certaines des dispositions ont été adoptées très peu de temps après cette décision et, semble-t-il, en réponse à celle-ci. En 1992, le législateur a permis aux syndics d'échapper à la responsabilité même que l'arrêt *Panamericana* avait retenue contre le séquestre (*Loi modifiant la Loi sur la faillite et la Loi de l'impôt sur le revenu en conséquence*, L.C. 1992, ch. 27, art. 9, modifiant l'art. 14 de la *LFI*). Une protection additionnelle a été accordée au syndic et au contrôleur avec les modifications adoptées en 1997 (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu*, L.C. 1997, ch. 12). Les modifications apportées en 2007 ont précisé que le tribunal chargé d'appliquer la *LACC* a

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need for fairness against the debtor's need to make a fresh start.

[48] Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings.

V. Application

[49] I now turn to the application of the principles discussed above to the case at bar. This case does not turn on whether the Province is the creditor of an obligation or whether damage had occurred as of the relevant date. Those requirements are easily satisfied, since the Province had identified itself as a creditor by resorting to *EPA* enforcement mechanisms and since the damage had occurred before the time of the *CCAA* proceedings. Rather, the issue centres on the third requirement: that the orders meet the criterion for admission as a pecuniary claim. The claim was contingent to the extent that the Province had not yet formally exercised its power to ask for the payment of money. The question is whether it was sufficiently certain that the orders would eventually result in a monetary claim. To the *CCAA* judge, there was no doubt that the answer was yes.

le pouvoir de décider qu'une ordonnance d'un organisme administratif peut constituer une réclamation; ces modifications ont de plus établi des critères applicables à la suspension de ces ordonnances (art. 65, modifiant la *LACC* par l'ajout de l'art. 11.1). Ces modifications visaient à établir un équilibre entre le besoin de traiter les créanciers de façon équitable et celui de permettre au débiteur de prendre un nouveau départ.

[48] La détermination qu'une ordonnance d'un organisme administratif constitue une réclamation éventuelle doit être fondée sur les faits de chaque affaire. La législation en matière d'environnement accorde généralement à un organisme administratif un pouvoir discrétionnaire de décider de la meilleure façon d'assurer le respect des obligations découlant de la réglementation. Quoique le tribunal doive se garder de s'ingérer dans l'exercice du pouvoir discrétionnaire de ces organismes, les mesures qu'ils prennent peuvent néanmoins faire l'objet d'un examen dans le cadre de procédures engagées sous le régime fédéral de l'insolvabilité.

V. Application

[49] J'aborde maintenant l'application des principes énoncés ci-dessus à l'affaire dont notre Cour est saisie. En l'espèce, le débat n'est pas centré sur la question de savoir si la province est créancière d'une obligation ou si des dommages étaient survenus à la date pertinente. Il est facile de répondre à ces questions étant donné que la province s'est elle-même présentée comme créancière en ayant recours aux mécanismes d'application de l'*EPA* et que les dommages sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Le débat porte plutôt sur la troisième condition, celle qui consiste à savoir si les ordonnances satisfont au critère d'admissibilité à titre de réclamation pécuniaire. La réclamation était éventuelle dans la mesure où la province n'avait pas formellement exercé son pouvoir de demander paiement d'une somme d'argent. La question est de savoir s'il était suffisamment certain que l'ordonnance mènerait éventuellement à la production d'une réclamation pécuniaire. Pour le juge de première instance, une réponse affirmative ne faisait pas de doute.

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[50] The Province's exercise of its legislative powers in enacting the *Abitibi Act* created a unique set of facts that led to the orders being issued. The seizure of Abitibi's assets by the Province, the cancellation of all outstanding water and hydroelectric contracts between Abitibi and the Province, the cancellation of pending legal proceedings by Abitibi in which it sought the reimbursement of several hundreds of thousands of dollars, and the denial of any compensation for the seized assets and of legal redress are inescapable background facts in the judge's review of the *EPA* Orders.

[51] The *CCAA* judge did not elaborate on whether it was sufficiently certain that the Minister would perform the remediation work and therefore make a monetary claim. However, most of his findings clearly rest on a positive answer to this question. For example, his finding that "[i]n all likelihood, the pith and substance of the EPA Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAFTA claims for compensation" (para. 178), is necessarily based on the premise that the Province would most likely perform the remediation work. Indeed, since monetary claims must, both at common law and in civil law, be mutual for set-off or compensation to operate, the Province had to have incurred costs in doing the work in order to have a claim that could be set off against Abitibi's claims.

[52] That the judge relied on an implicit finding that the Province would most likely perform the work and make a claim to offset its costs is also shown by the confirmation he found in the declaration by the Premier that the Province was attempting to assess the cost of doing remediation work Abitibi had allegedly left undone and that in the Province's assessment, "at this point in

[50] En adoptant l'*Abitibi Act*, ayant ainsi recours à son pouvoir législatif, la province mettait en place un contexte factuel unique qui menait à l'émission des ordonnances. La saisie par la province des actifs d'Abitibi, l'annulation de tous les contrats d'approvisionnement en eau et d'hydroélectricité conclus entre Abitibi et la province, l'annulation des recours intentés par Abitibi pour obtenir le remboursement de plusieurs centaines de milliers de dollars et le refus de toute indemnité et de tous recours en justice à l'égard des actifs saisis tissent un contexte factuel dont le juge ne peut faire abstraction dans son examen des ordonnances *EPA*.

[51] Le juge de première instance n'a pas fait une analyse distincte du critère suivant lequel le tribunal doit être suffisamment certain que le ministre exécuterait les travaux de décontamination et ferait, par conséquent, valoir une réclamation pécuniaire. Cependant, la plupart de ses conclusions reposent manifestement sur un constat positif à cet égard. Par exemple, le constat que [TRADUCTION] « [s]elon toute vraisemblance, le caractère véritable des ordonnances *EPA* [consiste] pour la province à tenter de jeter les bases de réclamations pécuniaires contre Abitibi, dans le but de les utiliser tout probablement à titre compensatoire au regard des demandes d'indemnisation d'Abitibi fondées sur l'ALÉNA » (par. 178) repose nécessairement sur la prémisse que la province allait fort probablement exécuter les travaux de décontamination. En effet, puisque les réclamations pécuniaires, en common law comme en droit civil, doivent être réciproques pour opérer compensation, la province devait avoir engagé des dépenses en exécutant des travaux, ce qui établissait la base de la réclamation qu'elle ferait valoir pour compenser celle d'Abitibi.

[52] Un autre fait illustre que le juge de première instance a implicitement conclu que la province allait fort probablement exécuter les travaux et produire une réclamation pour compenser ses coûts est qu'il en a trouvé une confirmation dans la déclaration du premier ministre selon laquelle la province tentait d'évaluer ce qu'il en coûterait pour réaliser les travaux de décontamination qu'Abitibi n'aurait

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time, there would not be a net payment to Abitibi" (para. 181).

[53] The *CCAA* judge's reasons not only rest on an implicit finding that the Province would most likely perform the work, but refer explicitly to facts that support this finding. To reach his conclusion that the *EPA* Orders were monetary in nature, the *CCAA* judge relied on the fact that Abitibi's operations were funded through debtor-in-possession financing and its access to funds was limited to ongoing operations. Given that the *EPA* Orders targeted sites that were, for the most part, no longer in Abitibi's possession, this meant that Abitibi had no means to perform the remediation work during the reorganization process.

[54] In addition, because Abitibi lacked funds and no longer controlled the properties, the timetable set by the Province in the *EPA* Orders suggested that the Province never truly intended that Abitibi was to perform the remediation work required by the orders. The timetable was also unrealistic. For example, the orders were issued on November 12, 2009 and set a deadline of January 15, 2010 to perform a particular act, but the evidence revealed that compliance with this requirement would have taken close to a year.

[55] Furthermore, the judge relied on the fact that Abitibi was not simply designated a "person responsible" under the *EPA*, but was intentionally targeted by the Province. The finding that the Province had targeted Abitibi was drawn not only from the timing of the *EPA* Orders, but also from the fact that Abitibi was the only person designated in them, whereas others also appeared to be responsible — in some cases, primarily responsible — for the contamination. For example, Abitibi was ordered to do remediation work on a site it had surrendered more than 50 years before the orders were issued; the expert report upon which the orders were based made no distinction between Abitibi's activities on the property, on which its source of power had been horse power, and subsequent activities by others who had used fuel-powered vehicles

pas exécutés, et que selon l'estimation de la province, [TRADUCTION] « à l'heure actuelle, aucun paiement net ne serait versé à Abitibi » (par. 181).

[53] Les motifs du juge de première instance reposent non seulement sur une constatation implicite que la province exécuterait fort probablement les travaux, mais ils renvoient expressément aux faits qui appuient cette constatation. Pour conclure que les ordonnances *EPA* étaient de nature pécuniaire, le juge s'est fondé sur le fait qu'Abitibi pouvait mener ses opérations grâce à un financement de débiteur-exploitant et qu'elle n'avait accès à ces fonds que pour ses activités courantes. Étant donné que les ordonnances visaient des sites que, pour la plupart, Abitibi ne possédait plus, cela signifiait qu'Abitibi ne disposait d'aucune ressource pour exécuter les travaux pendant la réorganisation.

[54] De plus, parce qu'Abitibi ne disposait pas des fonds et n'exerçait plus aucun contrôle sur les biens, l'échéancier fixé par la province dans les ordonnances *EPA* était non seulement irréaliste, mais suggérait que la province n'avait jamais vraiment eu l'intention qu'Abitibi exécute les travaux qu'elle lui ordonnait de faire. Par exemple, les ordonnances en date du 12 novembre 2009 exigeaient que certains travaux particuliers soient terminés le 15 janvier 2010 alors que la preuve démontre qu'il aurait fallu presque un an pour exécuter ces travaux.

[55] En outre, le juge s'est appuyé sur le fait qu'Abitibi n'était pas simplement désignée comme [TRADUCTION] « personne responsable » aux termes de l'*EPA*, mais qu'elle était intentionnellement visée par la province. Il a fait cette constatation non seulement en raison du choix du moment où les ordonnances ont été prononcées, mais aussi parce qu'Abitibi y était la seule personne désignée alors que d'autres semblaient également responsables — et en certains cas, principalement responsables — de la contamination. Par exemple, la province a ordonné à Abitibi d'effectuer des travaux de décontamination d'un site qu'elle avait abandonné plus de 50 ans avant le prononcé des ordonnances alors que le rapport d'expert sur lequel les ordonnances étaient fondées ne distinguait aucunement les activités d'Abitibi, qui avait utilisé des chevaux,

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there. In the judge's opinion, this finding of fact went to the Province's intent to establish a basis for performing the work itself and asserting a claim against Abitibi.

[56] These reasons — and others — led the *CCAA* judge to conclude that the Province had not expected Abitibi to perform the remediation work and that the "intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (para. 211). He found that the Province appeared to have in fact taken some steps to liquidate the claims arising out of the *EPA* Orders.

[57] In the end, the judge found that there was definitely a claim that "might" be filed, and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" (para. 227). In his words, the situation did not involve a "detached regulator or public enforcer issuing [an] order for the public good" (para. 175), and it was "the hat of a creditor that best fi[t] the Province, not that of a disinterested regulator" (para. 176).

[58] In sum, although the analytical framework used by Gascon J. was driven by the facts of the case, he reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. He did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. Earmarking money may be a strong indicator that a province will perform remediation work, and actually commencing the work is the first step towards the creation of a debt, but these are not the

et les activités subséquentes d'autres personnes qui y avaient utilisé des véhicules alimentés au mazout. Ce fait, pour le juge, illustrait l'intention de la province d'établir un fondement pour exécuter elle-même les travaux et présenter une réclamation contre Abitibi.

[56] Ces motifs — et d'autres — ont amené le juge de première instance à conclure que la province ne s'attendait pas à ce qu'Abitibi exécute les travaux de décontamination et que [TRADUCTION] « les ordonnances *EPA* avaient pour effet voulu, pratique et réaliste de jeter les bases qui permettraient à la province de recouvrer les sommes d'argent devant éventuellement être employées pour la décontamination des terrains en question » (par. 211). Il a conclu que la province semblait avoir en fait pris des mesures en vue de liquider les réclamations découlant des ordonnances *EPA*.

[57] En fin de compte, le juge a conclu qu'il existait véritablement une réclamation qui « pourrait » être présentée, et qu'on ne pouvait laisser au bon vouloir du créancier [TRADUCTION] « le choix subjectif de la garder en réserve pour des raisons tactiques » (par. 227). Pour reprendre ses propres mots, il ne s'agissait pas d'un cas où « un organisme de réglementation ou d'application de la loi a émis de manière objective une ordonnance dans l'intérêt public » (par. 175), mais que « la province a agi plus comme un créancier que comme un organisme administratif désintéressé » (par. 176).

[58] En somme, bien que le cadre analytique utilisé par le juge Gascon a été dicté par les faits de l'affaire, il a examiné tous les principes juridiques et les faits qu'il était tenu de prendre en compte pour statuer sur la question qui se posait. À l'occasion, il s'est appuyé sur des indicateurs singuliers qui ne figurent pas dans le cadre analytique que j'ai déjà proposé, mais cela s'explique par les faits exceptionnels en l'espèce. Or, s'il avait formulé la question comme je l'ai posée, sa conclusion, appuyée sur ses constatations de fait objectives, aurait été la même. Le fait de prévoir un budget peut constituer un indicateur clair qu'une province exécutera des travaux de décontamination, et le fait que ces travaux soient entrepris constitue la première étape de

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only considerations that can lead to a finding that a creditor has a monetary claim. The *CCAA* judge's assessment of the facts, particularly his finding that the *EPA* Orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

la constitution d'une dette, mais ces considérations ne sont pas les seules qui permettent de conclure qu'un créancier fait valoir une réclamation pécuniaire. L'appréciation des faits par le juge de première instance, plus particulièrement sa constatation que les ordonnances constituaient la première étape en vue de la décontamination des sites, ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire.

VI. Conclusion

VI. Conclusion

[59] In sum, I agree with the Chief Justice that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor. Our difference of views lies mainly in the applicable threshold for including contingent claims and in our understanding of the *CCAA* judge's findings of fact.

[59] En somme, je suis d'accord avec la Juge en chef pour dire qu'en règle générale, une ordonnance environnementale d'un organisme administratif peut être traitée comme une réclamation éventuelle et qu'une telle réclamation peut être incluse au processus de réclamation s'il est suffisamment certain que l'organisme administratif fera valoir une réclamation pécuniaire contre le débiteur. Nos divergences de vues portent principalement sur le critère applicable pour que les réclamations éventuelles soient incluses et sur la façon dont nous interprétons les constatations de fait tirées par le juge de première instance.

[60] With respect to the law, the Chief Justice would craft a standard specific to the context of environmental orders by requiring a "likelihood approaching certainty" that the regulatory body will perform the remediation work. She finds that this threshold is justified because "remediation may cost a great deal of money" (para. 86). I acknowledge that remediating pollution is often costly, but I am of the view that Parliament has borne this consideration in mind in enacting provisions specific to environmental claims. Moreover, I recall that in this case, the Premier announced that the remediation work would be performed at no net cost to the Province. It was clear to him that the *Abitibi Act* would make it possible to offset all the related costs.

[60] En ce qui concerne le droit, la Juge en chef établirait une norme propre au contexte des ordonnances environnementales qui exigerait une « probabilité proche de la certitude » que l'organisme administratif réalisera les travaux de restauration. Elle estime que ce critère s'impose parce que « les travaux de restauration peuvent être très coûteux » (par. 86). Je reconnais que les travaux de décontamination sont souvent coûteux, mais je crois que cette considération a été prise en compte par le législateur fédéral lors de l'adoption des dispositions particulières visant les réclamations en matière environnementale. De plus, je rappelle qu'en l'instance, le premier ministre a annoncé que les travaux de décontamination seraient réalisés sans coût net pour la province. Il était évident pour lui que l'adoption de l'*Abitibi Act* permettrait de compenser tous les coûts afférents.

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[61] Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under this approach, the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position to assert a monetary claim.

[62] Finally, the Chief Justice would review the *CCAA* court's findings of fact. I would instead defer to them. On those findings, applying any legal standard, be it the one proposed by the Chief Justice or the one I propose, the Province's claim is monetary in nature and its motion for a declaration exempting the *EPA* Orders from the claims procedure order was properly dismissed.

[63] For these reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

THE CHIEF JUSTICE (dissenting) —

1. Overview

[64] The issue in this case is whether orders made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"), by the Newfoundland and Labrador Minister of Environment and Conservation ("Minister") requiring a polluter to clean up sites (the "*EPA* Orders") are monetary claims that can be compromised in corporate restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). If they are not claims that can be compromised in restructuring, the Abitibi respondents ("Abitibi") will still have a legal obligation to clean up the sites following their emergence from restructuring. If they are such claims, Abitibi will have emerged from restructuring free of the obligation, able to recommence business without remediating the

[61] Par conséquent, je préfère retenir la méthode généralement suivie en matière de réclamations éventuelles. À mon avis, le tribunal chargé de l'application de la *LACC* peut prendre en compte l'ensemble des faits pertinents en vue de rendre la décision appropriée. Suivant cette approche, l'éventualité qu'il faut évaluer dans une affaire comme celle-ci est de savoir s'il est suffisamment certain que l'organisme administratif exécutera les travaux de décontamination et sera en mesure de faire valoir une réclamation pécuniaire.

[62] Enfin, la Juge en chef réviserait les conclusions de fait du juge de première instance. Pour ma part, je m'en remets à ces conclusions. Quelle que soit la norme juridique appliquée, soit celle proposée par la Juge en chef ou celle que je propose, au vu de ces conclusions, la réclamation de la province est de nature pécuniaire et sa requête demandant de déclarer que les ordonnances *EPA* n'étaient pas assujetties à l'ordonnance relative à la procédure de réclamations a été à juste titre rejetée.

[63] Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens

Version française des motifs rendus par

LA JUGE EN CHEF (dissidente) —

1. Aperçu

[64] Il s'agit en l'espèce de savoir si des ordonnances du ministre de l'Environnement et de la Conservation (le « ministre ») de Terre-Neuve-et-Labrador, émises en vertu de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2 (« *EPA* »), obligeant un pollueur à décontaminer des sites (les « ordonnances *EPA* ») constituent des réclamations pécuniaires qui peuvent faire l'objet d'une transaction dans le cadre d'une restructuration d'entreprise engagée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Si elles ne constituent pas des réclamations pécuniaires pouvant faire l'objet d'une transaction, les intimées du groupe Abitibi (« Abitibi ») auront encore l'obligation légale de décontaminer les sites lorsque leur

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properties it polluted, the cost of which will fall on the Newfoundland and Labrador public.

restructuration sera terminée. Dans le cas contraire, Abitibi sera dégagée de cette obligation; elle pourra reprendre ses activités à l'issue de la restructuration sans avoir à décontaminer les sites qu'elle a pollués et la population de Terre-Neuve-et-Labrador devra supporter le coût de la décontamination.

[65] Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They are not monetary claims. In narrow circumstances, specified by the *CCAA*, these ongoing regulatory obligations may be reduced to monetary claims, which can be compromised under *CCAA* proceedings. This occurs where a province has done the work, or where it is "sufficiently certain" that it will do the work. In these circumstances, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the *CCAA* proceedings. Otherwise, the regulatory obligation survives the restructuring.

[65] Les ordonnances exigeant la décontamination émises aux termes d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. Ces ordonnances ne constituent pas des réclamations pécuniaires. En certaines circonstances particulières prévues par la *LACC*, ces exigences réglementaires continues peuvent être converties en réclamations pécuniaires, lesquelles peuvent faire l'objet de transactions dans le cadre de procédures engagées aux termes de la *LACC*. Cette situation se produit lorsqu'une province a exécuté les travaux, ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux. Dans ces circonstances, l'exigence réglementaire serait éteinte et la province pourrait produire, dans le cadre de procédures engagées sous le régime de la *LACC*, une réclamation pécuniaire couvrant le coût des travaux de décontamination. Autrement, l'exigence réglementaire subsiste après la restructuration.

[66] In my view, the orders for remediation in this case, with a minor exception, are not claims that can be compromised in restructuring. On one of the properties, the Minister did emergency remedial work and put other work out to tender. These costs can be claimed in the *CCAA* proceedings. However, with respect to the other properties, on the evidence before us, the Minister has neither done the clean-up work, nor is it sufficiently certain that he or she will do so. The Province of Newfoundland and Labrador ("Province") retained a number of options, including requiring Abitibi to perform the remediation if it successfully emerged from the *CCAA* restructuring.

[66] À mon avis, les ordonnances exigeant la décontamination en l'espèce, à une exception près, ne constituent pas des réclamations pouvant faire l'objet de transactions dans le cadre d'une restructuration. Dans un des sites, la ministre de l'époque a effectué d'urgence la décontamination et a lancé un appel d'offres pour d'autres travaux. Le coût de ces travaux peut faire l'objet d'une réclamation dans les procédures engagées sous le régime de la *LACC*. Toutefois, en ce qui concerne les autres sites, selon les éléments de preuve dont nous disposons, le ministre en poste n'a pas effectué les travaux de décontamination et il n'est pas suffisamment certain qu'il le fera. La province de Terre-Neuve-et-Labrador (« province ») a conservé un certain nombre de solutions, dont celle d'obliger Abitibi à décontaminer les sites si elle réussit sa restructuration engagée sous le régime de la *LACC*.

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[67] I would therefore allow the appeal and grant the Province the declaration it seeks that Abitibi is still subject to its obligations under the *EPA* following its emergence from restructuring, except for work done or tendered for on the Buchans site.

[67] Je suis par conséquent d'avis d'accueillir le pourvoi et d'accorder à la province le jugement déclaratoire sollicité portant qu'Abitibi reste assujettie à ses obligations en vertu de l'*EPA* au terme de cette période de restructuration, à l'exception des travaux sur le site de Buchans déjà exécutés ou à l'égard desquels des appels d'offres ont été lancés.

2. The Proceedings Below

[68] The *CCAA* judge took the view that the Province issued the *EPA* Orders, not in order to make Abitibi remediate, but as part of a money grab. He therefore concluded that the orders were monetary and financial in nature and should be considered claims that could be compromised under the *CCAA* (2010 QCCS 1261, 68 C.B.R. (5th) 1). The Quebec Court of Appeal denied leave to appeal on the ground that this "factual" conclusion could not be disturbed (2010 QCCA 965, 68 C.B.R. (5th) 57).

2. Les décisions des juridictions inférieures

[68] Le juge de première instance a adopté le point de vue selon lequel la province avait émis les ordonnances *EPA*, non pas pour obliger Abitibi à réparer les dommages causés, mais pour lui soutirer de l'argent. Il a donc conclu que les ordonnances étaient de nature pécuniaire et financière, et qu'elles devraient être considérées comme des réclamations pouvant faire l'objet de transactions sous le régime de la *LACC* (2010 QCCS 1261, 68 C.B.R. (5th) 1). La Cour d'appel du Québec a refusé l'autorisation d'interjeter appel de cette décision au motif que rien ne permettait de modifier cette conclusion « de fait » (2010 QCCA 965, 68 C.B.R. (5th) 57).

[69] The *CCAA* judge's stark view that an *EPA* obligation can be considered a monetary claim capable of being compromised simply because (as he saw it) the Province's motive was money, is no longer pressed. Whether an *EPA* order is a claim under the *CCAA* depends on whether it meets the requirements for a claim under that statute. That is the only issue to be resolved. Insofar as this determination touches on the division of powers, I am in substantial agreement with my colleague Deschamps J., at paras. 18-19.

[69] Le point de vue peu nuancé du juge de première instance, selon lequel une obligation découlant de l'*EPA* peut être considérée comme une réclamation pécuniaire susceptible de faire l'objet d'une transaction du simple fait (à son avis) que la province n'était motivée que par l'argent, n'est plus en cause. Pour répondre à la question de savoir si une ordonnance émise sous le régime de l'*EPA* constitue une réclamation au sens de la *LACC*, il faut déterminer si elle satisfait aux conditions d'existence d'une réclamation établies par cette loi. Il s'agit de la seule question à trancher. Dans la mesure où la décision sur ce point touche le partage des pouvoirs, je souscris pour l'essentiel à l'opinion exprimée par ma collègue la juge Deschamps aux par. 18-19.

3. The Distinction Between Regulatory Obligations and Claims Under the *CCAA*

3. La distinction entre une exigence réglementaire et une réclamation au titre de la *LACC*

[70] Orders to clean up polluted property under provincial environmental protection legislation are regulatory orders. They remain in effect until the

[70] Les ordonnances exigeant la décontamination des sites pollués émises en vertu des lois provinciales sur l'environnement sont des ordonnances

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property has been cleaned up or the matter otherwise resolved.

[71] It is not unusual for corporations seeking to restructure under the *CCAA* to be subject to a variety of ongoing regulatory orders arising from statutory schemes governing matters like employment, energy conservation and the environment. The corporation remains subject to these obligations as it continues to carry on business during the restructuring period, and remains subject to them when it emerges from restructuring unless they have been compromised or liquidated.

[72] The *CCAA*, like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.

[73] This distinction is also recognized in the jurisprudence, which has held that regulatory duties owed to the public are not "claims" under the *BIA*, nor, by extension, under the *CCAA*. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements. Writing for the court, Laycraft C.J.A. said the question was whether the *Bankruptcy Act* "requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety . . . as a charge to the public" (para. 29). He answered the question in the negative:

The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the

de nature réglementaire. Elles demeurent en vigueur jusqu'à ce que le site ait été décontaminé ou que l'affaire soit réglée d'une autre façon.

[71] Il n'est pas inhabituel pour les sociétés qui cherchent à se restructurer sous le régime de la *LACC* d'être assujetties à diverses ordonnances réglementaires continues découlant de régimes législatifs régissant des domaines tels que l'emploi, la conservation de l'énergie et l'environnement. La société demeure assujettie à ces exigences alors qu'elle continue d'exercer ses activités pendant la période de restructuration, et elle y demeure assujettie au terme de cette période de restructuration, à moins que ces exigences n'aient fait l'objet d'une transaction ou qu'elles n'aient été liquidées.

[72] La *LACC*, à l'instar de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), établit une distinction fondamentale entre les exigences réglementaires continues établies en faveur du public, lesquelles continuent de s'appliquer après la restructuration, et les réclamations pécuniaires qui peuvent faire l'objet d'une transaction.

[73] Cette distinction est aussi reconnue dans la jurisprudence, selon laquelle les obligations réglementaires établies en faveur du public ne sont pas des « réclamations » aux termes de la *LFI* ni, par extension, aux termes de la *LACC*. Dans l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, la Cour d'appel de l'Alberta a statué qu'un séquestre doit se conformer à une ordonnance de l'Energy Resources Conservation Board lui enjoignant de respecter des exigences en matière d'abandon de puits. Le juge en chef Laycraft, au nom de la cour, a affirmé que la question à trancher était de savoir si la *Loi sur la faillite* [TRADUCTION] « exige que les actifs se trouvant dans le patrimoine d'un titulaire de permis de puits soient distribués aux créanciers en laissant à la charge du public les obligations en matière de sécurité environnementale » (par. 29). Il a répondu par la négative :

[TRADUCTION] L'obligation est établie comme une obligation à caractère public qui doit être respectée par

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citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed. [Emphasis added; para. 33.]

l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application d'une loi générale. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation. [Je souligne; par. 33.]

[74] The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (B.C.S.C.); *Shirley (Re)* (1995), 129 D.L.R. (4th) 105 (Ont. Ct. (Gen. Div.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 146, *per* Iacobucci J. (dissenting). As Farley J. succinctly put it in *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J.), at para. 18: "Once [the company] emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

[74] La distinction entre les exigences réglementaires découlant d'une loi d'application générale visant la protection du public, d'une part, et les réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration engagée sous le régime de la *LACC* ou en matière de faillite, d'autre part, constitue un élément important du droit canadien des sociétés. Cette distinction a maintes fois été reconnue : *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (C.S.C.-B.); *Shirley (Re)* (1995), 129 D.L.R. (4th) 105 (C. Ont. (Div. gén.)), p. 109; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 146, le juge Iacobucci (dissident). Comme l'a dit succinctement le juge Farley dans *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52 (C.S.J. Ont.), par. 18 : [TRADUCTION] « À l'issue des procédures engagées en vertu de la LACC — souhaitons qu'elles soient couronnées de succès — [la société] aura alors à régler chacun des dossiers non résolus [en matière réglementaire]. »

[75] Recent amendments to the *CCAA* confirm this distinction. Section 11.1(2) now explicitly provides that, except to the extent a regulator is enforcing a payment obligation, a general stay does not affect a regulatory body's authority in relation to a corporation going through restructuring. The *CCAA* court may only stay specific actions or suits brought by a regulatory body, and only if such action is necessary for a viable compromise to be reached and it would not be contrary to the public interest to make such an order (s. 11.1(3)).

[75] Des modifications apportées récemment à la *LACC* confirment cette distinction. Le paragraphe 11.1(2) prévoit maintenant expressément que, sauf dans la mesure où un organisme de réglementation fait respecter une obligation de paiement, une suspension générale ne porte aucunement atteinte aux pouvoirs de celui-ci à l'égard d'une société en restructuration. Le tribunal chargé d'appliquer la *LACC* ne peut ordonner une suspension qu'à l'égard de certaines actions ou poursuites intentées par un organisme administratif, et seulement si cette mesure est nécessaire à la conclusion d'une transaction viable et si une telle ordonnance ne serait pas contraire à l'intérêt public (par. 11.1(3)).

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[76] Abitibi argues that another amendment to the *CCAA*, s. 11.8(9), treats ongoing regulatory duties owed to the public as claims, and erases the distinction between the two types of obligation: see *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385, *per* Goudge J.A., relying on s. 14.06(8) of the *BIA* (the equivalent of s. 11.8(9) of the *CCAA*). With respect, this reads too much into the provision. Section 11.8(9) of the *CCAA* refers only to the situation where a government has performed remediation, and provides that the *costs of the remediation* become a claim in the restructuring process even where the environmental damage arose after *CCAA* proceedings have begun. As stated in *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, *per* Burrows J., the section "does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it" (para. 42).

[76] Abitibi plaide qu'en vertu d'une autre modification apportée à la *LACC*, le par. 11.8(9), les exigences réglementaires continues établies en faveur du public sont considérées comme des réclamations, et que cette modification élimine la distinction entre les deux types d'obligations : voir *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385, le juge Goudge, citant le par. 14.06(8) de la *LFI* (la disposition équivalente au par. 11.8(9) de la *LACC*). Avec égards, cette interprétation de la disposition est trop large. Le paragraphe 11.8(9) de la *LACC* vise uniquement la situation où un gouvernement a exécuté des travaux de réparation du dommage, et prévoit que les *frais de réparation* constituent une réclamation dans le cadre du processus de restructuration, même si les dommages ont été causés à l'environnement après l'introduction des procédures au titre de la *LACC*. Comme l'a déclaré le juge Burrows dans *Strathcona (County) c. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, la disposition [TRADUCTION] « ne convertit pas une exigence imposée par la loi et établie en faveur du public en général en une dette envers l'organisme public chargé d'appliquer la loi » (par. 42).

4. When Does a Regulatory Obligation Become a Claim Under the *CCAA*?

[77] This brings us to the heart of the question before us: When does a regulatory obligation imposed on a corporation under environmental protection legislation become a "claim" provable and compromisable under the *CCAA*?

[78] Regulatory obligations are, as a general proposition, not compromisable claims. Only financial or monetary claims provable by a "creditor" fall within the definition of "claim" under the *CCAA*. A "creditor" is defined as "a person having a claim": s. 2, *BIA*. Thus, the identification of a "creditor" hangs on the existence of a "claim". Section 12(1) of the *CCAA* defines "claim" as "any indebtedness, liability or obligation . . . that . . . would be a debt provable in bankruptcy", which is

4. Quand une exigence réglementaire devient-elle une réclamation au titre de la *LACC*?

[77] Ceci nous amène au cœur de la question dont nous sommes saisis : quand une exigence réglementaire imposée à une société en vertu d'une loi sur la protection de l'environnement devient-elle une « réclamation » prouvable et pouvant faire l'objet d'une transaction aux termes de la *LACC*?

[78] En règle générale, les exigences réglementaires ne sont pas des réclamations pouvant faire l'objet d'une transaction. Seules les réclamations financières ou pécuniaires prouvables par un « créancier » correspondent à la définition de « réclamation » au sens de la *LACC*. Un « créancier » est défini comme étant une « [p]ersonne ayant une réclamation » : art. 2, *LFI*. Ainsi, l'identification d'un « créancier » repose sur l'existence d'une « réclamation ». Le paragraphe 12(1) de la *LACC* définit une « réclamation »

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accepted as confined to obligations of a financial or monetary nature.

[79] The *CCAA* does not depart from the proposition that a claim must be financial or monetary. However, it contains a scheme to deal with disputes over whether an obligation is a monetary obligation as opposed to some other kind of obligation.

[80] Such a dispute may arise with respect to environmental obligations of the corporation. The *CCAA* recognizes three situations that may arise when a corporation enters restructuring.

[81] The first situation is where the remedial work has not been done (and there is no "sufficient certainty" that the work will be done, unlike the third situation described below). In this situation, the government cannot claim the cost of remediation: see s. 102(3) of the *EPA*. The obligation of compliance falls in principle on the monitor who takes over the corporation's assets and operations. If the monitor remediates the property, he can claim the costs as costs of administration. If he does not wish to do so, he may obtain a court order staying the remediation obligation or abandon the property: s. 11.8(5) *CCAA* (in which case costs of remediation shall not rank as costs of administration: s. 11.8(7)). In this situation, the obligation cannot be compromised.

[82] The second situation is where the government that has issued the environmental protection order moves to clean up the pollution, as the legislation entitles it to do. In this situation, the government has a claim for the cost of remediation that is compromisable in the *CCAA* proceedings. This is because the government, by moving to clean up the pollution, has changed the outstanding regulatory

comme étant « toute dette, tout engagement ou toute obligation [. . .] qui [. . .] constituerait une dette prouvable en matière de faillite », une définition dont la portée reconnue se limite aux obligations de nature financière ou pécuniaire.

[79] La *LACC* ne s'écarte pas du principe selon lequel une réclamation doit être financière ou pécuniaire. Elle prévoit cependant un régime permettant de régler les différends portant sur la question de savoir si une obligation est de nature pécuniaire, par opposition à une obligation d'une autre nature.

[80] Les obligations environnementales qui incombent à une personne morale peuvent engendrer un tel différend. La *LACC* reconnaît trois situations susceptibles de se présenter lorsqu'une personne morale s'engage dans un processus de restructuration.

[81] La première situation est celle où les travaux de restauration du site n'ont pas été exécutés (et il n'est pas « suffisamment certain » que les travaux seront exécutés, contrairement à la troisième situation exposée ci-après). En pareil cas, le gouvernement ne peut réclamer le coût de la restauration : voir le par. 102(3) de l'*EPA*. En principe, l'obligation de se conformer à la loi incombe au contrôleur qui prend en charge l'actif et les activités de la société. Si le contrôleur exécute les travaux de restauration du site, il peut réclamer les frais en tant que frais d'administration. S'il ne désire pas le faire, il peut obtenir de la cour une ordonnance suspendant l'exigence de restauration ou il peut abandonner l'immeuble : par. 11.8(5) de la *LACC* (dans ce cas, les frais de restauration ne font pas partie des frais d'administration : par. 11.8(7)). En pareil cas, l'obligation ne peut faire l'objet d'une transaction.

[82] La deuxième situation est celle où le gouvernement qui a émis l'ordonnance environnementale prend des mesures de décontamination, ce que la législation l'autorise à faire. En pareil cas, le gouvernement peut produire, pour le coût de la décontamination, une réclamation qui pourra faire l'objet d'une transaction dans le cadre des procédures engagées sous le régime de la *LACC*. Il en est ainsi

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obligation owed to the public into a financial or monetary obligation owed by the corporation to the government. Section 11.8(9), already discussed, makes it clear that this applies to damage after the *CCAA* proceedings commenced, which might otherwise not be claimable as a matter of timing.

parce que le gouvernement, en prenant des mesures pour décontaminer le site, a transformé l'exigence réglementaire non exécutée établie en faveur du public en une obligation financière ou pécuniaire à laquelle la société est tenue envers le gouvernement. Le paragraphe 11.8(9), examiné précédemment, prévoit clairement que cette situation s'applique aux dommages survenus après que les procédures ont été engagées au titre de la *LACC*; en l'absence d'une telle précision, ces dommages ne pourraient faire l'objet d'une réclamation compte tenu du moment choisi pour agir.

[83] A third situation may arise: the government has not yet performed the remediation at the time of restructuring, but there is "sufficient certainty" that it will do so. This situation is regulated by the provisions of the *CCAA* for contingent or future claims. Under the *CCAA*, a debt or liability that is contingent on a future event may be compromised.

[83] Une troisième situation peut se présenter : le gouvernement n'a pas encore exécuté des travaux de restauration au moment de la restructuration, mais il est « suffisamment certain » qu'il le fera. Cette situation est prévue par les dispositions de la *LACC* relatives aux réclamations éventuelles ou futures. Aux termes de la *LACC*, une dette ou un engagement qui dépend d'un événement futur peut faire l'objet d'une transaction.

[84] It is clear that a mere possibility that work will be done does not suffice to make a regulatory obligation a contingent claim under the *CCAA*. Rather, there must be "sufficient certainty" that the obligation will be converted into a financial or monetary claim to permit this. The impact of the obligation on the insolvency process is irrelevant to the analysis of contingency. The future liabilities must not be "so remote and speculative in nature that they could not properly be considered contingent claims": *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, at para. 4.

[84] Il est évident qu'une simple possibilité que les travaux soient exécutés ne suffit pas pour transformer une exigence réglementaire en une réclamation éventuelle au titre de la *LACC*. Pour en arriver à ce résultat, il faut plutôt qu'il soit « suffisamment certain » que l'exigence sera convertie en une réclamation financière ou pécuniaire. L'incidence de l'exigence sur le processus d'insolvabilité n'est pas pertinente pour l'analyse du caractère éventuel de la réclamation. Les engagements futurs ne doivent pas être [TRADUCTION] « si lointains et hypothétiques qu'ils ne puissent être considérés à bon droit comme des réclamations éventuelles » : *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, par. 4.

[85] Where environmental obligations are concerned, courts to date have relied on a high degree of probability verging on certainty that the government will in fact step in and remediate the property. In *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), Farley J. concluded that a contingent claim was established where the money had already been earmarked in the budget for the remediation project. He observed that

[85] Lorsque des exigences environnementales sont en cause, les tribunaux se sont jusqu'à ce jour fondés sur un haut degré de probabilité, proche de la certitude, que le gouvernement prendra réellement des mesures et exécutera les travaux de restauration. Dans *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (C.S.J. Ont.), le juge Farley a conclu que la preuve d'une réclamation éventuelle était établie parce que les fonds avaient

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"there appears to be every likelihood to a certainty that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent" (para. 15 (emphasis added)). Similarly, in *Shirley (Re)*, Kennedy J. relied on the fact that the Ontario Minister of the Environment had already entered the property at issue and commenced remediation activities to conclude that "[a]ny doubt about the resolve of the [Ministry's] intent to realize upon its authority ended when it began to incur expense from operations" (p. 110).

déjà été dédiés au projet de restauration dans le budget. Il a fait remarquer qu'[TRADUCTION] « il semble fortement probable et presque certain que chaque dollar dédié aux réclamations figurant au budget établi pour l'année se terminant le 31 mars 2002 sera dépensé » (par. 15 (je souligne)). De même, dans *Shirley (Re)*, le juge Kennedy s'est fondé sur le fait que les employés du ministère de l'Environnement de l'Ontario se trouvaient déjà sur le terrain en cause et avaient commencé les travaux de restauration pour conclure que [TRADUCTION] « [t]ous doutes quant à la détermination du [ministère] d'exercer son droit se sont estompés lorsque l'opération a commencé à lui occasionner des dépenses » (p. 110).

[86] There is good reason why "sufficient certainty" should be interpreted as requiring "likelihood approaching certainty" when the issue is whether ongoing environmental obligations owed to the public should be converted to contingent claims that can be expunged or compromised in the restructuring process. Courts should not overlook the obstacles governments may encounter in deciding to remediate environmental damage a corporation has caused. To begin with, the government's decision is discretionary and may be influenced by any number of competing political and social considerations. Furthermore, remediation may cost a great deal of money. For example, in this case, the *CCAA* court found that at a minimum the remediation would cost in the "mid-to-high eight figures", and could indeed cost several times that (para. 81). In concrete terms, the remediation at issue in this case may be expected to meet or exceed the entire budget of the Minister ($65 million) for 2009. Not only would this be a massive expenditure, but it would also likely require the specific approval of the legislature and thereby be subject to political uncertainties. To assess these factors and determine whether all this will occur would embroil the *CCAA* judge in social, economic and political considerations — matters which are not normally subject to judicial consideration: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 74. It is small wonder, then, that courts assessing whether it is "sufficiently certain" that a government will clean up pollution created

[86] Une bonne raison explique pourquoi il convient d'interpréter l'expression « suffisamment certain » comme exigeant une « probabilité proche de la certitude » lorsqu'il s'agit de déterminer si des exigences environnementales continues établies en faveur du public devraient être converties en réclamations éventuelles qui peuvent être rayées ou faire l'objet d'une transaction dans le cadre du processus de restructuration. Les tribunaux ne devraient pas oublier les obstacles auxquels les gouvernements peuvent se heurter lorsqu'ils décident de réparer les dommages environnementaux causés par une société. D'abord, la décision du gouvernement est discrétionnaire, et elle peut être influencée par nombre de considérations politiques et sociales concurrentes. En outre, les travaux de restauration peuvent être très coûteux. En l'espèce, par exemple, le juge de première instance a conclu que ces travaux pourraient coûter au minimum [TRADUCTION] « entre cinquante et cent millions de dollars », et même plusieurs fois cette somme (par. 81). En termes concrets, le coût des travaux en cause en l'espèce pourrait atteindre ou dépasser le budget total du ministre (65 millions de dollars) pour l'exercice 2009. Il s'agirait non seulement d'une dépense énorme, mais il faudrait probablement aussi l'approbation explicite de l'assemblée législative, avec les incertitudes politiques que cela comporte. L'évaluation de ces facteurs et l'appréciation de la possibilité que tout ce qui précède se produise entraîneraient le juge chargé d'appliquer la *LACC* dans des considérations d'ordre

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by a corporation have insisted on proof of likelihood approaching certainty.

[87] In this case, as will be seen, apart from the Buchans property, the record is devoid of any evidence capable of establishing that it is "sufficiently certain" that the Province will itself remediate the properties. Even on a more relaxed standard than the one adopted in similar cases to date, the evidence in this case would fail to establish that remediation is "sufficiently certain".

5. The Result in This Case

[88] Five different sites are at issue in this case. The question in each case is whether the Minister has already remediated the property (making it to that extent an actual claim), or if not, whether it is "sufficiently certain" that he or she will remediate the property, permitting it to be considered a contingent claim.

[89] The Buchans site posed immediate risks to human health as a consequence of high levels of lead and other contaminants in the soil, groundwater, surface water and sediment. There was a risk that the wind would disperse the contamination, posing a threat to the surrounding population. Lead has been found in residential areas of Buchans and adults tested in the town had elevated levels of lead in their blood. In addition, a structurally unsound dam at the Buchans site raised the risk of contaminating silt entering the Exploits and Buchans rivers.

[90] The Minister quickly moved to address the immediate concern of the unsound dam and put

social, économique et politique — des questions normalement soustraites à l'examen judiciaire : *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45, par. 74. Il n'est donc pas étonnant que les tribunaux, lorsqu'il s'agit d'apprécier s'il est « suffisamment certain » qu'un gouvernement procédera à la décontamination causée par une société, s'en soient tenus à la preuve d'une probabilité proche de la certitude.

[87] En l'espèce, comme nous le verrons, à l'exclusion du site de Buchans, le dossier est dénué d'éléments de preuve susceptibles d'établir qu'il est « suffisamment certain » que la province exécutera elle-même les travaux de décontamination. Même si l'on applique une norme plus souple que celle retenue jusqu'à ce jour dans des affaires semblables, la preuve en l'espèce n'établirait pas qu'il est « suffisamment certain » que les sites seront décontaminés.

5. L'issue du présent pourvoi

[88] En l'espèce, cinq sites différents sont en cause. La question dans chaque cas est de savoir si le ministre a déjà décontaminé les sites — il aurait alors une réclamation — ou, si tel n'est pas le cas, s'il est « suffisamment certain » qu'il exécutera les travaux de restauration, ce qui permettrait de considérer le coût de la décontamination comme une réclamation éventuelle.

[89] Le site de Buchans posait un risque immédiat à la santé pour les humains en raison de la forte concentration de plomb et d'autres contaminants présente dans le sol, l'eau souterraine et de surface ainsi que dans des sédiments. Il y avait un risque que le vent disperse la contamination, ce qui aurait représenté une menace pour la population environnante. On a trouvé du plomb dans des zones résidentielles de Buchans et les tests de sang ont révélé chez des adultes résidant dans la ville des concentrations élevées de plomb. De plus, un barrage en mauvais état situé sur le site de Buchans augmentait le risque de contamination du limon se déversant dans les rivières Exploits et Buchans.

[90] La ministre de l'époque a rapidement pris des mesures pour régler le problème immédiat du

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out a request for tenders for other measures that required immediate action at the Buchans site. Money expended is clearly a claim under the *CCAA*. I am also of the view that the work for which the request for tenders was put out meets the "sufficiently certain" standard and constitutes a contingent claim.

[91] Beyond this, it has not been shown that it is "sufficiently certain" that the Province will do the remediation work to permit Abitibi's ongoing regulatory obligations under the *EPA* Orders to be considered contingent debts. The same applies to the other properties, on which no work has been done and no requests for tender to do the work initiated.

[92] Far from being "sufficiently certain", there is simply nothing on the record to support the view that the Province will move to remediate the remaining properties. It has not been shown that the contamination poses immediate health risks, which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. Abitibi relies on a statement by the then-Premier in discussing the possibility that the Province would be obliged to compensate Abitibi for expropriation of some of the properties, to the effect that "there would not be a net payment to Abitibi": R.F., at para. 12. Apart from the fact that the Premier was not purporting to state government policy, the statement simply does not say that the Province would do the remediation. The Premier may have simply been suggesting that outstanding environmental liabilities made the properties worth little or nothing, obviating any net payment to Abitibi.

[93] My colleague Deschamps J. concludes that the findings of the *CCAA* court establish that it was

barrage en mauvais état et a lancé un appel d'offres relatif aux autres mesures nécessitant une intervention immédiate sur le site de Buchans. Il est clair que les sommes d'argent dépensées constituent une réclamation au sens de la *LACC*. J'estime également que les travaux à l'égard desquels des appels d'offres ont été lancés satisfont à la norme de ce qui est « suffisamment certain » et qu'ils constituent une réclamation éventuelle.

[91] Quant au reste, on n'a pas établi qu'il soit « suffisamment certain » que la province exécutera les travaux de décontamination de façon à pouvoir considérer comme des dettes éventuelles les exigences réglementaires continues que les ordonnances *EPA* ont imposées à Abitibi. La même conclusion s'applique à l'égard des autres sites, où aucun travail n'a été réalisé et pour lesquels aucun appel d'offres n'a été lancé pour l'exécution des travaux.

[92] Il n'est pas « suffisamment certain » que la province entreprenne la décontamination des autres sites : aucune preuve au dossier ne laisse entrevoir cette possibilité. Il n'a pas été démontré que la contamination pose pour la santé des risques immédiats exigeant la prise de mesures dans les plus brefs délais. Il n'a pas été démontré que la province a pris quelque mesure que ce soit pour réaliser des travaux. Et il n'a pas été démontré que la province a prévu des sommes d'argent pour ces travaux ou qu'elle a même songé à en prévoir. Abitibi se fonde sur une déclaration du premier ministre de l'époque, qui examinait la possibilité que la province soit tenue de verser à Abitibi une indemnité pour l'expropriation de certains terrains, selon laquelle [TRADUCTION] « aucun montant net ne serait versé à Abitibi » : m.i., par. 12. Mis à part le fait que le premier ministre ne prétendait pas établir une politique gouvernementale, sa déclaration n'indique aucunement que la province exécuterait la décontamination. Le premier ministre indiquait peut-être simplement qu'en raison des exigences environnementales non respectées, les terrains ne valaient plus rien ou presque et qu'il serait inutile de verser quoi que ce soit à Abitibi.

[93] Ma collègue la juge Deschamps conclut que les constatations du juge de première instance

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"sufficiently certain" that the Province would remediate the land, converting Abitibi's regulatory obligations under the *EPA* Orders to contingent claims that can be compromised under the *CCAA*. With respect, I find myself unable to agree.

[94] The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. Essentially, he proceeded on the basis that the *EPA* Orders had not been put forward in a sincere effort to obtain remediation, but were simply a money grab. The *CCAA* judge buttressed his view that the Province's regulatory orders were not sincere by opining that the orders were unenforceable (which if true would not prevent new *EPA* orders) and by suggesting that the Province did not want to assert a contingent claim, since this might attract a counterclaim by Abitibi for the expropriation of the properties (something that may be impossible due to Abitibi's decision to take the expropriation issue to NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2), excluding Canadian courts). In any event, it is clear that the *CCAA* judge, on the reasoning he adopted, never considered the question of whether it was "sufficiently certain" that the Province would remediate the properties. It follows that the *CCAA* judge's conclusions cannot support the view that the outstanding obligations are contingent claims under the *CCAA*.

[95] My colleague concludes:

[The *CCAA* judge] did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the

établissent qu'il est « suffisamment certain » que la province décontaminerait les terrains, transformant ainsi les exigences réglementaires que les ordonnances *EPA* imposent à Abitibi en réclamations éventuelles pouvant faire l'objet d'une transaction sous le régime de la *LACC*. Avec égards, je ne puis souscrire à cette conclusion.

[94] Le juge de première instance ne s'est jamais posé la question cruciale de savoir s'il était « suffisamment certain » que la province exécuterait elle-même les travaux. Essentiellement, il a tenu pour acquis que les ordonnances *EPA* n'avaient pas été émises avec l'intention sincère d'obtenir la décontamination des sites, mais qu'il s'agissait simplement d'une manœuvre pour soutirer de l'argent. Le juge a renforcé son point de vue selon lequel les ordonnances réglementaires émises par la province étaient dépourvues de sincérité en exprimant l'avis qu'elles n'étaient pas susceptibles d'exécution (ce qui, si cela s'avérait exact, n'empêcherait pas que de nouvelles ordonnances soient émises). Le juge a également laissé entendre que la province ne voulait pas produire une réclamation éventuelle, ce qui aurait pu provoquer le dépôt d'une demande reconventionnelle d'Abitibi pour l'expropriation des propriétés (un résultat qui peut s'avérer impossible étant donné la décision d'Abitibi de soumettre la question de l'expropriation à l'ALÉNA (*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis d'Amérique et le gouvernement des États-Unis du Mexique*, R.T. Can. 1994 n^{o} 2), en écartant la juridiction des tribunaux canadiens). Quoi qu'il en soit, il est évident que dans son raisonnement, le juge de première instance n'a jamais examiné la question de savoir s'il était « suffisamment certain » que la province décontaminerait les sites. Il s'ensuit que les conclusions du juge ne peuvent soutenir le point de vue selon lequel les obligations non exécutées constituent des réclamations éventuelles au sens de la *LACC*.

[95] Ma collègue conclut comme suit :

À l'occasion, [le juge] s'est appuyé sur des indicateurs singuliers qui ne figurent pas dans le cadre analytique que j'ai déjà proposé, mais cela s'explique par les faits exceptionnels en l'espèce. Or, s'il avait formulé la question

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question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. . . . The *CCAA* judge's assessment of the facts . . . leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim. [Emphasis added; para. 58.]

[96] I must respectfully confess to a less sanguine view. First, I find myself unable to decide the case on what I think the *CCAA* judge would have done had he gotten the law right and considered the central question. In my view, his failure to consider that question requires this Court to answer it in his stead on the record before us: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 35. But more to the point, I see no objective facts that support, much less compel, the conclusion that it is "sufficiently certain" that the Province will move to itself remediate any or all of the pollution Abitibi caused. The mood of the regulator in issuing remediation orders, be it disinterested or otherwise, has no bearing on the likelihood that the Province will undertake such a massive project itself. The Province has options. It could, to be sure, opt to do the work. Or it could await the result of Abitibi's restructuring and call on it to remediate once it resumed operations. It could even choose to leave the sites contaminated. There is nothing in the record that makes the first option more probable than the others, much less establishes "sufficient certainty" that the Province will itself clean up the pollution, converting it to a debt.

[97] I would allow the appeal and issue a declaration that Abitibi's remediation obligations under the *EPA* Orders do not constitute claims compromisable under the *CCAA*, except for work done or tendered for on the Buchans site.

comme je l'ai posée, sa conclusion, appuyée sur ses constatations de fait objectives, aurait été la même. [. . .] L'appréciation des faits par le juge [. . .] ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire. [Je souligne; par. 58.]

[96] Avec égards, je dois avouer que je ne partage pas la certitude de ma collègue à ce titre. Premièrement, j'estime ne pas pouvoir trancher le pourvoi en me fondant sur ce que je crois qu'aurait fait le juge de première instance s'il avait alors saisi correctement le droit et examiné la question réellement en jeu. À mon avis, le fait qu'il n'ait pas examiné cette question oblige notre Cour à y répondre à sa place au vu du dossier : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 35. Mais, plus précisément, je ne vois pas de faits objectifs qui appuient, et encore moins qui imposent, la conclusion selon laquelle il est « suffisamment certain » que la province entreprendra elle-même de décontaminer un site ou tous les sites pollués par Abitibi. L'humeur de l'organisme de réglementation qui ordonne la décontamination, qu'il soit ou non désintéressé, n'a aucune incidence sur la probabilité que la province entreprenne elle-même un projet d'une telle ampleur. Des choix s'offrent à la province. Elle pourrait certes choisir d'exécuter les travaux. Ou elle pourrait attendre le résultat de la restructuration d'Abitibi et lui demander d'exécuter les travaux d'assainissement une fois qu'elle aura repris ses activités. Elle pourrait même choisir de laisser les sites contaminés. Rien au dossier n'indique que le premier choix est plus susceptible d'être retenu que les autres, et encore moins qui établisse qu'il est « suffisamment certain » que la province exécutera elle-même la décontamination, convertissant ainsi l'opération en une créance.

[97] Je suis d'avis d'accueillir le pourvoi et de déclarer que les obligations de décontaminer les sites qui incombent à Abitibi aux termes des ordonnances *EPA* ne constituent pas des réclamations pouvant faire l'objet d'une transaction aux termes de la *LACC*, à l'exception des travaux exécutés sur le site de Buchans ou à l'égard desquels des appels d'offres ont été lancés.

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The following are the reasons delivered by

[98] LeBel J. (dissenting) — I have read the reasons of the Chief Justice and Deschamps J. They agree that a court overseeing a proposed arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), cannot relieve debtors of their regulatory obligations. The only regulatory orders that can be subject to compromise are those which are monetary in nature. My colleagues also accept that contingent environmental claims can be liquidated and compromised if it is established that the regulatory body would remediate the environmental contamination itself, and hence turn the regulatory order into a monetary claim.

[99] At this point, my colleagues disagree on the proper evidentiary test with respect to whether the government would remediate the contamination. In the Chief Justice's opinion, the evidence must show that there is a "likelihood approaching certainty" that the province would remediate the contamination itself (para. 86). In my respectful opinion, this is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J., which does not look very different from the general civil standard of probability, better reflects how both the common law and the civil law view and deal with contingent claims. On the basis of the test Deschamps J. proposes, I must agree with the Chief Justice and would allow the appeal.

[100] First, no matter how I read the *CCAA* court's judgment (2010 QCCS 1261, 68 C.B.R. (5th) 1), I find no support for a conclusion that it is consistent with the principle that the *CCAA* does not apply to purely regulatory obligations, or that the court had evidence that would satisfy the test of "sufficient certainty" that the province of Newfoundland and

Version française des motifs rendus par

[98] Le juge LeBel (dissident) — J'ai pris connaissance des motifs de la Juge en chef et de la juge Deschamps. Elles s'entendent pour affirmer qu'un tribunal qui supervise un arrangement proposé aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), ne peut soustraire les débiteurs aux exigences réglementaires qui leurs sont imposées. Seules peuvent faire l'objet d'une transaction les ordonnances réglementaires de nature pécuniaire. Mes collègues reconnaissent également que les réclamations environnementales éventuelles peuvent être liquidées ou faire l'objet d'une transaction s'il est établi que l'organisme administratif se chargerait de la décontamination, transformant ainsi l'ordonnance réglementaire en une réclamation pécuniaire.

[99] Sur ce, mes collègues diffèrent d'opinion quant au critère de preuve applicable pour déterminer si le gouvernement entend effectuer la décontamination. De l'avis de la Juge en chef, la preuve doit démontrer une « probabilité proche de la certitude » que la province se chargerait de la décontamination (par. 86). À mon humble avis, il ne s'agit pas du critère établi pour déterminer si, et de quelle façon, une réclamation éventuelle peut être liquidée en droit de la faillite et de l'insolvabilité. Le critère de ce qui est « suffisamment certain » qu'énonce la juge Deschamps ne semble pas différer beaucoup de la norme générale de probabilité en matière civile et reflète mieux la façon dont la common law et le droit civil envisagent et traitent les réclamations éventuelles. Cependant, en appliquant le critère que propose la juge Deschamps, je dois souscrire aux motifs de la Juge en chef et je suis d'avis d'accueillir le pourvoi.

[100] Tout d'abord, sans égard à la façon d'envisager le jugement du tribunal chargé d'appliquer la *LACC* (2010 QCCS 1261, 68 C.B.R. (5th) 1), rien à mon sens ne permet de conclure qu'il soit conforme au principe selon lequel la *LACC* ne s'applique pas aux exigences purement réglementaires, ou que la preuve faite devant le tribunal respecterait le critère

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Labrador ("Province") would perform the remedial work itself.

[101] In my view, the *CCAA* court was concerned that the arrangement would fail if the Abitibi respondents ("Abitibi") were not released from their regulatory obligations in respect of pollution. The *CCAA* court wanted to eliminate the uncertainty that would have clouded the reorganized corporations' future. Moreover, its decision appears to have been driven by an opinion that the Province had acted in bad faith in its dealings with Abitibi both during and after the termination of its operations in the Province. I agree with the Chief Justice that there is no evidence that the Province intends to perform the remedial work itself. In the absence of any other evidence, an offhand comment made in the legislature by a member of the government hardly satisfies the "sufficient certainty" test. Even if the evidentiary test proposed by my colleague Deschamps J. is applied, this Court can legitimately disregard the *CCAA* court's finding as the Chief Justice proposes, since it did not rest on a sufficient factual foundation.

[102] For these reasons, I would concur with the disposition proposed by the Chief Justice.

Appeal dismissed with costs, McLachlin C.J. *and* LeBel J. *dissenting.*

Solicitors for the appellant: WeirFoulds, Toronto; Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the respondents AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc.: Stikeman Elliott, Toronto.

Solicitors for the respondent the Ad Hoc Committee of Bondholders: Goodmans, Toronto.

Solicitors for the respondents the Ad Hoc Committee of Senior Secured Noteholders and the U.S. Bank National Association (Indenture Trustee

voulant qu'il soit « suffisamment certain » que la province de Terre-Neuve-et-Labrador (« province ») exécuterait elle-même les travaux de décontamination.

[101] À mon avis, le tribunal de première instance craignait un échec de l'arrangement si les sociétés du groupe Abitibi intimées (« Abitibi ») ne pouvaient se libérer des exigences réglementaires relatives à la pollution. Le tribunal voulait écarter l'incertitude qui aurait assombri l'avenir de ces sociétés après leur réorganisation. De plus, sa décision semble motivée par l'opinion suivant laquelle la province avait traité de mauvaise foi avec Abitibi dès que cette dernière eût cessé ses activités dans cette province. Je suis d'accord avec la Juge en chef pour conclure qu'aucune preuve ne confirme l'intention de la province d'exécuter elle-même les travaux de décontamination. En l'absence de tout autre élément de preuve, une remarque faite en passant par un ministre devant l'assemblée législative peut difficilement satisfaire au critère de ce qui est « suffisamment certain ». Même si l'on applique le critère de preuve que propose ma collègue la juge Deschamps, notre Cour peut légitimement écarter les conclusions du tribunal de première instance comme le propose la Juge en chef car elles ne reposent sur aucun fondement factuel suffisant.

[102] Pour ces motifs, je suis d'avis de souscrire au dispositif que propose la Juge en chef.

Pourvoi rejeté avec dépens, la juge en chef McLachlin *et le juge* LeBel *sont dissidents.*

Procureurs de l'appelante : WeirFoulds, Toronto; procureur général de Terre-Neuve-et-Labrador, St. John's.

Procureurs des intimées AbitibiBowater Inc., Abitibi-Consolidated Inc. et Bowater Canadian Holdings Inc. : Stikeman Elliott, Toronto.

Procureurs de l'intimé le comité ad hoc des créanciers obligataires : Goodmans, Toronto.

Procureurs des intimés le comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire

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for the Senior Secured Noteholders): Borden Ladner Gervais, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the interveners the Attorney General of British Columbia and Her Majesty The Queen in Right of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener Ernst & Young Inc., as Monitor: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Friends of the Earth Canada: Ecojustice, University of Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.

désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) : Borden Ladner Gervais, Toronto.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur des intervenants le procureur général de la Colombie-Britannique et Sa Majesté la Reine du chef de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante Ernst & Young Inc., en sa qualité de contrôleur : Thornton Grout Finnigan, Toronto.

Procureurs de l'intervenante Les Ami(e)s de la Terre Canada : Ecojustice, Université d'Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.

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BOA COMPEER001431

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

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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.

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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
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> (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.

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

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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.

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[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.

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J.C.Q.B.A.

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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CA010723
Vancouver Registry

1990 CanLII 1147 (BC CA)

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Mr. Justice Hinkson — May 8, 1990
The Honourable Mr. Justice Anderson
The Honourable Mr. Justice Gibbs — Vancouver, B.C.

BETWEEN:

V.F. ERICKSON CONSULTANTS LTD.

PETITIONER
(APPELLANT)

AND:

VENTURES WEST MINERALS LTD.,
VENTURES WEST CAPITAL LTD.,
J. HAIG deB FARRIS,
CLYDE L. SMITH,
GERALD HUNT,
MICHAEL J. BROWN,
VICTOR J.E. JONES and
WILLIAM J. BODEN

RESPONDENTS
(RESPONDENTS)

R.C. Gardner, Esq., Q.C. and
H. Wolfson, Esq. — appearing for the Appellant

Mrs. G.M. Quijano — appearing for the Respondent

HINKSON, J.A.: In September, 1983 the petitioner launched a petition pursuant to the provisions of s.224 of the *British Columbia Company Act*, R.S.B.C. 1979, c.59, seeking an order that the respondents purchase the shares of the petitioner in Ventures West Minerals Ltd. at the fair value of

those shares upon the basis of oppression and unfair prejudice suffered by the petitioner. Section 224 provides that a member of a company may apply to the Court for relief under that section. One of the types of relief provided is that the Court may direct or prohibit any act or cancel or vary any transaction or resolution.

The petitioner had been the president and an executive and director of Ventures West. He had an employment contract with the company that expired at the end of December, 1982. It was not renewed at that time but he continued as a director.

In September, 1983 a meeting of the shareholders was called for September 16th at which it was proposed to pass a resolution with respect to certain rights to shares to be offered by the company. The petitioner opposed that resolution on the basis that it would dilute his holdings as a minority shareholder, thus the petition was launched the day before that meeting was to be held seeking the relief specified in it.

The meeting was held on September 16, 1983 but the proposed resolution was withdrawn. The petition was not proceeded with promptly and it was not until 1989 that the respondents made a motion under Rule 18 to have the petition dismissed. Upon the hearing of that motion many additional affidavits were referred to relating to events that had occurred subsequent to September, 1983. Those matters were canvassed before the chambers judge, ultimately in the exercise of his discretion under s.224 of the *Company Act* he dismissed the petition. It is from that decision that the present appeal is taken.

At the outset of the appeal we inquired of counsel for the appellant as to why the appeal should proceed as the resolution which was the subject matter of the petition had not been passed. He referred to the subsequent events

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that had occurred in the company but we indicated that in our view those matters were the subject of other proceedings which have not been taken.

The appellant referred to the decision of Fulton, J. in *Diligenti v. R.W.M.D. Operations Kelowna Ltd. et al* (1976), 1 B.C.L.R. 36, and urged that the failure to renew the employment contract of the petitioner might form the basis for a finding of oppression or prejudice.

The failure to renew the contract might be the basis for supporting an argument of prejudice or oppression but standing by itself it is not evidence of oppression or prejudice. It might form the matter of separate proceedings for wrongful dismissal or breach of contract but it is not the subject matter of the present petition.

In view of the fact that the resolution was withdrawn on September 16, 1983 the foundation for the relief sought in the petition disappeared and therefore, there is no basis for granting the relief sought in that petition.

I referred to the provisions of s.224 of the *Company Act* because it is clear that if the company simply withdrew the resolution on September 16, 1983 with the intention of frustrating the petitioner and then sought to pass the same or a similar resolution subsequently, the petitioner could have sought relief by way of s.224 to prevent the reintroduction of that type of resolution in the future. That was not the relief, however, that was being sought in the petition but rather a requirement that the company purchase the minority shareholdings of the petitioner.

In my opinion, there is no basis upon which the present petition can proceed to a successful completion for the petitioner. For those reasons I would dismiss the appeal.

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ANDERSON, J.A.: I agree.

GIBBS, J.A.: I agree.

HINKSON, J.A.: The appeal is dismissed.

E.E.H.
J.A.

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Court of Queen's Bench of Alberta

Citation: Devon Canada Corporation v. Canadian Pacific Railway Co., 2009 ABQB 143

Date: 20090306
Docket: 0801 04741, 0801 04892
Registry: Calgary

2009 ABQB 143 (CanLII)

In the Matter of Devon Canada Corporation

Between:

Devon Canada Corporation

Applicant

- and -

Canadian Pacific Railway Co. and Randolph Allan Hill

Respondents

Docket: 0801 04892

And Between:

Nova Gas Transmission Ltd.

Applicant

- and -

Canadian Pacific Railway Co. and Randolph Allan Hill

Respondents

Reasons for Judgment
of the
Honourable Madam Justice M.C. Erb

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[1] The Applicants Devon Canada Corporation and Nova Gas Transmission Ltd. seek declaratory relief in companion applications to deal with the validity of a partial assignment of a

Crossing Agreement between the two Respondents. The Applicants' pipelines cross under railway tracks owned by the Respondent Canadian Pacific Railway Co., which partially assigned rights to the Respondent Mr. Hill.

[2] The Applicants seek an Order declaring that:

i. the partial assignment is void or invalid to the extent that it conveys any interest in the Crossing Agreement to the Respondent Mr. Hill;
ii. the Crossing Agreement is a license and does not convey an interest in land;
iii. the fee for permission contained in the Crossing Agreement is not a "rate of compensation" as defined in the *Surface Rights Act*, R.S.A. 2000, c.S-24;
iv. Costs.

[3] The Respondents ask that the Applications be dismissed with costs and further argue that provisions of the *Limitations Act*, R.S.A. 2000, c.L-12 operate to pre-empt any such entitlement to relief in any event. The Respondents further argue that any issue regarding "rate of compensation" is within the jurisdiction of the Alberta Surface Rights Board ("SRB") which through its enacting legislation deals with such matters.

[4] This Court agrees that SRB has the jurisdiction to deal with the issue of rate compensation, a matter clearly within its mandate. The only issues properly before this Court are:

i. whether the Partial Assignment of Unregistered Encumbrances is valid;
ii. the nature of the interest granted by the Crossing Agreement; and
iii. the application, if any of the *Limitations Act* in this case.

Factual Narrative

[5] In March 2004, CPR lands between miles 60.16 and 61.51 in Lochearn, Alberta became designated as surplus to the railway's operating needs and were listed for sale. The lands described by a CPR representative as "non-occupied station grounds consisting of four strips running parallel to the CPR track, two strips per side", are located in the Alberta Central Subdivision in Clearwater County about one mile west of the town of Rocky Mountain House. CPR retained immediately adjacent land on both sides of its track for railway purposes The main line is part of the Alberta central subdivision.

[6] Long before CPR decided to divest itself of some of its surplus real property, it had entered into crossing agreements with a number of companies permitting pipelines to cross under its tracks. The crossing agreements are standard form and there are more than 3,000 such agreements in existence in Alberta; 7,000 in Western Canada and another 2,500 similar agreements in place in Quebec and Ontario.

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[7] Included in the list of pipeline companies are two of relevance in these proceedings: Texas Pacific Oil Canada Ltd, a predecessor of the Applicant Devon, and Alberta Gas Trunk Line Company Limited, a predecessor of TransCanada PipeLines Limited of which Nova is a wholly-owned subsidiary. Nova's predecessor entered into the Crossing Agreement with CPR in 1969 and Devon's entered into a similar agreement in 1979.

[8] In December 2004, Mr. Hill purchased two lots from CPR comprising 65.78 acres (26.62 hectares) for which he paid just under $55,000. The lots are bisected by the railroad and there are several pipelines running under the track.

[9] There is no quarrel among the parties about the events leading up to the closing. In August, 2004 Clearwater County contacted CPR, Nova and Devon and advised that Mr. Hill was seeking approval for a proposed development of a subdivision on the lots which Mr. Hill intended to purchase from the railroad. There is no record of whether Devon replied, but Nova by letter dated August 23, 2004, confirmed that it had no objection to the proposed subdivision.

[10] The County approved Mr. Hill's proposal in late August 2004 and as a result the sale documents were completed on December 1, 2004 making Mr. Hill the registered owner of the lots. In addition, Mr. Hill became an assignee to the Crossing Agreements by way of an "Unregistered Permitted Encumbrances and Indemnity Agreement" with CPR. This document purports to partially assign the Crossing Agreements entered into in 1969 and 1979 with the predecessors of Nova and Devon respectively.

[11] The Crossing Agreement has never been registered on title although CPR filed caveats respecting drainage and sight lines respecting the railway tracks.

[12] In July 2005, Mr. Hill had his (then) counsel, Roy Elander, contact the Applicants to advise that all rentals payable under the Crossing Agreements to CPR were to be sent to him. The following April, Mr. Hill advised the Applicants by letter that he planned to extract gravel from his lots and ready the land for a subdivision including the construction of roads along both sides of the track. The Applicants were also advised that Mr. Hill planned to seek compensation from them payable pursuant to s. 27 of the *Surface Rights Act*.

[13] On April 6, 2006, the Applicants were invited to a meeting to discuss Mr. Hill's plans for the lots. The meeting took place on April 18. Mr. Hill deposed in his filed affidavit that neither Nova nor Devon "responded favorably" to his plan for extraction of gravel and development of a residential development. He further deposed that he has been unable to exploit or develop the lots because of outstanding issues with the Applicants.

[14] Mr. Hill then brought an application before the SRB for a review of rate compensation under the *Surface Rights Act*. The SRB found that Mr. Hill's application was premature pending hearing of the Court of Queen's Bench applications. Mr. Hill is hoping to have the nominal fee converted to a substantial annual payment.

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The Submission of the Parties

[15] In addition to their concerns about the rate compensation review, the Applicants argue that they face potentially substantial new burdens arising from Mr. Hill's use of the lots he purchased from CPR. For example, if Mr. Hill pursues a county residential development, the Applicants say that the impact on them would include a class location upgrade of the pipelines under the CSA Standard Z662, which they speculate could result in a reduction in the maximum allowable operating pressure of the pipelines leading to a reduction in capacity or a requirement to upgrade the pipe at a substantial cost. Such a dramatic change would require CPR to give notice to them about an intended assignment and in the absence of such notice, among other reasons, raise questions about the validity of the partial assignment. They further argue that the Crossing Agreement is not an interest in land because it does not fit any legal description of such and is at best a licence.

[16] In addition, the Applicants dispute Mr. Hill's position that he has been prevented from using the property and assert that nothing has prevented him from mining the gravel he claims is present; rather he has "chosen" not to proceed with his extraction plans. Further, the Applicants argue that there is no adverse effect with respect to the "area granted" since there is no defined area to which the Agreement applies.

[17] Upon conclusion of these proceedings, Mr. Hill intends to renew his SRB application for compensation which arises from a clause in the Crossing Agreement providing for a nominal annual fee. There is evidence which suggests that this amount, collected annually, was an administration fee or alternatively that it was simply nominal consideration to complete contractual terms and it was ultimately used to cover administrative costs. Mr. Hill's application before the SRB was for a review of the annual fee as a "rate of compensation" which could then facilitate an increase from the $10 to about $120,000 based on loss of use or adverse effect.

[18] The Respondent CPR argues that the only issue properly before this Court is whether the Partial Assignment of the Crossing Agreements is valid. It further submits that all other issues are matters for the SRB.

Validity of the Partial Assignment

[19] There is only one clause which addresses the issue of assignment in the original Crossing Agreements and it is the same in both the 1969 and 1979 documents. The "Applicant" referred to in the agreements are the predecessors of Nova and Devon. The 1969 agreement grants permission for the construction and maintenance of certain works under railway lands at "8th Ferrier South Lateral Crossing at Mileage 60.58 Alberta Central Subdivision" . The 1979 Agreement permits the construction and maintenance of a "water pipe crossing at Mileage 60.3489 Alberta Central Subdivision". Clause 12 of the Crossing Agreements provides:

> The Applicant shall not assign, transfer or dispose of this agreement or the rights and privileges conferred thereby, without the consent in writing, first obtained, of the Railway Company.

[20] The Applicants argue that the partial assignment cannot be valid because although CPR as a contracting party can assign its rights under the contract, it cannot assigns its own liabilities or obligations to a third party (i.e. Mr. Hill) without the consent of the other contracting parties, the Applicants. Further, conditions for foregoing such consent have not been met. They further argue that the Crossing Agreement was intended to be only with a party which had the "special characteristics" of a railway company.

[21] With respect to obligations and liabilities, the only clause dealing with obligations appears to be the "applicants" named in the Crossing Agreement, predecessors of the Applicants in these proceedings. The Crossing Agreements as I read them impose the following rights, privileges, obligations and liabilities on the parties paraphrased as follows:

(a) **The Railway Company**

Clause 2	Grants permission to construct, maintain and repair works under its lands in accordance with the CTC rules and regulations;
Clause 3	CPR retains the work of supporting the railway tracks and structures and protecting train movements with attendant costs;
Clause 5	Requires supervision of the construction, renewal and repair of the works to by a railway company employee and whose wages and expenses are to be paid by the Applicant.
Clause 11	Requires CPR to give notice to the Applicant if it requires the works to be moved or altered to accommodated railway company requirements or as ordered by the CTC.
Clause 13	Gives three months notice of its intent to terminate the Agreement.

(b) **The Applicant**

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Clause 2	Requires construction, maintenance and repairs of Applicant to be in compliance with CTC rules and regulations
Clause 4	Requires installation and maintenance of signs prominently marking the works and their distance underground.
Clause 5	Requires at least 48 hours notice in writing of intent to do construction, renewal and repair work and restoring the property of the rail road upon completion and to maintain the works in good order and condition to the satisfaction of the railway company. Applicant must pay the railway company's supervisor.
Clause 6	Requires indemnification of the railway from loss, costs, damage, injury, expense by reason of any injury or damage to persons or property caused by the works or any thing related to it unless the cause can be traced elsewhere.
Clause 7	Grants the right to enter on the railway lands for the purpose of construction, maintenance, inspection, removal and repair of the works and the assumption of any and all risks of its employees related to it and indemnification of the railway against any claims and demands related to such entry.
Clause 8	Requires Applicant to take responsibility for neglect of repair or maintenance to the works and to pay the railway company for any work it undertakes because of the Applicants failure to do so.
Clause 9	Requires Applicant to indemnify the railway company from "all taxes or assessment of any description whatsoever levied by any authority" in respect of the works.
Clause 10	Applicant to pay the required compensation for the permission at in advance on the 1st day of April each year.

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Clause 11	Requires Applicant to safeguard the works at its own expense should the railway company require that the works be moved or altered to meet railway needs or as may be ordered by the CTC and to pay the railway for any costs of doing so should it fail within the required time frame.
Clause 12	Applicant to refrain from assigning, transferring or disposing of the Agreement or the rights and privileges conferred without first having the consent in writing of the railway.
Clause 13	Applicant to give three months notice of its intent to terminate the Agreement.
Clause 15	Applicant to remove its works upon termination as the railway company requires.

[22] The argument about passing obligations and liabilities appears to arise from a decision of the British Columbia Court of Appeal, *Frederickson v. I.C.B.C.* (1986) 3 B.C.L.R. (2d) 145 (C.A.) per (then) McLachlin, J.A., in which six categories of contracts were found to be unassignable including two which the Applicants say apply in this case:

> (b) contracts which by their assignment throw uncontemplated burdens on the debtor;
> (c) personal contracts;

[23] The Applicants say that because the assignment fits into these categories, consent to the assignment is required. The conditions for foregoing the requirement to obtain the consent of the other party to the contract who is not participating in the proposed assignment are set out in the English decision in *Tolhurst v. Assoc. Portland Cement Mfr. (1900) Ltd.*, [1902] 2 KB 660 (CA); aff'd [1903] AC 414 (HL) in which the act of replacing one party to a contract with another is allowable where "it can make no difference to the person on whom the obligations lies to which of two persons he is to discharge it...".

[24] The Applicants cite paragraph 33 of *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) in further support of its position that consent is effectively a condition precedent to the partial assignment granted here:

> Aside from limitations imposed by statute, public policy or the terms of a specific contract, a party to an agreement may assign its rights, but not its obligations under that agreement, to a third party without the consent of the other party to the contract. A party will not, however, be allowed to assign its rights under a

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contract if that assignment increases the burden on the other party to the agreement, or if the agreement is based on confidences, skills or special personal characteristics such as to implictly limit the agreement to the original parties.

[25] The portions of the Crossing Agreements executed by predecessors of Nova in 1969 and Devon in 1979, which passed to Mr. Hill are set out in the Partial Assignment of Unregistered Permitted Encumbrances and Indemnity Agreement and I reproduce them here:

Clause 1.1 The Vendor (CPR) hereby assigns, transfers and sets over unto the Purchaser (Mr. Hill) as and from the Effective Date, with respect to the Lands to be conveyed to him:

(a) that portion of the right, title and interest of the Vendor in, to, and under the Unregistered Permitted Encumbrances and the reversion thereof in respect of the Lands;

(b) that portion of any rents or other payments due or accruing due at, from and including the Effective Date in respect of the Lands under the Unregistered Permitted Encumbrances or any extension or renewals thereof; and

(c) that portion of the benefit of all covenants and agreements and guarantees and indentures in respect of the Lands under the Unregistered Permitted Encumbrances.

Clause 1.2 The Purchaser does hereby agree to observe, perform and assume all obligations for the Vendor in respect of the Lands under the Unregistered Permitted Encumbrances to be performed from and after the Effective date and agrees to indemnify and save harmless the Vendor from any and all actions, proceedings, claims, losses, expenses, costs and all liabilities of every nature and kind with respect to any breach or non-observance thereof by the Purchaser.

ANALYSIS

[26] The Applicants argue that the partial assignment is not valid because of the divestiture of obligations relating to railroads and federal agencies such as the CTC which in this case can only bind a railway. They argue that the railway company cannot assign its obligations only its rights. They say the Crossing Agreements cannot be assigned because doing so would create additional financial burdens they did not otherwise have with the railway. They further argue that they were entitled to notice that the Land was being sold to Mr. Hill.

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[27] I see nothing in the Partial Assignment which indicates that the railway has passed along obligations to the Respondent Mr. Hill which only another railway can fulfill, that is which has "special characteristics" in the manner the Applicants submit. Having retained land on both sides of the tracks for railway purposes indicates that CPR retained what it needs to meet its obligations and no such obligations were passed to the purchaser of the surplus lots sold. The remaining land surely just becomes ordinary land which has pipelines beneath it with all of the attendant implications.

[28] There is nothing in the Crossing Agreement which prohibits CPR from any such assignment. Clause 12 prohibits the Applicants from assigning, transferring or disposing of the agreements without consent in writing of the railway company but does not restrict CPR in that way. This is a one-sided obligation. There is no evidence before this Court that the assignment issue was raised by the predecessors of the Applicants at the time or that it has been raised any time since, excepting these proceedings. Had they wanted to limit assignment, this could have been negotiated. However, someone turned their minds to and raised the issue; otherwise the railway would not have had it in the agreement for its purposes.

[29] Further, there is nothing before this Court that suggests convincingly that the railway divested itself of railway obligations under the CTC or any other federal authority. There is nothing in the language of the agreement between CP Rail and Mr. Hill which suggests he has acquired any such obligation.

[30] There is evidence that CPR retained a "swath of land" on either side of the tracks. Surely this was for railway purposes involving the tending to of tracks and movement of trains. Surely the Crossing Agreements continue with respect to pipelines still running under railway tracks, that has not changed. The balance with respect to non railway required lands upon sale are outside the CTC's interest. The fact that CPR's retention of the "swath of land" and its purpose could have been made clearer in the Partial Assignment does not affect the issues here. The purpose of the retention of land is obvious in any event and clearly separates railway interests from the rest of the land; that is, the lots which Mr. Hill acquired.

[31] I remain unconvinced that an imposition of "greater burdens" means the partial assignment is invalid. If there are new burdens on the Applicants, these are no different than any other land under which pipelines pass, held by private citizens of Alberta. The sale of the surplus railway land to Mr. Hill may well mean that the Applicant's long run of minimal financial obligations regarding those lands is over. It may well be a case of the train having simply left the station. I see nothing in the Crossing Agreements which suggests that the benefits of them were to continue in perpetuity. The termination clause suggests otherwise.

[32] There were opportunities for the Applicants to have input into the application for subdivision which was the precursor to the conveyance of the Land from CPR to Mr. Hill. Clearwater County provided notice about Mr. Hill's subdivision application and it preceded the finalization of the sale. The Applicants could have raised its objections at a time when Mr. Hill

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could have made a decision to proceed with the purchase if approved or otherwise. Instead Devon appears to have taken no position and Nova confirmed in writing that it had no objection.

[33] The Applicants had ample opportunity to explore any implications for themselves. It was clear from the County's correspondence that the Applicants' pipelines would be under land owned by a private citizen rather than the railway. Surely the Applicants understood that subdivision development entails the building of roads, movement of earth and laying of utility lines among many other surface and subsurface tasks. Whether Clearwater County would have approved the proposal had the Applicants objected is a question of no importance in these proceedings.

[34] The fact that CPR retained land on both sides of its track confirms to this Court its continuing obligation to meet railway line requirements to the CTC and any other relevant authority. There was no assignment of those requirements to Mr. Hill. The question of what land the Applicants can access to deal with their pipelines remains the same as it did under the original Crossing Agreements: it is land held by CPR which runs under its railway tracks and any access to other land is no different than pipeline which runs under the land of any other private land owner.

Nature of the Crossing Agreement

[35] I find that the Crossing Agreement is a license, given the fact that it does not purport to grant exclusive possession of the Land to the Applicants thereby according a true interest in land: *Johnson v. British Columbia Canadian Insurance Co.*, [1932] S.C.R. 680. Further, the fact that the Agreement can be terminated by either party upon three months notice is contrary to the requirements for an easement, which do not apply where rights granted are temporary: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at paras. 19 to 22.

Application of Limitations Act

[36] Section 3(1) of the *Limitations Act* sets limitations periods for remedial orders. It does not do so where a party seeks a declaration as to rights. The Respondents argue that the Applicants effectively seek relief which is really remedial in nature dressed as declaratory relief. This would require an exploration as to motives which this Court is neither inclined to consider nor in the position to do. Here the Applicants seek declaratory relief and the provisions of the *Limitations Act* limiting when the claim can be made to do not apply: *Daniels v. Mitchell* (2005), ABCA 271.

[37] However, the doctrine of laches is specifically available to the Respondents as a remedy as s. 10 of the *Limitations Act* provides:

> Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

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[38] The Alberta Court of Appeal summarized the key aspects of the doctrine of laches in *Ambrozic v. Burcevski*, 2008 ABCA 194, 433 A.R. 25 at paras. 42- 45:

> The doctrine of laches is an equitable doctrine which precludes a remedy for a cause of action not otherwise time barred.
>
> Laches is an equitable remedy that will not normally be granted when the defendant is guilty of wrongdoing.
>
> Laches may also apply when the plaintiff has acquiesced to infringement of her rights, or when delay makes prosecution unreasonable.

[39] Notwithstanding that this claim would not be barred per s.3(1) of the *Limitations Act*, the equitable doctrine of laches would apply because of the clear acquiescence of the Applicants who were specifically advised by the County that CPR was selling land which they knew or ought to have known affected them because of their subsurface pipelines. Rather than make enquiries or raise objection, the Applicants did nothing, lulling the Respondents into the natural assumption that no issues were being raised. In fact the Applicants did nothing until the matter arose before the SRB and it became clear that there could be substantial financial implications for them.

Order to be Entered

[40] This Court declares that:

i The Partial Assignment of Unregistered Encumbrances between the Respondents is valid;

ii. The nature of the Crossing Agreement is a licence;

iii. The *Limitation Act* does not operate to Bar the Applications.

iv. The Application with respect to the nature of the fee contained in the Crossing Agreement is a matter for the Alberta Surface Rights Board and is not at present properly before this Court.

[41] If the parties cannot agree, Costs may be spoken to within 60 days of the date this Judgment is issued.

Heard on the 12th day of December, 2008.
Dated at the City of Calgary, Alberta this 6th day of March, 2009.

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M.C. Erb
J.C.Q.B.A.

Appearances:

Munaf Mohamed
for the Applicant Nova Gas Transmission Ltd.

Michael D. Mysak
for the Applicant Devon Canada Corporation

Karl R. Seidenz
for the Respondent Canadian Pacific Railway Company

Edward W. Halt, Q.C.
for the Respondent Randolph Allan Hill

CITATION: Urbas v. Home Savings, 2015 ONSC 6399
COURT FILE NO.: 11-30252SR
DATE: 2015/10/23

2015 ONSC 6399 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Estate of Ruth Urbas, Deceased by her estate trustee Carol Frances Conrad Urbas and Carl F. Urbas, Plaintiffs

AND:

Home Savings and Loan Corporation also known as Home Trust Company, Defendant

BEFORE: Justice A. J. Goodman

COUNSEL: M. Roefe for the Plaintiffs, responding parties

A. Jackson for the Defendant, moving party

HEARD: August 27, 2015

E N D O R S E M E N T

Introduction

[1] This action concerns a claim for payment under two Certificates of Deposit (the "Certificates") the Defendant, Home Trust Company ("Home Trust"), issued in 1988 to each Plaintiff, Carl and Ruth Urbas.

[2] The Plaintiffs bring the claim under the simplified rules. The Plaintiffs allege Home Trust is indebted to Ruth Urbas's Estate in the amount of $60,000.00, plus interest and costs. The Plaintiffs say the debt results from a Certificate the Defendant issued on June 28, 1988, to Ruth Urbas, the registered holder, in the principal amount of $60,000.00, plus 9.55% interest per annum.

[3] The Plaintiffs' also claim that Home Trust is indebted to the Plaintiff, Carl Urbas, Ruth Urbas's son, the sum of $56,720.00, plus interest and costs. This claim is pursuant to a Certificate Home Trust issued on September 29, 1988, to Carl Urbas, the registered holder, for the principal amount of $56,720.00, plus 9.55% annual interest.

[4] Both Certificates matured on September 29, 1988. Home Trust refused to pay either Certificate when the Plaintiffs presented the Certificates on or about June 21, 2011.

[5] The Plaintiffs commenced the within action on September 23, 2011, seeking payment and interest, approximately 23 years after the Certificates matured. The Statement of Claim does not detail how the Plaintiffs came to be aware, or have knowledge, of the Certificates, but it does identify September 29, 1988, as the Certificates' maturity date.

[6] The Defendant served a Statement of Defence on November 21, 2011.

[7] The Plaintiffs delivered their Affidavit of Documents on or about April 23, 2013. The Defendant delivered its Affidavit of Documents on July 10, 2013. Examinations for discovery of Carl Urbas and Cathy Sutherland (on behalf of Home Trust), were held on October 8, 2013. Ms. Sutherland retired from Home Trust on May 31, 2010, at which time she was the Senior Vice President – Finance. She began employment with Home Trust on April 30, 1990, as a Controller. Prior to that she was an auditor of Home Trust employed by Touche Ross.

[8] The examinations for discovery were held after the death of Ruth Urbas on April 20, 2012, and accordingly, she was never examined.

[9] The Defendant moved for summary judgment on two bases. First, the Defendant pleads that this action is out of time as against them and is statute barred pursuant to the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24. Second, the Defendant advances a delay argument under the equitable principles of laches.

Background

[10] I accept the following facts arising from the evidence adduced in this application.

[11] The Defendant's covenant to pay the Plaintiffs as stated in the Certificate of Deposit, a pre-printed form authored by the Defendant, is as follows:

> [Home Trust] hereby promises to pay to the Registered Holder hereof the principal sum in lawful money of Canada on the maturity date on presentation and surrender of the certificate at the branch of issue.

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> Interest shall be calculated on the Principal sum at the rate per annum herein stated from the date of purchase until the date of maturity and the amount thereof shall be paid or credited to the Registered Holder on the dates indicated or be accumulated and paid or carded at the date of maturity as stated above.
>
> This certificate is not redeemable prior to the maturity date except on the death of a registered holder. The Corporation will be liable only for the amount of principal and interest as set out herein and no interest shall accrue after the maturity date.

[12] The Certificate also reads, "THIS CERTIFICATE IS TO BE SURRENDERED ON REPAYMENT" (emphasis in original).

[13] During his examination for discovery, Carl Urbas testified that he first became aware of the Certificates in May 2010 when he discovered a box of paper while cleaning out his mother's house. Mr. Urbas testified he asked his mother about the Certificates and she advised that she did not know what the documents were and did not recall seeing them before.

[14] Additionally, on May 21, 2014, the Plaintiffs produced a copy of Ruth Urbas's 1988 tax year return. Included within the 1988 tax return was a copy of a T5 Statement of Investment Income Home Trust issued for investment income Ruth Urbas earned in 1988 for the Certificates issued to her.

[15] Ruth Urbas's 1988 tax return was prepared by Ms. Priscilla Monteith, and, as appears from Ms. Monteith's letter attached to Ruth Urbas's tax return, the tax return was completed by April 5, 1989.

[16] The T5 included in Ruth Urbas's 1988 tax return reports investment income of $1,459.97. This amount is consistent with the interest she would have been paid for the Certificate from the issue date, June 28, 1988, to the maturity date, September 29, 1988, on a principal amount of $60,000.00 with an annual interest rate of 9.55%.

[17] Additionally, the T5 references the number "1521 17359". This number matches the client and certificate numbers appearing on the face of the Certificate issued to Ruth Urbas.

[18] As appears from Ruth Urbas's 1989 tax return, no T5 from Home Trust was reported by her for the 1989 tax year.

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[19] On January 14, 2015, Gowlings received from Mr. Roefe a screenshot of the electronic record of the T5 issued to Mr. Urbas for the 1988 tax year. In producing the screenshot of the T5, Mr. Roefe advised that the tax records of Carl Urbas and Ruth Urbas from 1988 and onward was irrelevant. Further, Mr. Roefe advised the effort and costs of production of other tax records in the possession of their former accountant, Michael Smith, were disproportionate to their evidentiary value. Mr. Roefe also advised that the 1988 T5 was the only document that Mr. Urbas had authorized Mr. Smith to release to Home Trust.

[20] The screenshot of the electronic record of Carl Urbas's T5 indicates an amount of $1,380.18 (attached as Exhibit "S" to Brian Mosko's Affidavit). This amount is consistent with the interest Carl Urbas would be paid for the Certificate from the issue date, June 28, 1988, to the maturity date, September 29, 1988, on a principal amount of $56,720.00 with an annual interest rate of 9.55%.

Positions of the Parties

[21] The moving party Defendant submits the action against them is based on acts or omissions that occurred before January 1, 2004. Therefore, the transition provisions pursuant to the *Limitations Act, 2002* apply.

[22] In response to the motion, the Plaintiffs submit the Defendant acknowledges the Plaintiffs are in possession of the original Certificates, and the Plaintiffs presented the certificates of deposit for surrender and payment. Further, presentation and surrender of the original Certificates are necessary for the Defendant to pay, which directly impacts on the limitation period.

[23] The Plaintiffs submit that they have not been paid the principal or any interest pursuant to the Certificates. They submit the Defendant has no direct evidence that the Defendant paid the Plaintiffs the principal or interest before the Plaintiffs surrendered the Certificates on June 21, 2011.

[24] The Plaintiffs further submit the Defendant never contacted the Plaintiffs, either by phone or mail, regarding the outstanding Certificates, although such contact is the Defendant's usual course of conduct. Additionally, the Defendant has no records or other evidence that it tried to contact the Plaintiffs about the Certificates.

[25] The Plaintiffs submit the Certificates were purchased by Frank Urbas, Carl Urbas's father and Ruth Urbas's husband, without their knowledge, and before Frank Urbas's death on November 25, 1987, pursuant to instructions given before his death. They submit they continued to have no knowledge of the

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Certificates until May 2010, when the Plaintiffs discovered the certificates in a drawer in the family home.

[26] The Plaintiffs submit they provided tax records, referred to by Brian Mosko in his affidavit, on a without prejudice basis and deny they are relevant to the matters at issue. The Defendant has not produced an Order determining the relevance or propriety of the Defendant's discovery question upon which these documents were provided to Defendant.

[27] The Plaintiffs deny the T5s provided sufficient notice or knowledge of these particular Certificates. They assert they are unsophisticated in financial matters and it was Frank Urbas who purchased the Certificates and dealt with their investments.

[28] The Defendant submits the Plaintiffs delayed commencing the action for approximately 23 years. And, documents produced through discovery show the Plaintiffs were aware of the Certificates in 1988 or 1989, despite Carl Urbas's assertion he did not know about the Certificates until May 2010.

[29] Moreover, the evidence that still exists confirms that the Certificates matured in 1988, were not renewed, and were paid out to the Plaintiffs at maturity.

[30] The Defendant argues the Plaintiffs' delay in commencing the action has and continues to prejudice the Defendant. Relevant records relating to the Certificates have been destroyed. For example, the process to redeem a Certificate of Deposit in 1988, if the original Certificate of Deposit was lost or mislaid, was to sign a bond of indemnity. Any record of a bond of indemnity would have been destroyed in 2008. Also, if a Certificate of Deposit remained unclaimed, the process in 1988 was to contact the client with phone calls or letters. If a call was unsuccessful, a letter would be sent. Records were maintained of the process taken with particular Certificates of Deposit. In addition, Ruth Urbas could not be examined for discovery.

[31] Based on these factors, the Defendant submits the action is statute barred because the Plaintiffs commenced it outside the limitation period. Similarly, the action should be dismissed based on the application of the doctrine of laches.

Legal principles

[32] On January 1, 2004, the *Limitations Act, 1990*, R.S.O. 1990, c. L.15, was repealed and replaced by the *Limitations Act, 2002*. The *Limitations Act, 2002* represents a revised, comprehensive approach to the limitation of actions.

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[33] According to the transitional rules, if the claim was discovered before January 1, 2004, the former six-year limitation period applies. Further, if the former limitation period expired before January 1, 2004, then the claim is statute barred. If the claim was not discovered prior to January 1, 2004, the two-year limitation period under the *Limitations Act, 2002* applies.

[34] In determining whether the Plaintiffs knew or ought to have known of the facts giving rise to the cause of action, the knowledge of their solicitor is imputed to them.

[35] If the *Limitations Act, 2002* applies, courts do not have discretion to extend the basic two-year limitation period, as the Court of Appeal recently confirmed.

[36] Section 5 of the *Limitations Act, 2002* sets out when a claim is "discovered" within the meaning of the statute:

> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause 1(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[37] Statutes of limitations have long been said to be statutes of repose. There comes a time when a potential defendant should be secure in his

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reasonable expectation that he will not be held to account for ancient obligations: *M.(K.) v. M.(H.),* [1992] 3 S.C.R. 6, at para. 22

[38] Once a limitation period has elapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to a claim: *M.(K.) v. M.(H.),* at para. 23. Plaintiffs are expected to act diligently and not sleep on their rights. Statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion: *M.(K.) v. M.(H.),* at para. 24.

Analysis

[39] This motion for summary judgment is brought under Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 1994.

[40] The Plaintiffs argue there are genuine issues requiring a trial, including: the state of the Plaintiffs' knowledge of the Certificates such to give rise to a laches defence as raised by the Defendant, whether the Defendant's conduct contributed to the conduct attributed to the Plaintiffs to give rise to the defence of laches, whether the Defendant paid the Plaintiffs the principal or interest on the Certificates, whether the Certificates are demand notes upon which s. 22 of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, and s. 5(3) of the *Limitation Act, 2002* apply.

[41] The Defendant submits there is no genuine issue requiring a trial because the evidence clearly establishes the limitation period to commence this action expired in 1995, at the latest. The Plaintiffs had knowledge of the Certificates as early as 1989, and they delayed unreasonably in the bringing this action for over 23 years, to the prejudice of Home Trust. Both the expiry of the limitation period and the doctrine of laches bar this action.

[42] In *Hryniak v Maudlin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada overturned the "full appreciation" test promoted by the Ontario Court of Appeal in summary judgment matters. The Supreme Court held there is no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits. A trial is not required if a summary judgment motion achieves a fair and just adjudication, allows the judge to make the necessary findings of fact and apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[43] Judges must interpret summary judgment rules broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. On a motion for summary judgment, each side must put its best foot forward with respect to the existence or non-existence of material issues to be

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tried. A party is not entitled to sit back and rely on the possibility that more favourable facts may develop at trial. The motions court is entitled to assume the evidence contained in the record is all the evidence the parties would rely on if the matter proceeded to trial.

[44] A defendant may move for summary judgment on the basis that the statutory limitation period applicable to a claim has expired. To resist an order for summary judgment on a limitation period issue, the plaintiff must satisfy the court that there are material facts to be tried as to when the cause of action arose and must also demonstrate that there is a real chance of success at a trial of the issue. The plaintiff must present the court with coherent evidence showing a genuine issue for trial.

[45] I am satisfied that these issue can be dealt with on the record presented here in this motion.

[46] Two preliminary matters affecting the applicable limitation period must be addressed. First, I must determine whether the Certificates of Deposit are demand obligations. Second, I must determine whether the Certificates of Deposit are promissory notes.

Are the Certificates of Deposit demand obligations?

[47] The short answer is affirmative. The Certificates are demand obligations. In *2148251 Ontario Inc. v. Catan Canada Inc.*, 2013 ONSC 4049 (CanLII), at paras. 15-19, Sloan J. found the debt obligation at issue was a demand obligation despite appearing "to be a mixed obligation". Here, the Certificates have contingent obligation components – the specified maturity date – and demand obligation components – the "presentation and surrender" proviso. The Certificates do not specify when presentation must occur. They only say it must occur after the maturity date. As a result, the demand date is uncertain and what appears as a mixed obligation on the Certificates' face is properly construed as a demand obligation.

[48] A debt obligation is either a demand obligation, a contingent obligation, or possibly, a delayed-demand obligation: *Catan Canada Inc.*, at para. 15.

[49] Sections 22 and 23 of the *Bills of Exchange Act* provide guidance to determining whether a debt obligation is a demand or contingent obligation: *Skuy v. Greennough Harbour Corporation*, 2012 ONSC 6998 (CanLII), at para. 31; *Catan Canada*, at para. 16. Section 22(1) states a "bill is payable on demand (a) that is expressed to be payable on demand or on presentation; or (b) in which no time for payment is expressed." Section 23 states a bill is "payable at a

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determinable future time, within the meaning of this Act, that is expressed to be payable (a) at sight or at a fixed period after date or sight; or (b) on or at a fixed period after the occurrence of a specified event that is certain to happen, though the time of happening is uncertain."

[50] In *Skuy*, at para. 31, Perell J. summarized some cases interpreting these sections: "[A] debt obligation that does not specify a date for repayment is a demand obligation. Where a debt obligation is payable on a fixed date, it is not a demand obligation, even if the obligation stipulates that the lender must give notice or make a demand for payment before enforcing the debt obligation." On the latter point, Perell J. noted, at para. 31, "This is an example of the confusing nature of the law because a non-demand obligation can have a demand component to it."

[51] Where no time is fixed for repayment of a loan, and no other terms are mentioned, the loan is repayable on demand: *Wilkosz v. Amato*, [1999] O.J. No. 1958, at para. 50.

[52] Here the Certificates specify September 29, 1988, as the maturity date. Based on that fact alone, they would not constitute demand obligations under s. 22(1)(a) because that section requires that the debt obligation express no payment time. However, despite specifying the maturity date, the Certificates may still constitute demand obligations because the Certificates require "presentation and surrender" to receive payment.

[53] In *Catan Canada*, Sloan J. had to interpret a promissory note with similar terms and concluded it was a demand obligation. The promissory note was "due 'on demand after the maturity date'". Sloan J. concluded, at para. 17, "[w]hile the maturity date presents a determinable future time, the addition of "on demand" clarifies that s. 23 does not apply. This is not a fixed period after a date, because the date of the demand is uncertain." The same applies here. Although the maturity date is a determinable future time, the "presentation" proviso is an express statement that the Certificates are demand obligations. The Certificates do not limit when after the maturity date the holder can demand payment. As a result, there is no fixed period after the specified date.

[54] Additionally, although the Certificates could be considered 'non-demand obligations with demand components', the case here is distinguishable from *Berry v. IPC Securities Corp.*, [2009] O.J. No. 1598, the case to which Perell J. referred to in *Skuy* when stating non-demand obligations can have demand components.

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[55] In *Berry*, the debt obligation was ruled a contingent obligation. However, in that case, the debt obligation's demand component only arose upon default in paying the principle or interest. Otherwise the debt obligation, which specified a payment date, was a non-demand obligation. Belobaba J. determined the default demand component did not render the non-demand obligation a demand obligation. At para. 17, Belobaba J. stated "[w]here a promissory note provides that it is to be payable upon demand upon a default occurring, this does not make it a demand note."

[56] In *Berry*, the demand component was a secondary component because the demand only arose on default. The case here is different. The demand components are inherent to the Certificates. The demands do not arise based on Home Trust's failure to pay back the deposit; rather the Certificate holder must make the demand to receive payment. As a result, the Certificates, while they mix contingent and demand components, constitute demand obligations.

Are the Certificates of Deposit promissory notes under the *Bills of Exchange Act*?

[57] Again, the response is affirmative. The Certificates are promissory notes under the *Bills of Exchange Act.* Section 176 defines a promissory note. Section 176 requires an agreement to have the following elements to qualify as a promissory note:

- An unconditional promise in writing made by one person to another;
- The maker's signature; and,
- The maker engages to pay, on demand or at a fixed determinable future time, a sum certain in money to, or to the order of, a specified person or bearer.

[58] The Certificates are in writing, they are promises Home Trust made to Ruth and Carl Urbas, and they are signed by Home Trust's representatives. The agreement stipulates Home Trust "hereby promises to pay" the holders "the principal sum … on the maturity date on presentation and surrender of this certificate." Further, the sum (principal and interest) is clearly set out in the agreement. From this it is evident the agreement is an unconditional promise to pay a certain sum of money, on demand or at a fixed time in the future, to a specified person.

[59] Further, s. 186(1) establishes the provisions of the Act relating to bills apply to promissory notes with necessary modifications and some exceptions.

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[60] In 1988, when the Certificates were issued, Home Trust was legally known as Home Savings & Loan Corporation and was a loan corporation incorporated under the *Loan and Trust Corporations Act*, *1987*, S.O. 1987, c.33.

[61] The *Act* provides that a registered provincial loan corporation may, in a debtor and creditor relationship for the purposes of investment, receive money, repayable upon the expiry of a fixed term, and the corporation may issue debentures or other evidences of indebtedness in respect thereof, appropriate to the debtor and creditor relationship created thereby: *Loan and Trust Corporations Act, 1987*, s. 155(1).

[62] I will now address the Defendant's argument that the Plaintiffs' claim should be barred. For the following reasons, I conclude the Plaintiffs' claim is barred because it was brought after the applicable limitation period expired and because the doctrine of laches and delay applies in this case.

The Plaintiffs brought the claim after the limitation period expired

[63] In this motion, the focus is on the Plaintiffs' discoverability of the cause of action. For this motion, several cases have been provided by the parties, on the issue of discoverability, albeit many of which are distinguishable on their particular facts. For example, in *St. Jean v. Cheung,* 2008 ONCA 815 (CanLII), the Court of Appeal held that the limitation period started to run from the time that the Plaintiff's litigation guardian and counsel received the medical records which, had they been reviewed promptly, would have disclosed immediately the identities of the doctors and the postnatal care provided by them.

[64] The *Limitations Act, 2002*, contains provisions dealing with claims discovered prior to that Act coming into force. Section 24(3) provides:

> If the former limitation period expired before January 1, 2004, no proceeding shall be commenced in respect of the claim.

[65] Consequently, the former limitation periods established by the provisions of the *Limitations Act, 1990* will only apply in the circumstances of this case if the limitation period expired before January 1, 2004.

[66] Section 45(1) of the *Limitations Act*, *1990* provides the following:

> The following actions shall be commenced within and not after the times respectively hereinafter mentioned …

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> (g) an action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander,
>
> within six years after the cause of action arose ….

[67] Any action on the Certificates is one of simple contract or debt and, therefore, section 45(1)(g) of the prior Act applies and the applicable limitation period for the commencement of this action is within six years after the cause of action arose.

[68] However, the question remains when did the cause of action arise?

[69] A loan payable on demand is payable immediately and the limitation period begins to run from the date of instrument: *Bank of Montreal v. Stephen*, [1990] N.B.J. No. 612 (C.A.). Notably, the Certificates do not contain any language providing for automatic renewal if the funds owing under them are not claimed after the stipulated maturity date.

[70] I find favour with the Defendant's position, which is supported by what little documentary evidence remains, that the Certificates matured in September 1988 and they did not remain with Home Trust after maturity. Nevertheless, the Defendant submits that the limitation period for any action on the Certificates would have started to run from their maturity on September 29, 1988.

[71] The relationship between Home Trust and the Plaintiffs with respect to the Certificates is that of debtor and creditor. Pursuant to the terms of the Certificates, Home Trust promised to pay the Plaintiffs the principal amount and accrued interest for the term of the deposit on the maturity date of September 29, 1988, with no further interest to accrue past the maturity date.

[72] The Plaintiffs' right to repayment of the amounts evidenced by the Certificates began on the maturity date, which was September 29, 1988.

[73] I accept that if the Certificate had been renewed beyond its maturity date, the T5 would have indicated an amount of interest greater than $1,459.97. Moreover, if the Certificate of Deposit had been renewed, or otherwise continued to exist with Home Trust into 1989, Home Trust would have issued Ruth Urbas a T5 in respect of investment income earned in 1989.

[74] I am satisfied that for Ruth Urbas, the latest possible date for the commencement of the limitation period would be April 5, 1989. This is the date of

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the letter from her accountant, Priscilla Monteith, enclosing the 1988 tax return and T5 in relation to her Certificate.

[75] While the Plaintiffs have the original documents in their possession, I accept the evidence provided in Brian Mosko's affidavit that payment of the principle pursuant to the obligation can be made by way of bond.

[76] Mr. Mosko's affidavit stated, at para. 43, where a Certificate of Deposit was lost or mislaid, the process to redeem the amount owing was for the client to sign a bond of indemnity.

[77] Further, I do not accept that the Defendant merely sat with these funds unaccounted for over 20 years without due regard for statutory compliance. This appears to defy the statutory obligations imposed on the Defendant.

[78] Based on the above analysis and findings, the limitation period started running in 1988 or, at the latest, 1989. Since the claim arose before January 1, 2004, the former limitation period of 6 years applies. This means the limitation period expired well before January 1, 2004, and therefore, the Plaintiffs' claim is statute barred.

Laches and Delay also bars the Plaintiffs' claim

[79] Laches is established when two conditions are fulfilled: (1) there is unreasonable delay in the commencement or prosecution of proceedings; and (2) in all of the circumstances the consequences of delay renders the grant of relief unreasonable or unjust: *Rhyolite Resources Inc. v. CanQuest Resource Corp.,* [1999] B.C.J. No. 114 (C.A.), at para. 33.

[80] There are two distinct branches to the laches doctrine. The doctrine will apply where the delay of the plaintiff (a) constitutes acquiescence, or (b) results in circumstances that make the prosecution of the action unreasonable: *M.(K.) v. M.(H.),* at para. 98.

[81] Mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine of laches considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine. The court in exercising its equitable jurisdiction must always consider the conscionability of the behaviour of both parties.

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[82] "Acquiescence" has various meanings. One meaning is that a plaintiff stands by and watches the deprivation of her rights and does nothing. Another is that after the deprivation of her rights and in the full knowledge of their existence, a plaintiff delays, leading to an inference that her rights have been waived: *M.(K.) v. M.(H.),* at para. 100

[83] A plaintiff's knowledge of her rights is critical to the notion of acquiescence; however, this knowledge is to be measured by an objective standard so that the question is whether it is reasonable for the plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim.

[84] Here, the Plaintiffs knew or ought to have known of their alleged rights for payment under the Certificates as early as 1988 or 1989 when T5s were issued to them and the T5 income was reported on their tax returns for 1988. The Plaintiffs' communication with their accountant also supports finding they had sufficient knowledge about the existence and nature of the Certificates.

[85] The Defendant submits that, despite having full knowledge of the Certificates, the Plaintiffs stood by and delayed making a claim for payment (assuming no payment was made which the evidence does not support) from 1988 to 2011 – a period of over 23 years. Home Trust submits that in so doing, the Plaintiffs waived any rights they might have had.

[86] Further, I agree with the Defendant that there is prejudice in this case due to the extended passage of time. I do not accept the Plaintiffs' argument that the Defendant has an onus to preserve documents or to advance the case.

[87] I accept the evidence provided by the Defendants in Mr. Mosko's affidavit at paras. 42-45. Many of the documents relevant to the action have been destroyed. Any record the Plaintiffs signed a bond of indemnity would have been destroyed in 2008. Records of calls and letters seeking to contact clients regarding unclaimed debts have also been destroyed. Further, no record of the Plaintiffs' names could be found after searching the Defendant's records.

[88] Clearly, the Defendant was entitled to destroy records after the passage of a reasonable period of time, in this case, 20 years.

[89] Additionally, the Defendant is further prejudiced by the unfortunate fact that Ruth Urbas passed away and therefore the Defendant could not examine her.

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[90] Based on all of the above, I find the action is barred by the doctrine of laches.

Conclusion

[91] On this motion for summary judgment I find that the Plaintiffs failed to commence their action against the Defendant within the time frame set out in the *Limitations Act, 2002* and as such are out of time.

[92] For the aforementioned reasons, this motion can be determined by summary judgment under Rule 20.01. There is no genuine issue requiring a trial with respect to whether the action against the Defendant is statue-barred pursuant to the *Limitations Act, 2002*. I am also satisfied that the Plaintiffs have failed in their claim for equitable relief.

[93] The Defendant's motion for summary judgment is granted.

[94] If the parties cannot agree on the issue of costs, I will consider brief written submissions. These cost memoranda shall not exceed three pages in length (not including any bill of costs or offers to settle). The Defendant shall file its costs submissions within 10 days of the date of this endorsement. The Plaintiffs may file their costs submissions within 10 days of the receipt of the Defendant's materials. The Defendant may file a reply within five days thereafter.

Justice A. J. Goodman

Date: October 23, 2015

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Court of Queen's Bench of Alberta

Citation: Weatherford Canada Partnership v Addie, 2016 ABQB 188

2016 ABQB 188 (CanLII)

Date: 20160407
Docket: 0603 04628
Registry: Edmonton

Between:

Weatherford Canada Partnership

Plaintiff/respondent

- and -

Dave Addie, David Anderson, Glen Kinnee, Ted Harland, Dan Endersby, Midfield Supply ULC, Midfield Supply International Ltd., Dale Denney, Douglas Golledge, John Letwinetz, Rick Endersby, Jakob Ambrosius, Artemis Kautschuk und Kunstoff-Technik GmbH, Wilhelm Kaechele GmbH, West Met Tools & Machinery Ltd., and Europump Systems Inc.

Defendants/applicants

Memorandum of Decision of the Honourable Madam Justice J.B. Veit

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Summary

[1] In this special chambers application, Artemis and Kaechele ask the court for leave to amend their statements of defence to plead that Weatherford's claim against them is barred by the *Limitations Act*, and, if the applications for amendment are granted, for summary judgment against Weatherford.

[2] The parties agree, in large part, on the applicable law. Insofar as amendments to pleadings are concerned, the parties agree that, although applications for amendment need only cross a low bar, amendments should not be allowed, amongst other reasons, if they cause the

party opposite prejudice which cannot be compensated by costs or if the proposed amendments are hopeless. Weatherford argues that they would suffer prejudice if the amendments were allowed because Weatherford is now unable to serve its 2007 statement of claim which did name the applicants as defendants; Weatherford also claims that the applications are too late given that a trial date in early 2017 has already been set.

[3] Insofar as applications for summary judgment are concerned, the parties agree that there has been a shift in the legal culture which now supports the granting of summary judgment in situations where uncontroverted evidence establishes that there is no genuine issue for trial. The applicants' application for summary judgment on a limitations basis is grounded in records produced by Weatherford in 2015, pursuant to court order, which disclosed internal Weatherford communications from November 2005. The applicants contend that the 2005 records establish, in light of all of the circumstances previously known, that Weatherford knew, by November 30, 2005, or in any event not later than March 31, 2006, of the issues which it raised in its Amended Amended Amended Statement of Claim filed April 7, 2008. The applicants assert that Weatherford understood the limitations issues because Weatherford acknowledged that Q.B. action 0703 13544 filed by Weatherford on October 23, 2007 – which named the applicants as defendants but which was never served on the applicants - had been filed to "preserve [its] position". Finally, the applicants argue that, because Weatherford deliberately chose not to serve its 2007 claim, it effectively chose not to initiate proceedings against them for tactical business reasons. The defendants therefore argue that they are entitled to rely on what they characterize as Weatherford's laches and acquiescence, together with s. 10 of the *Limitations Act*, to obtain limitations immunity from Weatherford's claims.

[4] Weatherford opposes the applications for summary judgment on the basis that there are issues of fact and law which genuinely require a trial. In particular, Weatherford highlights that:

- the Artemis defence does not explicitly refer to laches and acquiescence and therefore those issues should not be considered on Artemis' application;
- the amendment relating to laches and acquiescence is largely hopeless because it provides a defence only to equitable claims and Weatherford's claims are largely legal rather than equitable;
- in any event, the Kaechele application is hopeless because it does not provide evidence that Kaechele altered its conduct in any way in reliance on anything said or done by Weatherford;
- the facts surrounding the issue of when Weatherford had sufficient knowledge of the involvement of the applications are complex. Weatherford maintains that it was not until June 2006, when Weatherford saw one of its stators in the yard of a competitor in Lloydminster that it obtained the requisite knowledge to sue the applicants;
- if the court should find that Weatherford did not amend its claim to add the applicants to the main action within two years of the date on which it had sufficient knowledge of its cause of action, s. 6 of the *Limitations Act* allows it to add the applicants to its action even after the expiry of two years.
- in any event, at no time did Weatherford ever conduct itself in a manner or represent to the applicants that it intended to abandon its legal rights and remedies against them;

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- Weatherford's "contingency plan" or "replication project" was undertaken in direct response to the perceived threat that the applicants may be involved in supplying the startup competitor;
- also, Weatherford maintains that the applicants themselves did not have the "clean hands" required by equity: at the same time as Weatherford was taking steps to strengthen its relationship with each of them, the applicants were, separately, negotiating with the startup to be involved with the competing business in some way;
- the destruction by Dunn of the notes of his meetings with the defendants Addie and Anderson is not spoliation because Dunn took those notes personally and not during the course of his employment with Weatherford.

[5] The applications for amendments of the statements of defence are allowed. Weatherford has not established that it would suffer prejudice of the type required if the amendments are allowed: these amendments are not the reason why Weatherford is unable to serve its 2007 statement of claim. Weatherford chose to discontinue its 2007 action without any encouragement from the applicants. Although the amendments are late, in the circumstances, Weatherford had a full opportunity to respond to the issues raised in those amendments.

[6] The proposed amendments are not hopeless: in this context, the equitable doctrines of laches and acquiescence are potentially applicable to legal claims as well as to equitable ones.

[7] The applications for summary judgment are allowed. Spoliation, as an evidentiary concept, is not applicable here against Weatherford: the evidence does not establish that, when the senior Weatherford employee Dunn destroyed records of his meetings with the defendants Addie and Anderson, he did so "to affect the litigation".

[8] A review of the uncontested evidence establishes that Weatherford had all the information it required to sue the applicants by November 30, 2005 or March 31, 2006 at the latest. In all the circumstances, the November 25, 2005 email provided Weatherford with more than a mere suspicion of the alleged wrongful activities of the applicants. Therefore, Weatherford has failed to meet the s. 3 limitations deadline.

[9] Although Weatherford's 2008 added claim to its original pleading does relate to the conduct described in the original pleading, because of the equitable doctrines of acquiescence and laches outlined in s. 10 of the *Limitations Act*, the applicants are granted immunity from liability that would otherwise apply as a result of the application of the curative provisions of s. 6(4) of the *Limitations Act*. While the original pleading was in effect, Weatherford, a sophisticated litigant, knew of the limitations issue, but deliberately chose not to serve its 2007 statement of claim naming the applicants as defendants for the tactical reason of maintaining a supply of stators from the applicants until it could replicate the German stators. In those circumstances, it would be unequitable to allow Weatherford to benefit from the curative provisions of s. 6(4) of the *Limitations Act*.

Cases and authority cited

[10] **By Artemis Kautschuk und Kunstoff-Technik GmbH:** ***Weatherford Canada Partnership v Addie***, 2009, ABQB 39; ***Weatherford Canada Partnership v Addie***, 2012 ABQB 215; *Alberta Rules of Court*, Alta Reg 124/2010; ***Provalcid Inc. v Graff***, 2015 ABQB 574; ***Hryniak v Mauldin***, 2014 SCC 7; ***Templanza v Wolfman***, 2016 ABCA 1; ***Elkow v Sana***, 2015 ABQB 803; ***Sticks and Stones Communications Inc. v Hole's Greenhouses & Gardens Ltd.***,

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2015 ABQB 774; *Limitations Act*, RSA 2000, c L-12; ***Central Trust Co. v Rafuse***, [1986] 2 SCR 147; ***Quadrangle Holdings Limited v Coady***, 2012 ABQB 22; ***De Shazo v Nations Energy Company***, 2005 ABCA 241; ***Mohr v 477470 Alberta Ltd.***, 2003 ABQB 294; ***Goldencare Holdings Inc. v Manu Chugh Architect Ltd.***, 2006 ABQB 696; ***Rosenich v. Welke***, 2003 CarswellAlta 1888; ***Leokadia Contracting Ltd. v Sabre Plumbing Services Inc.***, 2012 ABQB 585; ***Jacqueleyne Poff v Great Northern Data Supplies (AB) Ltd.***, 2015 ABQB 173; ***Hunter Financial Group Ltd. v Maritime Life Assurance Co.***, 2007 ABQB 263; ***Brough v Yipp***, 2014 ABQB 777; ***Desoto Resources Ltd. v EnCana Corp.***, 2010 ABCA 110; ***S. (C.H.) v Alberta (Director of Child Welfare)***, 2006 ABQB 528; ***Barker v Budget Rent-A-Car of Edmonton Ltd.***, 2012 ABCA 76; ***Castledowns Law Office Management Ltd. v FastTrack Technologies Inc.***, 2012 ABCA 219; ***681210 Alberta Ltd. v Hunter***, 2012 ABCA 83 (Alta. C.A.); ***North American Road Ltd. v Hitachi Construction Machinery Co***, 200B5 ABQB 847; ***McDougall v Black & Decker Canada Inc.***, 2008 ABCA 353; ***Schnick v Rosen*** 2009 ABQB 189; ***Great-West Life Assurance Company v King*** 2013 ABQB 529; ***Devon Canada Corporation v Canadian Pacific Railway Co*** 2009 ABQB 143; ***Barker v Budget Rent-A-Car of Edmonton Ltd***. 2011 ABQB 127

[11] **By Wilhelm Kaechele GmbH**: ***Balm v 3512061 Canada Ltd***. 2003 ABCA 98; ***Canada Deposit Insurance Corporation v Canadian Commercial Bank*** 2000 ABQB 440; ***Boyd v Cook*** 2013 ABCA 399; ***Canadian National Resources Limited v Jensen Resources Ltd***. 2013 ABCA 27; ***M.(H.) v M.(K.)*** [1992] 3 SCR 6; ***Manitoba Metis Foundation Inc. v Canada (Attorney General)*** 2013 SCC 14; ***Zurich Insurance Co. v TD General Insurance Co.*** 2014 ONSC 3191; ***Lac Minerals Ltd. v International Corona Resources Ltd***. [1980] 2 S.C.R. 574***; Perry, Farley, & Onyschuck v Outerbridge Management Ltd.*** [2001] O.J. No. 1698; ***Hryniak v Maudlin*** 2014 SCC 7.

[12] **By Weatherford Canada Partnership:** ***Weatherford Canada Partnership v Artemis Katschuk und Kunstoff-Technik GmbH et al***, 2009 ABCA 195; ***Weatherford Canada Partnership v Addie***, 2011 ABQB 562; ***Weatherford Canada Partnership v Dave Addie et al***, 2009 ABQB 538; ***Balm v 3512061 Canada Ltd.***, 2003 ABCA 98; ***Godhart v Westlake Developments Inc.***, 2015 ABQB 543; ***First Investors Corp. v Quinpak Development Ltd.***, 1985 CarswellAlta 72; ***Hryniak v Mauldin,*** 2014 SCC 7; ***Stoney First Nation v Imperial Oil Resources Limited,*** 2014 ABQB 408; ***Windsor v Canadian Pacific Railway Ltd.***, 2014 ABCA 108; ***WP v Alberta***, 2014 ABCA 404; ***776826 Alberta Ltd. v Ostrowercha***, 2015 ABCA 49; ***Beier v Proper Cat Construction Ltd.***, 2013 ABQB 351; ***AT Films Inc. v AT Plastics Inc.***, 2014 ABQB 422; ***Condominium Plan 0125764 v Amber Equities Inc.***, 2015 ABQB 235; ***Meek (Trustee of) v San Jan Resources***, 2005 ABCA 448; ***Atlanta Industrial Sales Ltd. v Emerald Management & Realty Ltd.***, 2006 ABQB 255; ***De Shazo v Nations Energy Co.***, 2005 ABCA 241; ***Sun Gro Horticultural Canada Ltd. v Abe's Door Service***, 2005 ABQB 731, aff'd by 2006 ABCA 243; ***Poff v Great Northern Data Supplies (AB) Ltd.***, 2015 ABQB 173; ***Canadian National Resources Limited v Arcelormittal Tubular Products Roman SA***, 2012 ABQB 679; ***Elbow River Marketing Limited Partnership v Canada Clean Fuels Inc.***, 2012 ABQB 277; ***McLaughlin v Broddy***, 2006 ABQB 914; ***681210 Alberta Ltd. v Hunter***, 2012 ABCA 83; ***Intact Insurance Co. of Canada v Lombard General Insurance Co. of Canada***, 2015 ONCA 764; Allen M. Linden, Lewis N. Klar, Q.C.R Bruce Feldthusen, *Canadian Tort Law Cases, Notes & Materials*; 13th ed. (Canada: LexisNexis Canada Inc., 2009); ***Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.***, [1994] 2 SCR 490; ***Strand v Strand***, 2014 ABQB 754; ***Zippy Print Enterprises Ltd. v Pawliuk***, [1994] BCJ No. 2778; ***Ambrozic v Burcevski***, 2008 ABCA 194; ***Seyedi v Nexen Inc.*** 2016 ABCA 24; ***Re: San Francisco Gifts Ltd. (Companies'***

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Creditors Arrangement Act) 2004 ABQB 229; ***Seyedi v Nexen*** 2016 ABCA 24; Alberta Law Reform Institute, Report No. 55, December 1989, *Limitations*;

[13] **By the court:** ***Chow-Hidasi v Hidasi*** 2013 BCCA 73; ***H.E. v M.M.*** 2015 ONCA 813; ***Steward v North Metropolitan Tramways Co.*** (1886) 16 Q.B.D. 556 (C.A.); ***Bhasin v Hrynew*** 2014 SCC 71; ***Ferreira v Macedo*** 2016 ONSC 951; ***Bark-Fong v Cooper*** (1913) 49 S.C.R. 14; ***Webster v Gelinas*** [1941] 4 D.L.R. 495; ***Silver Eagle Management Inc. v Onoway (Town)*** 2011 ABQB 139; ***Paniccia Estate v Toal*** 2012 ABCA 397; ***No Limits Sportswear v 0912139 B.C. Ltd***. 2015 BCSC 1698, at paras. 23 ff.; ***Urbas Estate v Home Savings and Loan Corp***. 2015 ONSC 6399; ***Rivergate Properties Inc. v West St. Paul (Rural Municipality)*** 2006 MBCA 76.

1. Background

a) Factual

[14] The general background to this application has been set out in previous decisions: 2009 ABQB 39; 2009 ABCA 195; 2009 ABQB 538; 2011 ABQB 562; 2012 ABQB 215.

[15] It is sufficient for the purposes of these applications to say that Weatherford is a manufacturer of progressing cavity pumps, hereafter PC pumps. Alberta is the world's biggest market for those pumps. Two of the key components of those pumps are stators and rotors; a PC pump stator is a steel tube with an elastomer lining into which a rotor is inserted. The elastomers used by stator manufacturers are generally proprietary to that manufacturer, and highly confidential. Stators and rotors are then combined with other components and assembled by various manufacturers, including Weatherford, and sold to end customers in the Alberta heavy oil industry including Husky Oil, CNRL, Encana, etc.

[16] Artemis and Kaechele are German stator manufacturers. Although other companies manufacture stators, including Weatherford itself both at its Edmonton Strathcona plant and at its plant in Brazil, the two German manufacturers have a certain "cachet" in the industry. Their stators have been particularly prized in the heavy oil industry. The two German stator manufacturers are competitors with one another in the stator industry. During the period in question, Weatherford had contracts with each of the applicants for the supply of stators. The contracts did not contain exclusive production clauses; that is, Weatherford had not contracted with either of the German manufacturers to produce stators only for Weatherford. The contracts did not contain clauses prohibiting reverse engineering; that is, Weatherford had not contracted with either of the German manufacturers to prevent them from reverse engineering or replicating the stators which they produced for Weatherford for other potential customers. Even after they were served with process in these proceedings, the German manufacturers did not refuse to supply Weatherford with any product ordered by Weatherford.

[17] There are many models of PC pumps available on the market; typically, the pump models are differentiated by the total daily volume which can pass through the pump. Artemis produces 9 models of stators which have been used by Weatherford; Kaechele produces 2 such models. The ability of a particular PC pump to pump larger or smaller volumes of fluid will depend on the size of the pump and the size of the cavities created by the juxtaposition of the stator and the rotor. The cavities, which are sometimes referred to as "interior geometries" of a PC pump, are therefore important to the utility of a pump. Stators are manufactured based on specifications set for internal geometries, that is the cavity created between the stator and the rotor, and specific elastomer formulations.

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[18] Because limitations is a key component of these applications, it is necessary to have a clear outline of the chronology of the relevant events.

[19] Starting in early 2005, two key Weatherford employees, the defendants Addie and Anderson, began to consider leaving Weatherford to start up a new company that would produce interchangeable components for PC pumps and would compete with Weatherford. They approached another senior Weatherford employee, Lonnie Dunn, to ask him to join them. Dunn met with them off and on during 2005. Beginning in February 2005, Mr. Dunn made informal notes of his meetings.

[20] Starting at the latest on February 3, 2005, Weatherford considered changing the business relationship it had had with Artemis for "the last couple of decades": Weatherford would approach Artemis with a sole source agreement proposal. The proposed agreement would include the following terms: confidentiality with respect to exchanged technical information; Weatherford would become Artemis' world-wide PC pumps distributor; and, Weatherford would commit to order a certain dollar amount of product per year. Weatherford was informed by Anderson on March 2, 2005, that Artemis was not interested in making any such agreement. Renewed interest in pursuing the possibility of coming to such an agreement with Artemis was expressed by Weatherford in November, 2005. See Tab Q of the Gillis affidavit.

[21] On October 14, 2005, Addie resigned from Weatherford.

[22] On October 25, 2005, Anderson resigned from Weatherford.

[23] At about the time when Addie and Anderson left Weatherford, Mr. Dunn decided not to join them.

[24] After Dunn decided to remain with Weatherford, he destroyed the notes he had made of his meetings with Addie and Anderson.

[25] In early November, 2005, Dunn confirmed with the Weatherford management that he had had discussions with Addie and Anderson regarding the setting up of a competing business.

[26] On November 25, 2005, Lonnie Dunn, a key employee of Weatherford being the engineer who was responsible for the technical side of Weatherford's PC pump operation and a man who routinely dealt with each of the German applicants, wrote a detailed email to Bill Lane, the Vice-President of Weatherford, (see tab K, Gillis affidavit filed January 25, 2016) which included the following comments:

> As you know I have been aware of the situation developing for some time but conflicted on whether or not to take advantage of my knowledge and begin working against it. About a month ago after evaluating both sides I decided I would not participate and in light of what I saw going from the other side decided it was appropriate to begin doing some of the background work in confidence that would be required going forward. Some of the details on the consolidated product line, new stator and rotor production numbers and costs and pump configurations that I provided you and we discussed when you were here a few weeks ago were the result of that work. . . As a result of my situation I have given this much thought both in terms of what I would do if I was on either side. I wanted to share some of this with you as it may provide additional perspective for you to consider. Note that these are purely my opinions and for the most part were formulated upon my interpretation of the overall situation as opposed to my insider knowledge. Now that this is out in the open I feel like I can openly express my thoughts as the same thing

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would have happened had I not known in advance it would have just taken me longer to get to this point. Given that timing will be critical here and I am away next week I did not want to let any more time slip away. . . . The whole premise of the start-up's plan revolves around their existing relationships with customers and their ability to obtain and supply the rotor and stator product that still comprises the majority of the Canadian business. . . .The second part revolves around their access to the exact same pump product that the customers are using already and their knowledge that most of them are not comfortable with the high percentage of the business that we have. One thing I know that has concerned them is that over time the Strathcona product is cannibalizing the historical German product and beginning to differentiate itself in terms of performance . . . They will offer the exact same product and try to convince the customers that ours is different and unproven especially if we bring it in from Brazil. . . [t]hey will get stators from Artemis and Kaechele and rotors from . . . [f]rom the assembly end of things they only [need] . . . to deal with welding, phasing and testing which is relatively routine and it is not unrealistic that a small assembly operation can be set up in three months. That timing would be good as one would assume they have already ordered product from Artemis and Kaechele so it will arrive in about three months (early March). . . Obviously we need a strategy to complete [sic] with them as if we are offering the same product at the same price and they have the relationships we will lose a large portion of the business within six to nine months as they ramp-up capacity. . . If we are to compete on price over the long term we can't continue to offer the German . . . product as since these companies are tied in with the start-up they will get preferential pricing even if we are ordering higher quantities. . . . One thing working in our favour is being vertically integrated we should be more efficient and have better flexibility. Although all these companies are all working together they are comprised of manufacturers (Artemis, Kaechele . . .) an assembly operation (the start-up pump company) and a distributor . . . who all need to get their piece of the pie. . . . However, Artemis and Kaechele are legitimate businesses that need to make money and based on my conversations with . . . and . . . they have been squeezed quite tight over the last few years by Dave. . . . The success of our pricing opportunity in the heavy oil market lies in utilizing our internal manufacturing to reduce cost and maintain margins. . . . Note that I am not suggesting an abrupt change in supply chain but rather phasing one or perhaps both German suppliers over time (one possibility although remove [sic] would be that the Germans would cut us off and I suspect . . . will do that regardless). . . . . With this situation now in the open John will be able to factor those scenarios into the AFEs he has been working on for new rotor and stator manufacturing equipment. . . . On the technical side there would also be an extensive reengineering effort required to develop interchangeable conventional stators but it is not insurmountable as we have become very good at this by moving several German models here already . . . This situation becomes very complicated because the timing is critical and most of the options we have will take considerable time. To make matters worse the competition is already moving . . . Since we have to anticipate competition from early March there is no possibility of us being able to replace any significant German production by then as the earliest we could have stators coming back from Brazil is about four to five months and a new extruder and associated capacity here in Canada about six to eight months. As such we need to continue our relationship with the Germans for at least three to four months after which

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> even if we stop ordering the product on . . . and in inventory would carry us through. If we require this working relationship with the Germans it likely impacts how aggressive we want to get in terms of going after them for using our technology/designs which in turn could potentially slow down the start-up. . . .
>
> [Emphasis added]

[27] On December 19, 2005, Lonnie Dunn sent an email to Bill Lane, Bob McNair, Jeff Lembcke, Roland Moneta, and John Baker, all of whom are part of the management team of Weatherford. The email is entitled "Approval for Engineering Costs Associated with Strathcona Replication of German PCP Product Line", can be found at tab T of Mr. Gillis' affidavit, and includes the following:

> In follow up to the discussion in our last conference call we have now moved into active development on the project to replicate the German PCP product line at Strathcona. . . . Whereas normally these developments would be individually documented and justified through the Project and Project databases and Stage Gate Development Process, for confidentiality we have agreed to replace this formal process with a single e-mail approval based on the following . . . .
>
> [Emphasis added]

Every addressee approved Dunn's proposal. Bill Lane's email reads: "Excellent detail and plan. Approved. Full speed ahead." It goes without saying that the German manufacturers were not informed by Weatherford of its replication project.

[28] On January 11-13, 2006, Bill Lane travelled to Germany to meet with each of the applicants separately. Lane did not discuss Weatherford's replication project with the Germans.

[29] While the Weatherford team was in Kaechele's boardroom, the principal of Kaechele accidentally brought up onto a motorized whiteboard an outline of information relating to Europump. He was greatly embarrassed by this; being unable to remove the offending panel, eventually pulled the plug out of the wall in order to remove the information. In a written thank you note for the hospitality which they had received in Germany, Lane referred to this incident only obliquely by referring to the fact that he realized that Weatherford had competitors.

[30] On January 11, 2006, Lane visited the Artemis headquarters and assured himself that Artemis would continue to supply Weatherford with stators. However, Artemis continued to refuse to enter into a new, more circumscribed arrangement with Weatherford.

[31] In early 2006, that is at some time in the first quarter of 2006, Weatherford received, from one of its customers, a Europump spec sheet relating to rotors; see Dunn's questioning, October 21, 2014, at page 2123/4.

[32] On January 30, 2006, Dunn sent one of his regular, typically monthly, updating emails to Weatherford's management about the replication of the German products. That update contained the following information and recommendations:

> While it was important to kick this off aggressively it appears now that we are unlikely to suffer an immediate supply disruption and as such I would like to propose we back off on my very aggressive initial schedule. . . . . This will also allow me to focus on the Brazil development aspect as well as beginning to look at the strategy through which we can differentiate our internal products (Strathcona and Brazil) from the German products.

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[33] On February 26-28, 2006, Dunn prepared a chronological history of his dealings with Addie and Anderson.

[34] On April 11, 2006, Weatherford filed its statement of claim in this action against a number of defendants, not including the applicants. The statement of claim did, however, recite the defendants Addie and Anderson's relationships to the applicants:

> 12. Addie was a director and shareholder . . . . in BMW Monarch . . . BMW Monarch was a distributor of PC Pumps manufactured by Weatherford or its predecessors . . .
>
> 13. Addie, . . . subsequently formed a company called BMW Pump Inc. . .
>
> 14. Shortly after BMW Pump was formed, Anderson left his position with Weatherford to join BMW Pump as its Chief Engineer. . . . While with BMW Pump, Anderson made arrangements to obtain parts used for the assembly of BMW Pump products directly from supplier who supplied parts to Weatherford's PC Pump operating unit, including ARTEMIS Kautschuk und Kunstoff-Technik GmbH ("Artemis") and Wilhelm Kaechele GmbH ("Kaechele") both of which were (and continue to be) based in Germany and supplied (and continue to supply) Weatherford with stators manufactured to Weatherford's confidential and proprietary specifications . . . . Stators and rotors are key components used in the manufacturing of PC Pumps.
>
> 15. BMW Monarch and BMW Pump became competitors of Weatherford.
>
> 16. On October 9, 1997 Weatherford . . . acquired both BMW Pump and BMW Monarch by purchasing all of the shares of those companies . . . Weatherford paid Addie $1,714,286.00 for his interest in BMW Monarch and $4,883,721.00 for his interest in BMW Pump. Anderson was paid $4,883,721.00 for his interest in BMW Pump.
>
> . . .
>
> 28. Addie and Anderson had extensive and recurring contact with key suppliers of Weatherford around the world including Artemis, Kaechele and . . ., in the course of which Addie and Anderson gained and used an intimate knowledge of those suppliers' special needs, preferences, idiosyncrasies and plans.
>
> 29. Addie and Anderson had direct contact and dealings with Weatherford's key suppliers in relation to both field and shop testing of PC Pump prototypes. Both Addie and Anderson encouraged and facilitated the sharing of Weatherford confidential and proprietary information with Artemis, Kaechele and . . .
>
> . . .
>
> 58. While still employed with Weatherford . . . . Addie and Anderson . . . devised and carried out a plan to attempt to cripple Weatherford's PC Pump business while at the same time furthering the interests of [Addie and Anderson and others] by engaging, directly or indirectly, in the following wrongful acts:
>
> > a) incorporating ABC Co. Ltd. Through which the Defendants . . . are or will be manufacturing, assembling and supplying PC Pumps and PC Pump components for supply to . . . in competition with Weatherford, using Weatherford confidential and proprietary information in the possession of Addie, Anderson . . . and in the possession of Weatherford suppliers, Artemis, Kaechele, . . .

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> b) inducing or attempting to induce . . . suppliers or other persons with whom Weatherford has relationships relating to the research, design, development, manufacturing, supply, sales and service of PC Pumps and PC Pump components to alter, leave or terminate their relationships with Weatherford;
>
> . . .
>
> f) inducing or attempting to induce suppliers of Weatherford to provide PC Pumps and PC Pump components to the Defendants, . . . which PC Pumps and PC Pump components are manufactured using Weatherford confidential and proprietary information;
>
> . . .
>
> 59. In carrying out their wrongful acts, [the defendants Addie and Anderson or others] directly or indirectly:
>
> . . .
>
> b) arranged with Weatherford's suppliers, Artemis, Kaechele, . . . to cease doing business with Weatherford or, alternatively, to supply ABC Co. Ltd., . . . or others with rotors and stators manufactured to Weatherford's confidential and proprietary specifications in order to allow ABC Co. Ltd., . . and others to supply and offer to supply PC Pumps and PC Pump components to Weatherford customers;

[35] "ABC Co. Ltd." mentioned in the pleading has now been identified as Europump.

[36] In early June, 2006. Weatherford states that it saw some of its stators in a Europump yard in Lloydminster.

[37] On October 23, 2007, Weatherford filed a new action against the same defendants as in its 2006 statement of claim, in virtually the same terms as the 2006 statement of claim, but also naming Artemis and Kaechele as defendants. That statement of claim was never served on the applicants.

[38] On January 18, 2008, Weatherford filed an application to amend its 2006 statement of claim, i.e. the claim in this proceeding, *inter alia* by adding Artemis and Kaechele as defendants.

[39] On March 31, 2008, the case management judge permitted Weatherford to amend its statement of claim, *inter alia* by adding Artemis and Kaechele as defendants.

[40] On April 7, 2008, Weatherford filed its Amended Amended Amended Statement of Claim in this action, which named these applicants as defendants.

[41] On May 14, 2008 Weatherford was granted leave by the case management judge to serve the applicants outside Canada.

[42] On June 3, 2008, Weatherford notified Artemis and Kaechele of the amended statement of claim naming them as defendants and of the issuance of an order allowing Weatherford to serve Artemis and Kaechele in Germany. In August 2008, Artemis and Kaechele were served with the amended statement of claim naming them as defendants and the order permitting Weatherford to serve Artemis and Kaechele in Germany.

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[43] On September 25 and October 27, 2008, Artemis and Kaechele filed applications to set aside the order for service outside Canada.

[44] On January 23, 2009, on the application of Artemis and Kaechele, the order for service outside of Canada was set aside.

[45] On April 22, 2009, Weatherford discontinued its 2007 action.

[46] On May 29, 2009, the Court of Appeal overturned the Q.B. order which had set aside the order for service *ex juris*.

[47] On January 28, 2011, Artemis and Kaechele file applications for summary judgment; those applications were dismissed by the case management judge: 2011 ABQB 562.

[48] The trial of this action has now been set to begin on January 16, 2017; it is expected that the trial will last approximately 4 months.

b) Legislative

[49] The applicable provisions of the *Limitations Act* are:

> s.3 *Limitation periods*
>
> 3(1) Subject to subsections (1.1) and (1.2) and 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.
>
> (1.1) If a claimant who is liable as a tort-feasor in respect of injury does not seek a remedial order to recover contribution under section 3(1)(c) of the *Tort-feasors Act* against a defendant, whether as a joint tort-feasor or otherwise, within
>
> (a) 2 years after
>
> (i) the later of
>
> (A) the date on which the claimant was served with a pleading by which a claim for the injury is brought against the claimant, and
>
> (B) the date on which the claimant first knew, or in the circumstances ought to have known, that the defendant was liable in respect of the injury or would have been liable in respect of the

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injury if the defendant had been sued within the limitation period provided by subsection (1) by the person who suffered the injury,

if the claimant has been served with a pleading described in paragraph (A), or

(ii) the date on which the claimant first had or in the circumstances ought to have had the knowledge described in subclause (i)(B), if the claimant has not been served with a pleading described in subclause (i)(A),

or

(b) 10 years after the claim for contribution 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 for contribution.

(1.2) For greater certainty, no claim for contribution against a defendant in respect of damage referred to in section 3(1)(c) of the *Tort-feasors Act* is barred by the expiry of a limitation period within which the person who suffered that damage could seek a remedial order.

(2) The limitation period provided by subsection (1)(a) or (1.1)(a) begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a),

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a), or

(ii) an agent with a duty to communicate the knowledge prescribed in subsection (1)(a) or (1.1)(a) to the principal, first actually acquired that knowledge,

and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a), if the deceased owner acquired the knowledge more than 2 years before the deceased owner's death;

(ii) when the representative was appointed, if the representative had the knowledge prescribed in subsection (1)(a) or (1.1)(a) at that time;

(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a), if the representative acquired the knowledge after being appointed.

(3) For the purposes of subsections (1)(b) and (1.1)(b),

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(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

(b) a claim based on a breach of a duty arises when the conduct, act or omission occurs;

(c) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made;

(d) a claim in respect of a proceeding under the Fatal Accidents Act arises when the conduct that causes the death, on which the claim is based, occurs;

(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 to impose a liability on which the claim for contribution can be based, whichever first occurs;

(f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.

. . .

s. 6 *Claims added to a proceeding*

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 subsection (2), (3) or (4) are satisfied.

(2) When the added claim

(a) is made by a defendant in the proceeding against a claimant in the proceeding, or

(b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,

the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(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, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

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(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 or 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.

(5) Under this section,

(a) the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of subsection (3)(c), if in issue, has been satisfied,

and

(b) the defendant has the burden of proving that the requirement of subsection (3)(b) or (4)(b), if in issue, was not satisfied….

. . .

s. 10 *Acquiescence or laches*

Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

2. Procedural issues

[50] At the outset of the hearing, the parties raised several procedural issues. At the conclusion of the hearing of submissions on those issues, I reserved a decision until the conclusion of the hearing when I would address those issues in my substantive decision.

[51] Overall on the procedural issues, I have concluded that no evidence which has been led by any party on this application should be excluded from consideration for technical reasons. Rather, the court will consider all of the material submitted, having in mind, of course, that, generally, evidence which is developed contemporaneously and which is independent is more weighty than evidence which is produced after time for consideration and by the party tendering the evidence. At this stage, I will make general comments about each of the main procedural issues; as I discuss each of the substantive issues, I may come back to comment on the procedural issues which affect the substantive results.

i) Filing of Bill Lane's February,2016, affidavit

[52] Although it acknowledges that Rule 6.6 does not set deadlines for the filing of affidavits, Artemis objects to the filing of Lane's affidavit because it was filed after Weatherford had filed its written brief on this application; it states that Lane could use his affidavit as a way to reply to matters raised in the brief. Therefore, there is no technical objection to the filing of the Lane affidavit. Moreover, the court takes note of Weatherford's claim that there have been some

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procedural uncertainties, such as whether the applicants were applying only to amend their statements of defence or whether the applications for summary judgment would be joined to the first hearing. In those circumstances, it is not surprising that the Lane affidavit was filed after Artemis had filed its brief.

ii) Use of Lonnie Dunn's questioning

[53] Relying on Rule 5.31(2), Artemis objects to Weatherford's use of portions of Dunn's questioning which have not been included in Artemis' position. Naturally, Weatherford cannot use Dunn's questioning in a self-serving way as, for example, an oath-helping device. On the other hand, Weatherford is entitled to ensure that any excerpt from Dunn's evidence on which the applicants rely constitutes a fair representation of Dunn's evidence. I consider that Weatherford's reliance on additional portions of Dunn's questioning is merely Weatherford's attempt to ensure fair representation of the evidence.

iii) Weatherford's use of Dunn's 2008 cross-examination

[54] Relying on Rule 6.7, Artemis objects to Weatherford's inclusion in its materials of transcripts of the cross-examination of its key employee, Dunn, conducted in 2008. These are completely different applications. Nonetheless, I view these excerpts of Dunn's evidence in the same way as indicated above, i.e. an attempt by Weatherford to ensure that a fair representation of Dunn's evidence is before the court.

iv) Use of Gillis' affidavit

[55] Weatherford objects to the Gillis affidavit on the grounds that Gillis purports to provide direct, and even on occasion opinion, evidence about some of the issues in the proceedings. Naturally, the applicants cannot use Gillis' affidavit to spin existing evidence or to create evidence; the only purpose of his affidavit is to put before the court evidence which is contained in the various records disclosed by Weatherford and in the questioning of various Weatherford representatives. I agree with Weatherford that the court cannot rely on Gillis' affidavit to summarize Weatherford's evidence, but must refer to Weatherford's actual evidence.

3. Amending the Statements of Defence

[56] The parties agree that a low threshold applies to requests to amend pleadings: they agree that the "classic rule" is that requests for amendment to pleadings should be granted unless the proposed amendment causes prejudice, is clearly hopeless, seeks to add a cause of action after the expiry of a limitation, or, is associated with bad faith: see, for example, ***Provalcid Inc***. Artemis and Kaechele maintain that none of these exceptions are engaged.

[57] Weatherford agrees that the last two of the four exceptions do not apply, but maintains that the proposed amendments should not be allowed for two reasons. First, the amendments would cause them prejudice because they would prevent them from curing the identified limitations problem and because the request is made too late relative to the anticipated commencement of trial in January 2017. Second, insofar as the proposed amendments rely explicitly or implicitly on laches and acquiescence, the proposed amendments should not be allowed because they are hopeless: the equitable concepts of laches and acquiescence apply only to equitable claims and Weatherford's claims are, in the main, legal claims.

[58] For the reasons set out below, I have concluded that: Weatherford will not suffer prejudice of the kind required in this context, and, the proposed amendments are not hopeless.

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a) Weatherford will not suffer prejudice

[59] Weatherford claims two types of prejudice. First, it claims that since Artemis and Kaechele did not, when they challenged the order for service on them outside Canada, also challenge the order of the court which allowed Weatherford to amend its pleadings so as to add them as defendants, they prevented Weatherford from serving its 2007 statement of claim which did name them as defendants clearly within the limitations period. Second, it claims that the late applications invoking laches and acquiescence do not allow Weatherford sufficient time to respond given that a trial date has been set for January, 2017 and that a great deal of time and money has already been spent on pre-trial process.

i) The granting of an amendment at this time is not the reason why Weatherford is unable to serve its 2007 statement of claim

[60] Weatherford states that its 2007 statement of claim was filed within 2 years of November, 2005 and, therefore, the 2007 claim was filed within the limitation period. I agree.

[61] Weatherford states that, when the applicants applied to set aside the case management judge's decision allowing Weatherford to serve its amended statement of claim on the applicants, the applicants did not appeal the case management judge's decision to allow the amendments which included the applicants. Weatherford suggests that if it had known, in 2008, that the applicants were intending to raise a limitations defence, it could have, would have, served the 2007 statement of claim.

[62] With respect, I cannot agree with Weatherford that the current application to add a limitations defence causes them prejudice of the type that should preclude the amendments to the statements of defence. At the outset of the analysis on this issue, I question whether the kind of prejudice claimed by Weatherford – the loss of the ability to right the substantive wrong – is the kind of prejudice which is anticipated in the Rules and in the law. The standard of non-compensable prejudice as being one of the bars to an amendment of pleadings was solidified in the ***Steward*** decision. What must be recalled about that decision is, however, that Lord Esher himself said that his formulation of the standard of conduct – "if the amendment will put [the party opposite] into such a position that they must be injured, it ought not to be made" – which formulation has subsequently been adopted by many courts, had been better, more clearly, put by Bowen L.J. when he said that an amendment to the pleadings is to be allowed "whenever you can put the parties in the same position for the purposes of justice that they were in at the time the slip was made". It is therefore the latter articulation of the principle that I will follow. It will be recalled that the ***Steward*** decision arose out of a situation where a plaintiff was injured as a result of poor road repair; the defendant filed a statement of defence. Six months after the pleadings had closed, the defendant asked for leave to amend its statement of defence to plead a contract which it had with the local vestry which shifted the responsibility for maintenance from itself to the vestry. By the time the defendant applied to amend its statement of defence, the plaintiff's right to sue the vestry was taken away by the statute of limitations. In denying the defendant leave to amend its statement of defence based on prejudice to the plaintiff, the English Court of Appeal emphasized that it was essentially impossible for the plaintiff to have discovered the contract between the defendant and the vestry. In those circumstances, granting the defendant leave to amend its pleadings would have unfairly denied the plaintiff a substantive right. In the circumstances here, there is nothing which the applicants have done which in any way precluded Weatherford from serving its 2007 statement of claim.

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[63] In any event, however, assuming that the prejudice of being unable to remediate the substantive wrong is the kind of prejudice which might prevent the amendment of pleadings, I have concluded that Weatherford has suffered no such prejudice. On an overview, it is not because the applicants are bringing this application at this stage of the proceedings that Weatherford has lost its right to serve its 2007 statement of claim: nothing the applicants have done prevented Weatherford from serving its statement of claim and, in any event, Weatherford chose to take away from itself its ability to serve its 2007 claim when it discontinued that claim in 2009. Moreover, under a ***Steward*** type of analysis, the inability of the applicants to bring this application before Weatherford disclosed its November 2005 emails was not due to a blunder or slip or carelessness on the part of the applicants, but a failure on Weatherford's part to make full disclosure.

[64] On a more detailed analysis, although the applicants knew, when they applied to set aside the order allowing service *ex juris* that they had been named as defendants – indeed, there could not have been an application for service *ex juris* unless Artemis and Kaechele had been named as defendants in the amended statement of claim – they were procedurally unable to apply to set aside the order which had allowed them to be added to the statement of claim. Indeed, the reality was that the applicants were not affected by any aspect of Weatherford's statement of claim unless the decision allowing service on them to be effected outside Canada was maintained. As a matter of law, had the applicants attempted to appeal the case management judge's decision on the amendment separately from the issue of the amendment to the pleadings by which they were added as defendants, they would surely have been taken to have attorned to Alberta's jurisdiction and would therefore have been necessarily involved in complicated lawsuit. Although in its recent decision in ***H.E.*** the Ontario Court of Appeal, albeit in the context of the best interests of children, appears to state that explicit attornment to a jurisdiction is not determinative on the issue of jurisdiction, in the circumstances here – including the fact that this is normal commercial litigation rather than family litigation – attornment by the applicants to Alberta would surely have resulted in the automatic denial of their request to set aside the order allowing service on them in Germany.

[65] What is determinative of Weatherford's claim of prejudice is that Weatherford only discontinued its 2007 claim – the one that had named Artemis and Kaechele as defendants within the limitation period – in April 2009. By April 2009, neither Artemis nor Kaechele had done anything to make Weatherford believe that they would not rely on a limitations defence. On the contrary, by April 2009, both Artemis and Kaechele had made it clear that they wanted to be removed from this lawsuit and that they would take every possible opportunity to achieve that result. In April 2009, when Weatherford discontinued its 2007 action, Artemis and Kaechele had the benefit of a QB decision which struck down the *ex juris* leave in this action; in other words, on April 21, 2009, Artemis and Kaechele were not properly part of this lawsuit. There was therefore no reason whatever for Weatherford to discontinue its 2007 action against them; on the contrary, there was every reason for Weatherford to maintain its 2007 lawsuit. On April 23, 2009, Weatherford had no viable action of any kind against Artemis and Kaechele: Weatherford had discontinued its 2007 action and the QB decision held that Artemis and Kaechele could not be served in Germany. By the time the Court of Appeal overturned the QB decision in May, 2009, and allowed Artemis and Kaechele to be included in this lawsuit, Weatherford had already put itself in the position where it could no longer serve its 2007 statement of claim. When Artemis and Kaechele were formally brought into this lawsuit after being served in September, 2009, they were facing a situation in which Weatherford had, on April 7, 2008, filed the order

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granting it leave to amend its statement of claim to add them as defendants. The time for appealing the April 2008 order had long since expired. Moreover, the applicants were entitled to assume that the case management judge who granted the order in question had, in the same way that this court must consider the exceptions to the granting of amendments to pleadings, come to the conclusion in April 2008 that giving Weatherford leave to add Artemis and Kaechele as defendants did not allow them to be added outside a limitation period. It is not realistic to think that Artemis and Kaechele would immediately in September 2009 try to challenge the April 2008 decision; nor would it be fair to criticize them for failing to have done so. In any event, even if they had done so, it was already too late to allow Weatherford to serve its 2007 statement of claim on them.

ii) Weatherford has enough time to defend the laches and acquiescence issues

[66] The second kind of prejudice Weatherford alleges as a result of this application, particularly in relation to Kaechele's explicit reliance on laches and acquiescence and also on any implicit reliance by Artemis on laches and acquiescence, is that the application is brought too late in the proceedings, given that a trial date for January, 2017 has already been set and there has already been massive pre-trial work undertaken.

[67] Artemis and Kaechele could not have asked to amend their pleadings to plead a limitations defence earlier than the current applications.

[68] It was not until Artemis and Kaechele came into possession of the November 25, 2005 email from Dunn to Lane that the applicants had evidence emanating from Weatherford itself about the state of its knowledge of the involvement of Artemis and Kaechele in Addie and Anderson's scheme. As soon as this evidence became available to the applicants, they brought the within application.

[69] Not only does this chronology establish that Artemis and Kaechele acted at the first opportunity, the chronology also establishes that the defences filed by Artemis and Kaechele were not "blunders" or "slips" in relation to the limitations issue; they clearly could not responsibly have alleged a limitations defence until the November 2005 Weatherford documents came into their possession.

[70] As to the ability of Weatherford to defend the applications without embarking on extensive, expensive additional process, I agree that there has already been extensive disclosure by, and questioning of, all parties; every aspect of the relationship amongst the parties has been subjected to careful scrutiny. Moreover, Weatherford has been allowed to file the Lane affidavit which has given Weatherford the opportunity, unhindered, to put forward any evidence available to it on the limitations issue. Therefore, Weatherford has not suffered and will not suffer any prejudice as a result of allowing the proposed amendments.

[71] In summary on this issue, Weatherford will not suffer any of the required type of prejudice if the applications for amendment of the statements of defence are allowed.

b) The proposed amendments are not hopeless

[72] Relying on the Ontario Court of Appeal's decision in ***Intact Insurance***, Weatherford asserts that the equitable principles of laches and acquiescence apply only to equitable claims and, since Weatherford's claims are, in the main, legal rather than equitable, there is no point in allowing an equitable defence to be advanced to its claims. With respect, ***Intact Insuranc***e, and

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indeed all similar decisions which deal with the recent application of equitable defences to Ontario limitations legislation can be of no assistance in Alberta, where – as opposed to Ontario - there has been preservation of the use of equitable defences in Alberta's *Limitations Act*. The importance of that statutory distinction is emphasized by the Ontario Court of Appeal in para. 35 of its decision. The situation in Ontario is particularly stark because Ontario is a jurisdiction in which the legislation which previously maintained equitable defences then amended its legislation to remove that reference. In Ontario, there is therefore an argument that there has been a clear policy message from the legislator to the effect that limitations legislation should be addressed without reference to equitable principles; no such argument is available in Alberta.

[73] Moreover, as many cases cited in the ***Intact*** decision itself make clear, contemporary Canadian courts are courts of both law and equity. The Supreme Court of Canada illustrated this intersection recently in ***Bhasin*** when, in dealing with the interpretation of contracts, it held:

> The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another -- even intentionally -- in the legitimate pursuit of economic self-interest. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency. The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

[74] More prosaically, ***Intact Insurance*** itself refers to the Supreme Court of Canada decision in ***M.(K.)*** which provided an instructive outline of the fusion of courts of law and equity: see paras. 58 ff. The Supreme Court saw no principled objection to the mingling of equitable and legal principles; on the contrary, it asserted:

> It is desirable, indeed inevitable, for the two great branches of our judicial law systems to borrow from one another to achieve just and reasonable results and consistency over time.

[75] Given this type of comment in the Supreme Court's decision, it is difficult to understand how ***M.(K.)*** has come to be thought of - even in Ontario - as authority for the proposition that equitable principles cannot apply to defeat legal claims: see ***Ferreira*** at para. 31. The Supreme Court of Canada has never made any such general assertion.

[76] Although the doctrine of laches was, historically, important to deal with late-brought equitable claims since those claims were not subject to limitations statutes and the doctrine of laches was necessary to mimic the principles reflected in the law's approach to limitations in the sphere of equity, the doctrine of laches was never restricted to situations in which there was an otherwise applicable limitations statute. ***Ferreira*** itself deals with a situation where there was an application for partition and sale. In ***Bark-Fong***, a decision which is now over 100 years old, the Supreme Court noted the potentially broad spectrum of application of the doctrine of laches:

> The question remains whether the appellants have lost their right by reason of laches. The general principle is stated in Fry on Specific Performance, at page 539:-

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> The Court of Chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of laches. But it is now clearly established that the delay of either party in not performing its terms on his part, or in not prosecuting his right to the interference of the court by the institution of an action, or, lastly, in not diligently prosecuting his action, when instituted, may constitute such laches as will disentitle him to the aid of the court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract.

[77] It is also important to note that in the particular circumstances of ***Intact Insurance***, the appeal court found that laches was not available on the facts. Therefore, its comments relating to the general application of laches principles to limitations as a matter of law are merely *obiter*.

[78] Finally, even under the decisions on which Weatherford relies, where there is a strong equitable cast to a legal claim, the concept of laches has been applied. Here, Weatherford has not relied on any contractual basis for its claims against Artemis and Kaechele; rather, it has based its claims on grounds which are redolent of equity, i.e. that the German producers acted wrongly, unfairly, in providing stators to the competitive start-up. All of Weatherford's legal claims are, at a minimum, intertwined with its equitable claim.

[79] In summary on this point, in Alberta it is not hopeless to invoke laches or other equitable principles when dealing with limitations issues. It remains to be determined, of course, whether the application of equitable principles in the circumstances of this case entitles the applicants to the relief which they seek.

c) Conclusion

[80] For the reasons set out above, the court concludes that the applications to amend the statements of defence are allowed.

4. Summary Judgment

[81] The parties agree on the general legal framework for contemporary summary judgment applications: the parties are required to put their best foot forward, and the court is entitled to, and should, grant the application if it concludes that it can fairly do so on the basis of the material put forward, that is, without requiring a trial.

a) Artemis can rely on laches and acquiescence

[82] The parties disagree, however, on whether Artemis can invoke the provisions relating to laches and acquiescence in the *Limitations Act* without having explicitly referred to laches and acquiescence in its pleadings. Weatherford's objection is invalid. The historical requirement of pleadings is merely to state the facts, not to state the law. This principle was concisely articulated in ***Webster*** as follows:

> 7 In my view this section means, in so far as the facts in issue in an action, are concerned, that after the facts have been established, the law as enunciated by any statute relating to the subject matter of the action, shall be made applicable to such facts by the tribunal which tries the case, without mention of the statute in the pleadings. This statement is subject to any rule of law which requires a statute to be specifically pleaded.

[83] In ***Silver Eagle Management***, Ross J. outlined the gloss which has been added to the basic principle by Alberta's Rules of Court:

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71 At trial, counsel for the Town submitted that he was surprised by his friend's arguments on behalf of the Developer that the Condition had not been waived, that the Purchase Agreement and Option to Repurchase were invalid, and that the agreements had been varied.

72 Section 13.6(3) of the Alberta Rules of Court, Alta. Reg. 124/2010, lists a number of arguments that must be pled in the pleadings if a party wishes to rely on them at trial:

> 13.6(3) A pleading must also include a statement of any matter on which a party intends to rely that may take another party by surprise, including, without limitation, any of the following matters:
>
> (a) breach of trust;
>
> (b) duress;
>
> (c) estoppel;
>
> (d) fraud;
>
> (e) illegality or invalidity of a contract, including the grounds;
>
> (f) malice or ill will;
>
> (g) misrepresentation;
>
> (h) payment;
>
> (i) performance;
>
> (j) release;
>
> (k) undue influence;
>
> (l) voluntary assumption of risk;
>
> (m) waiver;
>
> (n) lack of capacity or authority;
>
> (o) wilful default;
>
> (p) tender of payment;
>
> (q) a limitation period;
>
> (r) a provision of an enactment.
>
> [Emphasis added]

73 Section 109 of the old Alberta Rules of Court, Alta. Reg. 390/1968, which were in place at the time that the pleadings were filed, states as follows:

> When specific pleading required
>
> 109 A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, payment, any statute of limitation, statute of frauds, fraud or any fact showing illegality
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable, or

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> (b) which, if not specifically pleaded, might take the opposite party by surprise, or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

[84] In ***Silver Eagle Management***, the town of Onoway stated that it was taken by surprise by the plaintiff's argument with respect to the status of the contract. Ross J. observed that neither party had pleaded that a material condition had not been waived or that there had been a variation of the contract. Nonetheless, she dealt with the legal arguments despite the absence of explicit pleading:

> The question of variation in this case was basically a matter of interpreting three written contracts between the parties, contracts which were clearly placed before the Court, and the interpretation of which should not have taken either party by surprise.

[85] The use of pleadings to prevent surprise is also emphasized by our Court of Appeal in ***Paniccia Estate***; that court goes on to add that the Rules would, in certain circumstances, entitle a court to consider a matter not explicitly pled: see para. 36 ff.

[86] Here, Weatherford cannot claim that it has been taken by surprise by Artermis' position on laches and acquiescence. First, Artemis' amended statement of defence includes the following:

> 28. Further, and specifically, Artemis states that the Amended Amended Amended Statement of Claim is statute barred by operation of s. 10 of the Limitations Act, RSA, 2000 c. L-12 respecting Laches and the Plaintiff's acquiescence.

Section 10 of the Act explicitly outlines laches and acquiescence as matters which may have to be taken into account in applying the statute.

[87] Moreover, and more importantly given the stage at which the applications for amendment of the statements of defence are made, it is clear that, from at least 2007 on, Weatherford was very aware of the limitations issues: as Weatherford itself has acknowledged, a potential limitations problem is the reason for the filing of the 2007 statement of claim. In those circumstances, Weatherford cannot maintain that it is taken by surprise by Artemis' reliance on s. 10 of the *Limitations Act* and its reference to laches and acquiescence.

[88] In the result, in its summary judgment analysis, the court will consider laches and acquiescence in relation to the claims of both Artemis and Kaechele.

> *b) The undisputed facts here establish that Weatherford knew, or should have known of its alleged cause of action against Artemis and Kaechele by November 30, 2005 or, at the latest, by March 30, 2006*

[89] The parties essentially agree on the framework which must be used to weigh an application for summary judgment. As the case law reviewed in ***Sticks and Stones Communications Inc***. emphasizes, the sufficiency of the evidence invoked in any application for summary judgment is the key. If material evidence is, or can be, disputed, a trial will usually be required and the application for summary judgment will be refused.

[90] In the context of a limitations defence, therefore, the applicant for summary judgment must satisfy the court that there are "undisputed facts that necessarily lead to the conclusion that it is plain and obvious that the plaintiff's claim is statute barred": ***DeShazo***, at para. 19.

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[91] In this context, the first contested issue which arises is whether, as Artemis contends, the destruction of the Dunn notes results in a rebuttable adverse inference against Weatherford. After he decided to remain with Weatherford, a key employee of Weatherford, Lonnie Dunn, destroyed records he had made - i.e. notes of meetings he had had with the defendants Addie and Anderson - at a time when he knew that litigation was contemplated.

[92] I agree that the concept of spoliation as an evidentiary rule is even more well established now in Canada than it was a decade ago, and that, when it applies, it sensibly ensures that litigants will not get a litigation advantage by spoiling or destroying records that might have a negative effect on them.

[93] I also agree that, even though Dunn was clearly not taking notes of his meetings with Addie and Anderson as part of his employment with Weatherford, the evidence establishes that he destroyed his notes only after he had decided to remain in Weatherford's employ.

[94] In those circumstances, it is necessary to consider the potential application of the doctrine of spoliation on the facts of this case.

[95] I agree that Dunn's own email of November 25, 2005 indicates that, at the least by that date, Dunn was aware that litigation was being contemplated.

[96] I also agree that the evidence establishes that Dunn intentionally destroyed his records of the Addie/Anderson meetings.

[97] However, I am not satisfied that the evidence establishes that Dunn intentionally destroyed the evidence of the meetings "to affect the litigation", as our Court of Appeal put it in ***McDougall***. Rather, I accept the evidence that Dunn was keeping the records to perform a SWOT (Strengths, Weaknesses, Opportunities, Threat) analysis for himself, i.e. as to whether it was to his advantage or disadvantage to defect to the start-up company. When he decided to remain with Weatherford, he had no further need for the records; his destruction of the records was therefore entirely personal.

[98] Even if, in Alberta, it were possible to fashion a civil remedy for unintentional destruction of evidence, see ***Chow-Hidasi*** at para. 30, for the reasons given above, there is no evidentiary basis in this case for the development of any such remedy.

[99] Finally, the evidence suggests that Weatherford never received the benefit of Dunn's actual notes of his meetings with Addie and Anderson. All Weatherford received from Dunn was general information about his meetings with Addie and Anderson, his various emails, including the email of November 25, 2005 which summarized Dunn's "personal opinions" of the situation Weatherford was facing as of that date, and other emails which are now available from Weatherford's production, along with the chronology which Dunn prepared after the destruction of his notes. From that perspective, as well as from the perspective that Dunn only became a corporate officer of Weatherford in 2007, it would be unfair to draw an adverse inference against Weatherford as a result of Dunn's destruction of personal records.

[100] In response to the application, Weatherford relies on affidavit evidence from Lane. However, I do not attach any weight to the Lane affidavit: rather than comments in 2016 about events which occurred in the past, I rely on Weatherford’s contemporary documents.

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[101] By deciding not to draw any adverse inference against Weatherford as a result of the destruction of the Dunn notes, the only evidence which is left on the applications for summary judgment establishes uncontested facts because it is all evidence from Weatherford.

[102] There is no dispute between the parties about what the undisputed facts must establish. As the ***DeShazo*** decision from our Court of Appeal clarifies, perfect knowledge of a claim is not the correct test for determining when the limitations clock starts to run:

> 31 The principle of discoverability does not require perfect knowledge. As this court noted in Hill v. Alberta (South Alberta Land Registration District) (1993), 100 D.L.R. (4th) 331 at 336 (Alta. C.A.) (leave to appeal to S.C.C. denied):
>
> > Even if the discoverability rule of limitations applies to this case (which I need not decide), it does not call for perfect certainty. It does not require discovery at all: it says something else will do instead. It suffices that "the material facts on which [the cause of action] is based ... ought to have been discovered by the plaintiff by the exercise of reasonable diligence...": Central Trust v. Rafuse... . If the plaintiff is told a fact by someone who is likely to know, surely that makes the fact known or discoverable, even if someone else disputes the fact. Very few people who sue have perfect certainty.
>
> 32 The same point is made in Owners: Condominium Plan 9421549 v. Main Street Developments Ltd., supra, where Clackson J. summarily dismissed the plaintiff's claim on the basis of undisputed facts. He said at paras. 55-56:
>
> > I am satisfied that these facts establish, beyond a reasonable doubt, that the Plaintiff knew that the buildings suffered from moisture problems and knew of the potential sequella if the problems were not rectified. This knowledge existed well before May 25, 1999. While I accept that it is possible the Plaintiff did not have perfect knowledge of the injury, that level of knowledge is not required: Peixeiro v. Haberman, [1997] 3 S.C.R. 549; Hill v. Alberta (South Alberta Land Registration District), (1993) 135 A.R. 266 (C.A.), leave to appeal to S.C.C. refused [1994] 1 S.C.R. viii; Ward v. Taubner, 2004 ABQB 565, 9 E.T.R. (3d) 275 (QB).
> >
> > What was obvious was that there was a problem and that there was damage or at least the real potential for damage if the problem was not addressed. In my view, that is enough.
>
> [Emphasis added]
>
> 33 De Shazo says he was lacking proof that O'Mara owned or controlled NovoMundo. He says that in July 2002 he received, for the first time, "credible factual information from the defendants that O'Mara owned NovoMundo" in the form of the statement from Wilson that NovoMundo was, as far as Wilson and others knew, owned by O'Mara. This, De Shazo says, was the missing piece of the puzzle that he needed to put his claim together. However, that statement did not add significantly to the picture De Shazo already had in February 2000.
>
> 34 In our view, the information in De Shazo's hands in February 2000 was sufficient for him to bring a claim against the appellants for an oppression remedy and in fraud, and to resist a summary judgment application to dismiss such a claim. Further, in June 2001

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> De Shazo went so far as to obtain a legal opinion about the availability of an oppression remedy from Alberta counsel, and then changed that legal opinion and sent the doctored version to O'Mara in March 2002 to bolster his threat of litigation. As counsel for the appellants noted in argument, if this is not an appropriate case for summary judgment it is difficult to imagine what is.

[103] In this case, therefore, the real issue to be decided is: Have the applicants established, on the basis of uncontested facts, that any cause of action which Weatherford may have had against them has been defeated by application of the 2 year limit in the *Limitations Act*? In this context, the applicants argue that, most likely by November 30, 2005 or, at the latest, by March 31, 2006, the statutory limitation period began to toll against Weatherford and that Weatherford did not file its lawsuit against them within the required limitations period.

[104] Even if the answer to the above question is Yes, the court must then go on to consider whether the March 31, 2008 deadline has been extended by application of the provisions of s. 6(4) of the *Limitations Act*.

[105] Weatherford has two essential responses to the applicants' applications for summary judgment: first, until it saw stators which it identified as having been manufactured by the applicants in Europump's yard in early June, 2006, it had merely a suspicion about the activities of Artemis and Kaechele based on Dunn's hearsay evidence.

[106] Second, Weatherford argues that, even if the limitations clock would normally have started to run against it by March 31, 2006, s. 6(4)(a) allows them to add the applicants as defendants after the expiration of the relevant limitation period because the addition of the applicants as defendants is related to the conduct, transaction or events described in Weatherford's original statement of claim.

[107] For the reasons set out below, I have concluded that the applicants have met the required burden and are entitled to summary judgment dismissing Weatherford's claims against them: the limitations clock started to run against Weatherford at the latest by March 31, 2006 and, by March 31, 2008, Weatherford had not filed its claim against them. While Weatherford's April 2008 added claim against the applicants does relate to Weatherford's original pleading, because of the application of the equitable principles of acquiescence and laches, the applicants should not be deprived of limitations immunity from Weatherford's claim.

a) Indirect attack on earlier decision refusing summary judgment

[108] Obviously, the current applications for summary judgment are completely different in character – limitations defence – from the 2011 applications for summary judgment – exclusive use.

b) Best foot forward

[109] Weatherford has had the opportunity of putting forward unchallenged evidence from Lane about the limitations issue. Therefore, the court is entitled to assume that there is no additional evidence which Weatherford could advance to improve its position on the limitations issue.

[110] As indicated above, the court does not make any rebuttable adverse inference against Weatherford as a result of Dunn's destruction of the notes of his meetings with Addie and Anderson.

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[111] There is no conflict in the evidence since the applications are based on Weatherford's own evidence.

c) The two year limitations period started to run on November 30, 2005

[112] The key evidence on these applications is the November 25, 2005 email from Dunn to Lane.

[113] In determining the effect of Weatherford's receipt of the November 25, 2005 email, the court must consider the nature of the person who is sending the email, Lonnie Dunn.

[114] Mr. Dunn is not some insignificant or unreliable individual. He is a senior employee at Weatherford, with technical management of the PC pump sector, and having direct relationships not only with the defendants Addie and Anderson, but also with each of Artemis and Kaechele. He is therefore a person whose technical assessment is presumptively reliable. Also, because of his actual involvement with Addie, Anderson, Artemis and Kaechele, his opinion of the likelihood that they should be taken at their word is presumptively reliable.

[115] By the time this email was sent to Lane, Dunn had, earlier in the month of November, already "confessed" to Lane that, for many months earlier in 2005, he had met with Addie and Anderson to discuss the possibility that he would join them in starting up a company to compete with Weatherford. Even in a criminal context, where the burden of proof is much higher than in civil proceedings, a court is entitled to hear evidence from an individual - not a person in authority - to the effect that the accused made a confession to him. Evidence of that confession can be received as evidence for the truth of its content despite the fact that the evidence itself is hearsay evidence because evidence against interest has, historically, been found to be presumptively reliable. Naturally, a court – and certainly Weatherford – would be entitled to consider all of the circumstances with a view to determining whether Dunn's report of a confession by Addie and Anderson was an unreliable or false confession, or a reliable one. For example, in the circumstances here, there were no potential language problems; all the participants in the discussion not only all spoke and understood English but they all spoke and understood the technical language surrounding the production of stators. There was no suggestibility on the part of Addie and Anderson since they were the persons who brought the "opportunity" to Dunn's attention. Indeed, there is nothing in the circumstances of the confession of Addie and Anderson to Dunn and Dunn's report of that confession to Lane which puts the elements of the confession in doubt: Anderson had good relations with the German manufacturers, so it was not unlikely that he had convinced them to supply the startup with stators. Even in criminal proceedings, while it may be useful, confirmatory evidence of a confession is not necessary before the confession is admissible. In the civil sphere, having a reliable person tell it that Artemis and Kaechele were going to assist a competitive startup constituted adequate information on which Weatherford should have acted – by taking legal proceedings in much the same way as it acted by taking commercial proceedings - even in the absence of absolute proof.

[116] In determining the effect of Weatherford's receipt of the November 25, 2005 email, the court must also consider the overall context in which the email was sent.

[117] Part of that context is that there are very few stator manufacturers for the PC pump industry. Weatherford itself acknowledges that the German applicants have been very well

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accepted in the Canadian market. It was therefore not unlikely that arrangements would be made by a startup with the German manufacturers.

[118] Part of that context also included the fact that Weatherford realized that its relationship with the German manufacturers was not as clear and circumscribed as Weatherford would like: Weatherford had unsuccessfully attempted to negotiate new agreements that would change the relationship which Weatherford had had with the German suppliers over a considerable period of time. In the absence of any such new agreements, Weatherford would have realized its supply vulnerabilities.

[119] Part of that context also includes the fact that Addie and Anderson had been, in the past, involved in a situation where there was some challenge to sole source production from the German manufacturers; the idea that a competitive startup would use German-produced stators was clearly not a remote, weird, odd or unlikely event.

[120] It must also be noted that the November 25, 2005 email was not an "off the cuff" statement by Dunn; it was not one of those "thoughtless press send" situations which may occur even in a commercial situation. Not only was this email preceded by a meeting between Dunn and Weatherford's Vice-President Lane during which the general issues were discussed, the email itself notes that Dunn knowingly decides to send a lengthy email despite knowing Lane's preference for short emails. Dunn also notes the need for prompt action as a way of explaining why he is taking the time to send a lengthy email.

[121] In determining the effect of Weatherford's receipt of the November 25, 2005 email, the court must finally consider the email itself.

[122] The email mentioned that "this is . . out in the open". This presumably relates to the fact that, by November 25, 2005, both Addie and Anderson had actually left Weatherford's employ; this may be confirmatory of Dunn's disclosure of Addie and Anderson's plans. The reference to the matter now being in the open relates to the fact that Dunn acknowledges that he is in a position to make recommendations as to what course Weatherford should take in light of the departure of Addie and Anderson because he knew "in advance" that they were intending to leave.

[123] The email also emphasizes that the startup is based on "the exact same pump", "exact same product", i.e. a pump which has stators manufactured by the exact same companies which are manufacturing Weatherford's stators in November, 2005, i.e. Artemis and Kaechele. Indeed, the email explicitly states that the startup will "get stators from Artemis and Kaechele".

[124] The email also addresses the issue of timing. This engineer, with this background in the industry and this background with the individuals involved says that it can be assumed "that they have already ordered product from Artemis and Kaechele".

[125] While the email uses the phrase "purely my opinions", that phrase does not refer to the underlying factual matrix. Rather, it relates to the fact that Dunn is a technical expert and he realizes that management decisions, relating for example to the initiation of an expensive replication project, are not within his domain.

[126] Assuming that Weatherford might have a few days to await some additional information from Dunn or that it might need a few days to run Dunn's information by other knowledgeable people in the organization in order to satisfy its due diligence obligation, the court arrives at

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November 30, 2005 as the date by which Weatherford knew, or should have known, everything it needed to know to sue the applicants.

[127] Indeed, Weatherford learned nothing after November 25, 2005 which affected its decision to sue the applicants.

d) At the latest, the two year limitations period started to run on March 31, 2006

[128] For the reasons set out above, the court concludes that the limitations clock began to run against Weatherford on November 30, 2005.

[129] However, if the court were wrong it its assessment that November 30, 2005 is the critical date, it is clear that, by March 31, 2006, the clock had begun to run.

[130] The Weatherford evidence from the period after November 30, 2005 which is important in this context is the evidence of the Lane response to the Dunn email of December 19, 2005: "Full speed ahead". In other words, by December 19, 2005 at the latest, Weatherford was committed to the expenditure of time, professional resources, and money on the replication of the German stators with a view to cutting out the German applicants. Lane's affirmation to the contrary in February 2016 simply cannot be true in light of Weatherford's own documents.

[131] Relying on ***Seyedi***, Weatherford argues that it was not in a position to sue the applicants until it had proof that they had misappropriated proprietary Weatherford information and that it did not have that proof until June 2006. That argument is untenable for at least four reasons:

- first, as the December 19, 2005 communications made clear, Weatherford took the Dunn information of November 25, 2005 and December 19, 2005 seriously enough to spend material resources on dealing with the Artemis/Kaechele problem. Lane's subsequent affidavit on this topic cannot be taken seriously;

- second, when it saw pumps in a yard in June, 2006, Weatherford could not – simply from a view of the pumps - have known who manufactured the stators. Since there is a least one American manufacturer of stators, Robinson Meyers, who had previously been involved with these companies, Weatherford would have had to acquire one of those pumps, and dismantle it to try to determine who had manufactured the stator. Yet, Weatherford immediately presumed that it was the defendants who manufactured the startup's stators and that presumption was based on the November 2005 email from Dunn;

- third, on Weatherford's own assessment of the situation, starting in November 2005, the applicants had, at the least, agreed to misappropriate Weatherford's proprietary information and that agreement had encouraged the startup competition. The misuse of the information therefore was established by the promise to Addie and Anderson that they would manufacture the exact same pump for the startup;

- fourth, ***No Limits Sportswear*** reminds me that, even if actual detriment were required to establish the third factor in the Supreme Court of Canada's outline of the tort of misuse of confidential information, the replication program on which Weatherford embarked constituted a financial detriment to Weatherford.

[132] In addition to the December 19, 2005 evidence, in early January 2006 or at the latest by the end of the first quarter of 2006 – i.e. March 31, 2006, Weatherford received evidence from a customer – therefore an independent source - consisting of the specifications for rotors. Although the applicants manufacture stators and not rotors, the stators and the rotors must fit exactly with

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one another. Therefore, by seeing the rotor specifications, Weatherford could deduce what stator specifications were used with those rotor specifications; Weatherford could satisfy itself of the interior geometry of the PC pumps addressed in the rotor specs. Therefore, at the latest by March 31, 2006, Weatherford knew that the startup's plan to have the Germans manufacture stators for them was real and not merely some kind of airy-fairy possibility.

[133] In summary, although it is clear on the evidence that, by November 20, 2005, Weatherford knew everything it needed to know to sue the applicants, in addition by March 31, 2006, Weatherford had received confirmatory evidence that the startup's plan to compete by offering the same product to the marketplace was being put into operation. Therefore, by March 31, 2006, at the latest, the limitations clock started to tick against Weatherford. That clock ran out on March 31, 2008.

[134] Weatherford did not file its amendment to this statement of claim until April, 2008. Therefore, it missed the limitations deadline and its claims against the applicants are invalid.

e) For equitable reasons, the applicants should not be denied limitations immunity from Weatherford's use of the curative provisions of the limitations legislation

[135] Weatherford argues that even if it missed the two year deadline, it should have the benefit of the curative provision found in s. 6(4) of the *Limitations Act*.

[136] This is an awkward argument for Weatherford to advance because one of the requirements of s. 6 of the Act is that any added claim must "relate to the conduct, transaction or events described in the original pleading". The mentions of Artemis and Kaechele in the original pleading are highlighted in the Background section. In light of the original pleading, it is difficult to explain why the causes of action "added" against Artemis and Kaechele in 2008 were not clear when the original pleadings was filed. Indeed, it is difficult to identify how the "new" substantive claim against the applicants differs from the conduct outlined in the original pleading.

[137] In any event, however, assuming that s. 6(4) of the *Limitations Act* is available to Weatherford to extend its limitations period against them, Artemis and Kaechele argue that they should not be denied immunity from liability to Weatherford because of laches and acquiescence.

[138] In attempting to establish a purposive interpretation of s. 10 of the *Limitations Act*, the court looks to ALRI's Report on *Limitations*, which report presumably established the basis for the reform of limitations law in Alberta, and to which report even Weatherford refers. In that Report, one notes the following comment on the topic "Claims Added to a Proceeding":

> When a proceeding has been started by a timely claim, the parties will often wish to add further claims which are subject to a limitations defence. If the added claims are related to the conduct, transaction or events described in the original pleading in the proceeding, it will often be desirable, for reasons of justice and efficiency, to have them tried in a single proceeding with the original claims. The new Alberta Act will deprive a defendant of a limitations defence he would normally have to an added claim in the situation we have described, but only if requirements designed to give the defendant alternative limitations protection have been satisfied.

[139] It is therefore clear that section 6(4) in the new statute was not intended to deprive defendants of limitations protection. Indeed, the reform of limitations legislation would be a

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sham if a litigant could, by mere mention of a transaction, deliberately avoid or extend a limitations period.

[140] Next we must look at the definition of acquiescence and laches.

[141] Although the factual situations in the cases are of no assistance in resolving the issues here, I agree with Weatherford's outline of the basic legal principles of acquiescence and laches as outlined by our Court of Appeal in ***Hunter,*** which then refers to the SCC decision in ***M.(K.).*** Those decisions emphasize that laches requires more than mere delay; in addition to delay there must be acquiescence to the point of waiver, or prejudice, or other potential injustice.

[142] I have earlier outlined why, in Alberta, acquiescence and laches apply to legal as well as to equitable claims.

[143] As to the notion of acquiescence, some additional perspective is provided by ***Urbas Estate***:

> Laches and Delay also bars the Plaintiffs' claim
>
> 79 Laches is established when two conditions are fulfilled: (1) there is unreasonable delay in the commencement or prosecution of proceedings; and (2) in all of the circumstances the consequences of delay renders the grant of relief unreasonable or unjust: Rhyolite Resources Inc. v. CanQuest Resource Corp., [1999] B.C.J. No. 114 (C.A.), at para. 33.
>
> 80 There are two distinct branches to the laches doctrine. The doctrine will apply where the delay of the plaintiff (a) constitutes acquiescence, or (b) results in circumstances that make the prosecution of the action unreasonable: M.(K.) v. M.(H.), at para. 98.
>
> 81 Mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine of laches considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine. The court in exercising its equitable jurisdiction must always consider the conscionability of the behaviour of both parties.
>
> 82 "Acquiescence" has various meanings. One meaning is that a plaintiff stands by and watches the deprivation of her rights and does nothing. Another is that after the deprivation of her rights and in the full knowledge of their existence, a plaintiff delays, leading to an inference that her rights have been waived: M.(K.) v. M.(H.), at para. 100
>
> 83 A plaintiff's knowledge of her rights is critical to the notion of acquiescence; however, this knowledge is to be measured by an objective standard so that the question is whether it is reasonable for the plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim.

[144] In ***Hunter***, our Court of Appeal also approved the Manitoba Court of Appeal's decision in ***Rivergate Properties Inc***. which decision includes, starting at para. 38, an explanation of why, in an appropriate situation, on the basis of the wording of the statute itself, the equitable doctrines of laches and acquiescence can provide immunity even where a statutory limitation period still has time to run.

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[145] In the result, this court must determine whether a potential injustice is caused to the applicants if Weatherford were allowed to use the curative provisions of s. 6(4) of the *Limitations Act* to extend a limitations deadline and deprive the applicants of a limitations defence.

[146] In deciding whether an equitable argument is available to the applicants, the court must consider the equitable position of the applicants as well as that of Weatherford. Weatherford argues that the applicants do not have clean hands because they abused private information, etc.; the problem with that argument is, of course, that these are mere allegations on Weatherford's part, and the actual subject of the lawsuit. Weatherford cannot, in this context, presume that it will be successful in its lawsuit.

[147] Weatherford also argues that the applicants knew very well what they had done and it would therefore not be unjust to delay instituting legal proceedings against them for that reason. This is an argument which is essentially similar to the first argument advanced by Weatherford, and the answer to this argument is also the same: Weatherford cannot in this context assume that it will be successful in its lawsuit against the applicants.

[148] Nor in the context of limitations can it be suggested that defendants have any obligation to move the case along or otherwise to assist a plaintiff in acting within a limitations deadline.

[149] On the contrary, as soon as Weatherford was made to disclose the November 25, 2005 email, the applicants immediately applied for summary judgment on the basis of limitations. The applicants have clean hands on this application.

[150] On the other hand, the evidence is clear that Weatherford understood the limitations problem which it faced: it acknowledges that it issued the 2007 statement of claim to protect its limitations position. Limitations statutes establish deadlines; a horseshoes response to a statutory deadline is inadequate.

[151] Weatherford is a sophisticated litigant. As the November 25, 2005 email makes clear, as of that date Weatherford understood that it had a decision to make about whether and when it would sue the applicants. If it did sue the applicants, Weatherford believed that it had to take the risk that the applicants would not continue to supply Weatherford with stators; that would have effected a commercial detriment to Weatherford because Weatherford could not, in November, 2005, yet replicate the German stators. If it did not sue the applicants in November, 2005, it could hope to maintain supply from the German applicants until Weatherford had replicated the German stators and was in a position to, itself, provide the "exact same pump" to the marketplace as the pump to which the Germans had been contributing. That was, of course, the kind of choice which Weatherford was entitled to make. Even if Weatherford's deliberate choice not to sue the applicants and to continue placing orders for stators with them does not meet the level of waiver which the doctrine of acquiescence requires, it is at the least conduct which the court can take into account in determining the equities of the situation.

[152] What is decisive here is that Weatherford chose not to comply with a known limitations period and to sit on their rights; although Weatherford describes this as a "prudent risk", Weatherford's behaviour is a classic example of laches.

[153] Although the time which elapsed between the end of the s. 3 limitation period and Weatherford's filing of a lawsuit against these applicants is not long, in all the circumstances, I

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have concluded that to allow Weatherford to obtain the benefit of extending the statutory s. 3 limitation period would be inequitable.

f) Conclusion

[154] For the reasons outlined, I have concluded that there is no genuine issue for trial: the limitations issue can be fairly decided on the basis of uncontroverted evidence.

6. Costs

[155] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

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Heard on the 4th and 8th days of March, 2016.
Dated at the City of Edmonton, Alberta this 6th day of April, 2016.

J.B. Veit
J.C.Q.B.A.

Appearances:

Kenneth Fitz, McLennan Ross
For Applicant, Artemis Kautschuk and Kunstoff-Technik GmbH

Sylvia Jacob, Jacob Associates
For Applicant, Wilhelm Kaechele GmbH

Fausto Franceschi, Ward Hanson, Alison Walsh,
Dentons Canada LLP
For Respondent, Weatherford Canada Partnership

Court of Queen's Bench of Alberta

Citation: Delta Hotels No 2 Holdings Ltd v Calm Shore Ventures (1992) Inc, 2019 ABQB 434

2019 ABQB 434 (CanLII)

Date: 20190611
Docket: 1103 12977
Registry: Edmonton

Between:

Delta Hotels No 2 Holdings Ltd

Plaintiff

- and -

Calm Shore Ventures (1992) Inc, Calm Shores Ventures Inc, Jacques Whitford Limited, Stantec Inc, Hein Reichard Tomlin Inc, Schirmer Engineering Corporation, AON Fire Protection Engineering Corporation, Halsall Associates Limited, Impact Fire Safety Sales & Service Ltd, UTC Fire & Security Canada, Tyco International of Canada Ltd, Carrying on Business Under the Registered Trade Name of Simplex Grinnel, Ansul Incorporated, and ABC Co Ltd

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice K.G. Nielsen

I. Introduction

[1] Delta Hotels No 2 Holdings Ltd, now known as DHL No 2 Holdings Ltd (DHL Holdings) applies to: amend the current Amended Statement of Claim to reflect its current name; to add three companies, DHL No 2 Limited Partnership (DHL Limited Partnership), bcIMC Realty Corporation (bcIMC), and DHL Hotels Limited (DHL Hotels) as Plaintiffs; to remove all

of the Defendants against whom DHL Holdings has discontinued; and to make the necessary consequent amendments to the Amended Statement of Claim.

[2] The remaining Defendants consent to the Application to

(a) change the Plaintiff's name to reflect its current name;
(b) remove all Defendants against whom Discontinuances of Action have been filed; and
(c) the changes to the Amended Statement of Claim consequent upon such amendments.

[3] The remaining Defendants oppose the Application to add bcIMC, DHL Limited Partnership, and DHL Hotels as Plaintiffs.

[4] For the reasons that follow, I allow the Application to add bcIMC, DHL Limited Partnership, and DHL Hotels as Plaintiffs, as well as the amendments consequent to the addition of these Plaintiffs. Specifically, I allow the amendments proposed in paras 48 and 49 of the Amended Statement of Claim.

II. Background

[5] DHL Holdings is, and was at all material times, the title holder of the lands and building municipally located at 4404 Gateway Blvd, Edmonton, Alberta (the Hotel).

[6] bcIMC is, and was at all material times, the beneficial owner of the Hotel pursuant to a Declaration of Trust with DHL Holdings dated December 6, 2007 (the Declaration of Trust). The Declaration of Trust provides that DHL Holdings holds its interest in the Hotel as trustee in trust for bcIMC as beneficial owner.

[7] DHL Limited Partnership was at all material times the lessee of the Hotel pursuant to an Amended and Restated Operating Lease dated July 1, 2009 (the Lease). Pursuant to the Lease, DHL Limited Partnership agreed to use the Hotel and make rental payments to DHL Holdings and bcIMC as joint landlords of the Hotel. DHL Holdings alleges that the rental payments were calculated in part based upon the revenues generated by the operations of the Hotel.

[8] DHL Hotels , at all material times, provided hotel management services to DHL Limited Partnership under a Hotel Management Agreement dated July 1, 2009 (the Management Agreement). DHL Holdings alleges that the management fees under the Management Agreement were calculated, in part, based on the revenues generated by the Hotel's operations.

[9] DHL Holdings, DHL Limited Partnership, bcIMC, and DHL Hotels, at all material times, were controlled, directly or indirectly, by the British Columbia Investment Management Corporation.

[10] On or about August 26, 2009, a fire originated in the kitchen area of the Botanica Restaurant, located in the Hotel (the Fire). DHL Holdings alleges that the Fire caused damages and loss to the Hotel and its business.

[11] On August 15, 2011, DHL Holdings issued a Statement of Claim in this action. That Statement of Claim was amended on February 27, 2013. Of all of the Defendants named in the Action, only three remain.

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[12] In the Amended Statement of Claim, DHL Holdings alleges that Tyco International Canada Ltd., carrying on business under the registered trade name of Simplex Grinnel (Tyco) or its predecessors, contracted to supply and install a fire suppression system in the kitchen of the Botanica Restaurant.

[13] DHL Holdings also alleges that UTC Fire & Security Canada (UTCFS Canada), or its predecessors, contracted to test, maintain and inspect the fire suppression systems, fire extinguishers, and other life safety equipment within the Hotel, and to certify that such equipment was of the proper type, was suitable for the purpose intended, was properly installed, was adequately charged, and was capable of operating as intended.

[14] Finally, DHL Holdings alleges that the Defendant, Calm Shore Ventures (1992) Inc. (Calm Shore) contracted to clean the range hood within the Botanica Restaurant and the exhaust ducting leading from the range hood to the exterior of the Hotel.

[15] DHL Holdings alleges that the losses and damages it suffered as a result of the Fire were due to the breaches of contract or negligence of one or more of Tyco, UTCFS Canada and Calm Shore.

[16] As stated, DHL Holdings seeks to file an Amended Amended Statement of Claim adding each of bcIMC, DHL Limited Partnership, and DHL Hotels as Plaintiffs and seeking to recover the damages which each alleges to have suffered as a result of the Fire (the Proposed Amended Claim).

III. Pleadings

A. Amended Statement of Claim

[17] The Amended Statement of Claim alleges that each of Tyco, UTCFS Canada and Calm Shore contracted with the Plaintiff, namely, DHL Holdings. The damages and loss claimed are set out at para 48:

> As a result of the negligence and breaches of contract of the Defendants, or any one or more of them, the Plaintiff has suffered significant loss and damage to the Hotel and its contents, loss of revenues from the operation of the Botanica Restaurant and the Hotel during the period of repair and reconstruction and continuing thereafter, and loss of business reputation of the Hotel. Full particulars of the damages and loss have not as yet been ascertained but will be proven at the trial of this action.

[18] The relief sought is set out at para 49:

> The Plaintiff claims the following relief as against the Defendants, jointly and severally:
>
> a. Loss and damage to the Hotel and its contents in the approximate amount of $8 million [sic];
>
> b. Loss of revenues during the period of repair and reconstruction in the approximate amount of $5 million [sic];

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c. General Damages for ongoing loss of revenues and loss of business reputation in the amount of $2 million [sic];

d. Interest on the foregoing in accordance with the *Judgment Interest Act*, RSA 2000, c J-1; and

e. Costs of this action.

B. Proposed Amended Claim

[19] The Proposed Amended Claim alleges that Tyco, UTCFS Canada and Calm Shore each had a contract with the Plaintiffs, namely DHL Holdings and the three parties proposed to be added as Plaintiffs.

[20] The damages and losses claimed are set out at para 48:

> As a result of the negligence and breaches of contract of the Defendants, or any one or more of them, the Plaintiffs collectively have suffered significant losses and damage to the Hotel and its contents, loss of revenues from the operation of the Botanica Restaurant and the Hotel during the period of repair and reconstruction and continuing thereafter, loss of rental payments and hotel management fees and loss of business reputation to the Hotel. Full particulars and allocation of the damages and loss have not as yet been ascertained but will be proven at the trial of this action.

[21] The relief sought is set out at para 49 of the Proposed Amended Claim. The losses and damages claimed are the same as set out in the Amended Statement of Claim, but are now sought on behalf of DHL Holdings and the three parties proposed to be added as Plaintiffs.

IV. Issues

1. Should DHL Holdings be granted leave to further amend the Amended Statement of Claim by adding the three proposed Plaintiffs and making the consequential amendments although the relevant limitation period has expired?

2. Is the Application barred by the doctrines of laches and acquiescence?

V. Positions of the Parties

[22] DHL Holdings submits that the amendments set out in the Proposed Amended Claim do not change the claimed losses and damages, but merely seek to allocate them among the current and proposed Plaintiffs, namely as they pertain to the damage to real property, business interruption losses, and the loss of rental payments and hotel management fees suffered by the current Plaintiff and proposed Plaintiffs. DHL Holdings and the proposed Plaintiffs are "sister companies" and all part of the same corporate group controlled directly or indirectly by the British Columbia Investment Management Corporation and, therefore, should be permitted to allocate the losses within that group. The proposed amendments are permitted under the *Alberta Rules of Court*, AR 124/2010 and the *Limitations Act*, RSA 2000, c L-12. Further, the doctrines of laches and acquiescence do not apply here.

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[23] Tyco argues that the proposed amendments are barred by the *Limitations Act*. Further, Tyco argues that the Application is doomed by the doctrines of both laches and acquiescence.

[24] UTCFS Canada does not oppose the addition or substitution of bcIMC or DHL Limited Partnership to the extent these parties are seeking property damages to the Hotel and its contents or the business interruption claim in relation to the operations of the Hotel. However, UTCFS Canada does oppose the addition of parties, causes of action, and heads of damage in relation to the alleged loss of rental payments and the alleged loss of management fees.

[25] Calm Shore supports both Tyco and UTCFS Canada.

VI. Law

A. *Rules of Court*

[26] The following *Rules of Court* are germane to this Application:

> **3.62(1)** A party may amend the party's pleading, including an amendment to add, remove, substitute or correct the name of a party, as follows:
>
> ...
>
> (b) after pleadings close,
>
> (i) for the addition, removal, substitution or correction of the name of a party, with the Court's prior permission in accordance with rule 3.74 [*Adding, removing or substituting parties after close of pleadings*] ...
>
> ...
>
> **3.74(1)** After close of pleadings, no person may be added, removed or substituted as a party to an action started by statement of claim except in accordance with this rule.
>
> **(2)** On application, the Court may order that a person be added, removed or substituted as a party to an action if
>
> (a) in the case of a person to be added or substituted as plaintiff, plaintiff-by-counterclaim or third party plaintiff, the application is made by a person or party and the consent of the person proposed to be added or substituted as a party is filed with the application;
>
> (b) in the case of an application to add or substitute any other party, or to remove or to correct the name of a party, the application is made by a party and the Court is satisfied the order should be made.
>
> **(3)** The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

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B. *Limitations Act*

[27] The following sections of the *Limitations Act* are germane to this Application:

> **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 subsection (2), (3) or (4) are satisfied.
>
> ...
>
> **(3)** When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,
>
> (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
>
> (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, and
>
> (c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.
>
> ...
>
> **(5)** Under this section,
>
> (a) the claimant has the burden of proving
>
> (i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and
>
> (ii) that the requirement of subsection (3)(c), if in issue, has been satisfied,
>
> and
>
> (b) the defendant has the burden of proving that the requirement of subsection (3)(b) or (4)(b), if in issue, was not satisfied.
>
> ...
>
> **10** Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

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C. Case Law

[28] Generally, amendments should be allowed, no matter how late or careless, unless there is prejudice that cannot be repaired: ***Balm v 3512061 Canada Ltd***, 2003 ABCA 98, at para 43.

[29] This Court has broad discretion to allow amendments to pleadings and this discretion is to be exercised generously: ***Andritz Ltd v Quality Fabricating & Supply Ltd***, 2010 ABQB 101, at para 43. However, amendments will not be granted if the court finds:

> (a) the amendment will cause prejudice that cannot be ameliorated by costs or other measures;
>
> (b) the amendment is "hopeless", i.e. it does not disclose a cause of action and is not relevant to a cause of action;
>
> (c) the amendment would have been inappropriate as an original pleading, i.e. no amendment will be allowed if it could have been struck as being vexatious, an abuse of process, etc.;
>
> (d) the amendment is not in proper form or is unsatisfactorily particularized; or
>
> (e) the amendment is made after a limitation has passed and
>
> > (i) does not relate to the same conduct, transaction or events described in the original pleading in the proceedings;
> >
> > (ii) the defendant did not receive, within the limitation period applicable to the added claim plus the time provided by law for the service of process (a total of three years) sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits; and
> >
> > (iii) the added claim is not necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

[30] See ***Andritz*** at para 46; ***Foda v Capital Health Region***, 2007 ABCA 207, at para 10; ***S(CH) v Alberta (Director of Child Welfare)***, 2006 ABQB 528, at para 11; aff'd 2006 ABCA 355; ***Attila Dogan Construction & Installation Co v AMEC Americas Ltd***, 2013 ABQB 525, at para 13, aff'd 2014 ABCA 74.

[31] Some proposed amendments will require the requesting party to tender some evidence in support. In ***Bard v Canadian Natural Resources***, 2016 ABQB 267, Nixon J noted at para 12:

> If an amendment is ancillary, no evidence is necessary. Otherwise, the amount of evidence to support an amendment is generally low. This requirement for "modest" evidence includes amendments that allege new substantive facts; yet, even as the evidentiary threshold to amend is low, the evidence "must have some foundation in fact": ***Attila***, *supra* at paras 14-16. Amendments that particularize a pre-existing claim are granted more liberally than those which effectively add new causes of action. The onus is on the applicants to adduce a modest amount of evidence to support their proposed amendments.

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[32] Similarly, in ***Canadian Natural Resources Ltd v Arcelormittal Tubular Products Roman SA***, 2012 ABQB 679, aff'd 2013 ABCA 87, Hughes J (as she then was), relying on ***Balm*** at paras 9 and 23, noted that trivial amendments, "such as those that do not seek to impose any liability on new defendants" or amendments that are "purely ancillary," do not require evidence: at para 47. The Court went on to note at para 48:

> Amendments pleading a new cause of action or claim arising from facts already plead in existing pleadings filed in time, also require little if any evidence. In ***Balm***, Côté JA observed at para 11:
>
> > Paragraph 37 in the amended statement of claim is new, and is clearly a new cause of action. However, though the legal conclusion pleaded is new, the acts alleged in it are not new. It is trite law that a statement of claim need not name causes of action or draw legal conclusions. It need only plead facts. So the plaintiff could merely have sent the original defendants' counsel a letter warning that he would argue at trial that proof of such and such facts already alleged in the statement of claim would constitute the cause of action of mutuality of obligations under law merchant. See 30 Hals. Laws 7 (3rd Ed. 1959).

VII. Analysis

A. Amendment to Pleadings

[33] At the outset, I note that the consents of the three proposed Plaintiffs as required by Rule 3.74(2)(a) have been filed.

[34] The addition of bcIMC, DHL Limited Partnership, and DHL Hotels as Plaintiffs and the added claims for damages for loss of rental payments and hotel management fees are outside of the relevant limitation period. Section 6 of the *Limitations Act* applies.

[35] So long as none of the exceptions to the general rule - that amendments should be allowed, no matter how careless or late - apply, this Court should allow the amendments.

i) Prejudice

[36] A party cannot be added to a claim if prejudice would result to a party that could not be remedied by a costs award, an adjournment, or the imposition of terms.

[37] The Plaintiff submits there is no prejudice to the Defendants if the Court allows the amendments. The Plaintiff has already provided all of the records the current and proposed Plaintiffs will rely on to prove liability and quantum. Although scheduling additional Questioning of the proposed Plaintiffs may be time consuming, it does not result in serious prejudice to the Defendants that cannot be remedied.

[38] This case is very similar to the situation in ***Andritz***, which involved a plaintiff - Andritz Ltd. - that applied to add Andritz Inc. as a plaintiff to an action after the expiration of the limitation period. After filing its Statement of Claim, Andritz Ltd. determined that some of the damages set out in the claim were actually incurred by Andritz Inc. The background facts did not change as a result of the amendment. The damages incurred by Andritz Inc. were included in the

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damages already pled. In ***Andritz***, as in this case, there were allegations of breaches of contract and duty of care.

[39] Macklin J found there was no prejudice to the defendants that could not be ameliorated by an award of costs, amendments, or adjournments. He noted there was the possibility of inconvenience but no "serious prejudice or injustice": at para 49.

[40] Prejudice is also a factor under s 6 of the *Limitations Act*, and I will discuss it further when I discuss s 6.

ii) Hopeless

[41] I agree with the Plaintiff that the proposed amendments are not hopeless. The amendments merely extend previous allegations, of the existence of contractual relationships and a duty of care, to the proposed Plaintiffs.

iii) Inappropriate, Vexatious, Abuse of Process

[42] The proposed amendments are not inappropriate, vexatious, or an abuse of process.

iv) Improper Format, Insufficient Particulars

[43] The proposed amendments are sufficiently particularized. A pleading need only include facts; it is unnecessary for a pleading to contain evidence by which facts are to be proven: ***Andritz***, at para 56.

v) *Limitations Act*, s 6

[44] Although the proposed amendments are outside of the limitation period they satisfy the criteria in s 6(3) of the *Limitations Act*.

[45] The scope of s 6 includes "applications to add or substitute a claimant or change the capacity in which a claimant sues without in any way altering the body of the pleading...": ***Stout Estate v Golinowski Estate***, 2002 ABCA 49, at para 91.

[46] Courts use a functional approach in applying s 6. Late amendments will be allowed unless the party opposing the amendments can establish it will suffer actual prejudice: ***Stout Estate***, at paras 97-100. In applying the functional approach, a court must determine whether the requirements in s 6(3) are met.

a) Conduct, Transaction, Event

[47] In this case, the proposed amendments arise from the same conduct, transaction, and events found in the Amended Statement of Claim. The Plaintiff says the only difference between the Amended Statement of Claim and the Proposed Amended Claim is allocation of damages: namely the loss of rental payments and hotel management fees as functions of loss of hotel revenues.

[48] The proposed amendments arise out of the Fire. The Proposed Amended Claim does not introduce any new facts or events.

b) Sufficient Knowledge to Avoid Prejudice

[49] The Defendants take the position they did not receive sufficient knowledge of the added claims and they will therefore be prejudiced in maintaining a defence. Tyco alleges the amendments would cause prejudice because the defendants would be faced with diminished

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ability to garner evidence necessary to address the amended claims and that key evidence is missing.

[50] UTCFS Canada says the amendments would cause serious prejudice that is not compensable in costs, pointing to general loss of evidence, the fact that the litigation has been ongoing for more than seven years, the necessity for production of new records, Questioning, and expert reports, and the fact that necessary information is now difficult to locate or has been destroyed.

[51] The Plaintiff says the Defendants have failed to satisfy their burden of establishing they would suffer prejudice if the amendments are allowed. I agree. The Plaintiff is not alleging a new cause of action, nor is it adding new damages. Allowing the addition of the three proposed Plaintiffs, and allocating the damages between them, will not prejudice the Defendants.

c) Necessary to Ensure Enforcement

[52] Finally, adding the proposed Plaintiffs to the claim, and the further specification of the losses and damages suffered in the Fire, is necessary and desirable to ensure the effective enforcement of the claims originally asserted. As the parties who suffered the losses and damages, having the proposed Plaintiffs in the action will ensure effective enforcement.

[53] In ***Andritz***, Macklin J held that the proposed plaintiff, Andritz Inc., was not a "true stranger" to the litigation, but rather a "sister company" to Andritz Ltd. Macklin J noted at para 81:

> ...The claim now being suggested as properly that of Andritz Inc. is fully set out in the Statement of Claim issued on behalf of Andritz Ltd. The allegations relating to the existence of a contract and a duty of care are precisely the same. The same breaches are alleged. The identical damages are claimed. The two Andritz companies are related. This is not a situation where a different claimant who has a claim against the same defendant wishes to be added as a claimant with consequent amendments alleging different causes of action and other heads of damages.

[54] The statement above applies equally to this situation. The Amended Statement of Claim and Proposed Amended Claim involve the same allegations of breaches, the same damages, and the Plaintiff companies are all related. Although the Defendants argue that the proposed amendments add new heads of damages – namely loss of rental payments and hotel management fees – it is more accurate to say these are further particulars of losses and damages already claimed by the Plaintiff. Given the Proposed Amended Claim does not increase the amount of damages claimed, it is hard to see how these are "new" heads of damages.

vi) Evidence

[55] I find the proposed amendments are ancillary amendments that do not seek to impose new liability on new defendants. Rather, the amendments seek to allocate losses among parties related to each other – "sister companies." No evidence is needed to support these proposed amendments.

B. Laches and Acquiescence

[56] Tyco, relying on s 10 of the *Limitations Act*, further asks this Court to deny the proposed amendments because they offend the equitable doctrines of laches and acquiescence.

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[57] Tyco alleges the Plaintiffs deliberately waited to sue and it would be inequitable to deprive the Defendants of their right to immunity. Tyco relies on ***Weatherford Canada Partnership v Kautschuk***, 2017 ABCA 110 (***Weatherford CA***) which is an appeal of ***Weatherford Canada Partnership v Kautschuk***, 2016 ABQB 188 (***Weatherford QB***), where the Court of Appeal held that the appellant's behaviour, in deliberately waiting to sue and sitting on its rights, created prejudice or potential injustice to the respondents.

[58] Acquiescence and laches are established when there is unreasonable delay in commencement of proceedings or prosecution, and, considering all of the circumstances, the consequences of delay render the grant of relief unreasonable or unjust: ***Urbas Estate***, 2015 ONSC 6399, at para 79, cited by Veit J in ***Weatherford QB*** at para 143.

[59] This case is distinguishable from the situation in ***Weatherford***. First, ***Weatherford*** involved an attempt to add new defendants to a claim, not plaintiffs. Further, in ***Weatherford***, the plaintiff knowingly and strategically held off on suing the defendants in a timely manner, taking, what Weatherford referred to as, a "prudent risk": ***Weatherford QB*** at para 152. In ***Weatherford*** the plaintiff delayed suing the proposed defendants for business reasons. In this situation, there is no evidence of such knowledge and strategy on the part of the Plaintiff and proposed Plaintiffs.

[60] I do not find acquiescence and laches in the circumstances of this case.

VIII. Conclusion

[61] The Plaintiff's Application is allowed and the Plaintiff may file the Proposed Amended Claim.

IX. Costs

[62] The parties may speak to me within 60 days of these Reasons for Judgment if they are otherwise unable to agree on costs.

Heard on the 12th day of April, 2019.
Dated at the City of Edmonton, Alberta this 11th day of June, 2019.

K.G. Nielsen
A.J.C.Q.B.A.

Appearances:

Havelock Madill, QC and Eleni Loutas
Brownlee LLP
for the Plaintiff

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Andrew Stead and Gordana Ivanovic
McMillan LLP
for Tyco International of Canada Ltd carrying on business under the registered trade name of Simplex Grinnel

Greg Jaycock
Parlee McLaws LLP
for UTC Fire and Security Canada

Andrew Paterson
DDC Lawyers LLP
for Calm Shore Ventures (1992) Inc

2019 ABQB 434 (CanLII)

In the Court of Appeal of Alberta

Citation: Stankovic v 1536679 Alberta Ltd, 2019 ABCA 187

Date: 20190516
Docket: 1701-0329-AC
Registry: Calgary

2019 ABCA 187 (CanLII)

Between:

William Stankovic

Respondent
(Plaintiff/Defendant
by Counterclaim)

- and -

1536679 Alberta Ltd

Appellant
(Defendant/Plaintiff
by Counterclaim)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment

Appeal from the Decision by
The Honourable Mr. Justice J.T. Eamon
Dated the 18th day of October, 2017
(Docket: 1601 10040)

2019 ABCA 187 (CanLII)

Memorandum of Judgment

I. Introduction

[1] This appeal questions whether the chambers judge on appeal should have used the summary procedure under Rule 7.3 to grant summary judgment in a foreclosure action. He made a finding that the mortgage was in default and directed that the plaintiff could proceed with enforcement proceedings before a master.

[2] This Court must consider "[i]f the record allowed the judge to make the necessary findings of fact and apply the law"; if so, "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 Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 25 [***Weir-Jones***].

[3] Appellant 1536679 Alberta Ltd ("153") contends that the summary procedure should not have been used because there were unresolved material conflicts in the evidence that did not allow the chambers judge to make the necessary findings of fact and apply the law.

[4] We agree.

[5] For the reasons following, the order of the chambers judge is set aside. As this matter is remitted to the trial court, we say below only what is necessary to dispose of the appeal.

II. Previous Proceedings

A. *Master in chambers*

[6] Before the master in chambers, Stankovic sought both summary judgment in his foreclosure action and summary dismissal of 153's defence and counterclaim in the action.

[7] Stankovic swore an affidavit in which he annexed the parties' written agreements pre-dating the mortgage and the mortgage, deposed to 153's default thereunder and provided a calculation of the outstanding debt. The debt claimed far exceeds Stankovic's appraiser's opinion of value.

[8] The crux of 153's defence and counterclaim was that Stankovic:

> . . . was not a simple lender and mortgage holder in respect of the 77 Street Property, but an active Joint Venture party, and that the parties had collaterally agreed that there was no indebtedness owing under the James River or the 77 Street Property Mortgage to be paid independently of the 77 Street Property payment, and

> the parties had agreed that the James River Mortgage was of no validity and enforceability.

153 tendered substantial affidavit evidence through its principal, Trnski, in this respect.

[9] In response to 153's evidence, Stankovic swore at para 22 of his Affidavit that:

> I have reviewed the Statement of Defence and the Counterclaim filed by the Defendant in this Action. I believe there is no defence to my claim and that the Statement of Defence is without merit. I believe that there is no merit to the whole or any part of the Counterclaim. I believe that there are no genuine issues to be tried.

He otherwise did not tender any countervailing evidence.

[10] The master dismissed Stankovic's application because 153 had put forth a substantial affidavit that recited facts which had not been challenged; Stankovic made nothing more than a very general statement in his affidavit with respect to the merits of the matter. The master found that:

> … I'm not able to grant summary judgment based upon these materials and these facts … Mr [Trnski] has put forth a substantial affidavit that recites specific facts which your client may not agree with, but your client hasn't challenged those facts. He's made nothing more than a very general statement in his affidavit with respect to the merit of the matter generally.
>
> There is at least some corroborative evidence with respect to the non-arm's-length dealing between these parties and the fact that certain aspects of them might have been interconnected. And the materials, at the very least, put forward a set of facts that at the very least and on a preliminary examination would arguably result in a defence to any claim for deficiency and perhaps even more in terms of what they reveal.

B. *Court of Queen's Bench*

[11] Stankovic appealed, but changed course in doing so, indicating that he was "only challenging that [any joint venture agreement] cannot challenge the mortgage"; and "[t]he only thing that matters . . . for the purposes of today's application, is whether or not the [joint venture agreement] altered the term of the mortgage".

[12] As for 153's defence and counterclaim, Stankovic now took the position that if 153 and Trnski "say there's some oral joint venture agreement and there's obligations between the parties, which, of course, we deny, but if they say that, then that could be pursued at some future date".

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[13] On appeal, the evidentiary record was unchanged.

[14] The chambers judge stated that in his view, Stankovic's "denial of a collateral agreement that mortgage, principal and interest is not due is unassailable" because:

a) a self-serving statement in Trnski's affidavit alone was not sufficient to create a triable issue in the absence of detailed facts and supporting evidence. The statement in paragraph 22 of Trnski's affidavit was a bare assertion without any details of when the supposed express agreement was made or using what language, and without any explanation why the mortgage terms and the terms of the other agreements were drafted;

b) 153's evidence to the effect that there was an agreement that the mortgage would not be payable until subdivision and sale of the lots was clearly an agreement that modified the terms and conditions of the option agreement and the mortgage, and was excluded under the parol evidence rule;

c) while he "would not apply the parol evidence rule to permit the parties to facilitate a fraud", 153 didn't plead fraud and cannot "have it both ways" and "stop enforcement by raising hints of fraud, yet continue the fraudulent transaction and receive the financing and remain in possession of a multi-million dollar property at no cost";

d) there is no air of reality to the claim that Stankovic is estopped from insisting on its legal rights because "there is simply no evidence to suggest any representation on the part of the plaintiff that it would not enforce the mortgage";

e) if there was an obligation to fund the tax payments or other development expenses during the mortgage term, that could only be an obligation that is collateral to the vendor takeback mortgage; it cannot be one that is express or implied in the mortgage itself; and

f) no adverse inference would be drawn from Stankovic's failure to adduce evidence from the parties' joint lawyer.

[15] In the end however, the chambers judge also recognized that there were triable issues as to whether there was a joint venture agreement, a collateral agreement for Stankovic to provide funds to 153 and whether such arrangements had been breached, and made it clear that his decision was not to affect such claims. He stated:

> I want there to be a further direction in the formal order that this decision does not prejudice or affect the defendant's claim for damages under its counterclaim. If it turns out, at the end of day, that there was a joint venture agreement and there was a collateral agreement to provide funds, and, as I say, if the other legal requirements

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> are met, then it is not my intention to preclude the defendant from pursuing those claims. And certainly, at this point, based on the evidence I've seen, there is a triable issue because none of those allegations in this case have been rebutted by the plaintiff who also simply makes a bare assertion with respect to the existence of the joint venture agreement.

[16] The chambers judge granted a form of order that permitted Stankovic to proceed with the foreclosure action with the proviso that a master in chambers who had "expertise" would decide what to do in Stankovic's action; Stankovic's right to proceed was to be without prejudice to 153's right to pursue its counterclaim.

[17] 153 appealed.

III. Standards of Review

[18] As per ***Weir–Jones*** at para 10, the test for summary dismissal and the interpretation of the *Alberta Rules of Court*, Alta Reg 124/2010, are questions of law reviewed for correctness. Findings of fact underlying a summary dismissal are entitled to deference, as are the "chamber judge's assessment of the facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are all entitled to deference: ***Hryniak v Mauldin***, 2014 SCC 7 at paras 81-4, [2014] 1 SCR 87; ***Amack v AW Holdings Corp***, 2015 ABCA 147 at para. 27, 24 Alta LR (6th) 44, 602 AR 62." See also ***Housen v Nickolaisen***, 2002 SCC 33, [2002] 2 SCR 235; ***HL v Canada (Attorney General)***, 2005 SCC 25, [2005] 1 SCR 401; ***Attila Dogan Construction and Installation Co v AMEC Americas Ltd***, 2015 ABCA 406 at para 9, 609 AR 313

[19] While neither the master nor the chambers judge had the benefit of this Court's recent decision in ***Weir-Jones***, both parties made submissions at the oral hearing on how that decision impacts this appeal.

IV. Grounds of Appeal

[20] On appeal, 153 submits that the chambers judge erred in law by granting partial summary judgment and permitting enforcement on the mortgage despite his finding that triable issues existed with respect to whether there was a joint venture agreement and a collateral agreement to provide funds that was breached by Stankovic.

V. Analysis

[21] To succeed in obtaining summary disposition, Stankovic was required to demonstrate that under the mortgage, his *in rem* and *in personam* rights against 153 were unimpeded.

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[22] Stankovic as plaintiff was required to establish "no defence". "The resisting party need not prove the opposite in order to send the matter to trial. The party resisting summary judgment need only demonstrate that the record, the facts, or the law preclude a fair disposition or, in other words, that the moving party has failed to establish there is no genuine issue requiring a trial"; there is no symmetry of burdens: ***Weir-Jones*** at para 32.

[23] We are satisfied that the chambers judge erred:

a) in finding Trnski's evidence, encapsulated in particular at paragraph 22 of his affidavit, amounted to no more than a self-serving bare assertion, and was not admissible under the parol evidence rule; and

b) in finding that the mortgage was in default, while acknowledging that there were triable issues as to whether there was an overarching joint venture and a collateral agreement to provide funds to 153 that were breached by Stankovic.

[24] The chambers judge decided Stankovic's "denial of a collateral agreement that mortgage, principal and interest is not due is unassailable" as follows:

> . . . [A] self-serving statement in an affidavit alone is not sufficient to create a triable issue in the absence of detailed facts and supporting evidence. The statement in paragraph 22 of Mr. Trnski's affidavit is a so-called bare assertion without any details of when the supposed express agreement was made or using what language, and without any explanation why the mortgage terms and the terms of the other agreements were drafted. . . . The bare assertion is not sufficient to overcome the structure of the written option agreement and the vendor takeback mortgage, both of which are signed were signed by [153].

The chambers judge also found that Trnski's "evidence about the agreement contrary to the terms of the written mortgage is not admissible" on the basis that the parol evidence rule precludes the use of evidence to add to, subtract or vary the terms of a contract.

[25] The chambers judge failed to recognize however, that the parol evidence rule is subject to a myriad of exceptions. Moreover, ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at paras 60-61, [2014] 2 SCR 633 [***Sattva***] is clear:

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

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[26] ***Sattva*** was applied in ***IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 59, 53 Alta LR (6th) 96, in the context of an error of law:

> One error of law reviewed for correctness is where the trial judge fails to consider the "surrounding circumstances" or "factual matrix" of a contract. A trial judge must consider the factual matrix in interpreting a contract regardless of whether the contract is ambiguous. Therefore, it is an error for a trial judge to discount the factual matrix on the basis that the contract itself is not ambiguous. . . (citations omitted).

[27] Failing to consider the surrounding circumstances that were known or reasonably ought to have been known by the parties at the time of creation of the 2013 option agreement and mortgage, is an error of law reviewed for correctness.

[28] In our view, the chambers judge was wrong to disregard the content of Trnski's evidence that fell outside the four corners of the written documents. Trnski did not dispute that 153 signed the 2013 option agreement and the mortgage. In other words, there is no issue of authentication. 153 urged the chambers judge to consider, however, that there was a triable issue about whether the mortgage was presently enforceable by Stankovic's foreclosure action.

[29] We agree with 153's contention that the chambers judge rejected 153's evidence out of hand, in the absence of essential fact findings in the face of material, conflicting evidence. While he accepted that there were triable issues which should proceed to trial on the counterclaim with respect to the existence of an overarching joint venture agreement and a collateral agreement to provide funds to 153 and a breach by Stankovic of same, he wrongly decided that there was no triable issue as to whether the mortgage was in default and enforceable without determining those issues. 153 needed only to demonstrate that the record, the facts, or the law preclude a fair summary disposition or, in other words, that Stankovic failed to establish there is no genuine issue requiring a trial.

[30] A brief summary of the record is sufficient to underline our concerns, bearing in mind Trnski's evidence is uncontroverted but for Stankovic's bare denial.

a. *The parties' relationship*

[31] Trnski swore that he and Stankovic were longstanding friends and business partners who had come to various "handshake" agreements relating to the development of the 77 Street lands, a 4-acre parcel where Stankovic's principal residence was situated. Trnski stated that the deal was he and Stankovic together, would subdivide the lands into multiple executive lots that would be sold at a significant profit.

b. *The components of the parties' "Joint Venture Agreement"*

[32] The so-called "Joint Venture Agreement" had two parts, said Trnski. The first part included the parties' agreement that when subdivided into lots, the total value of the lands would be $5.5 million. This compared to a present value of $2.5 million for the undeveloped land, as is. Under their deal, Stankovic would receive the first $5 million from the sale of lots (being a $2.5 million income gain to Stankovic), with some adjustments; Stankovic and 153 would then share the profit above the first $5 million equally. The second part of the parties' agreement was to create a scenario whereby Stankovic could shield himself from paying taxes on the anticipated income gain; namely, he would claim as a sale of his principal residence the increased value of the land after subdivision.

[33] Trnski deposed that to achieve this desired outcome, he and Stankovic agreed that the 77 Street property would be transferred to Trsnki's company 153 at a price that would reflect the first $5 million to Stankovic, plus 50% of the increased value above that amount. Trnski produced an opinion letter dated May 13, 2010, from a law firm that explained such an arrangement, whereby "NewCo" would be specifically created for the project and would purchase the house and surplus land from Stankovic who would take back a first mortgage "due on sale of the property".

[34] Trnski deposed that the transaction was to be completed by a transfer of Stankovic's property to 153 only after the parties received a firm offer on the subdivided land. The transaction was characterized as an agreement for sale with a term of three years, being the expected subdivision and sale timeline. In an attempt to document the 77 Street transaction as being a *bona fide* sale by Stankovic at (the inflated) fair market value, Trnski said that Stankovic proposed registering a mortgage on the James River property (now involved in proceedings in another action, number 1501-04858). This would create the appearance that Stankovic was advancing funds to 153 to enable 153 to "pay" the $500,000 deposit on the 77 Street transaction, all in aid of lending an air of reality to Stankovic's representation that he sold his principal residence at the increased value.

[35] The parties first written document dated May 31, 2010, states a purchase price is $5.5 million, and Schedule "A" provides that 153 "shall have permission to apply to subdivide the lands at its costs"; monies purportedly due under this agreement were to be paid by June 15, 2013.

[36] In 2010, at about the same time, a $550,000 mortgage in Stankovic's favour was registered against 849450 Alberta Ltd's (Trnski's company) James River property. Trnski deposed this face amount represented the amount of the 77 Street Property deposit of $500,000, plus $50,000 that Stankovic paid for common joint venture expenses pursuant to their Joint Venture Agreement. Trnski deposed that the James River mortgage was interrelated to the parties' 77 Street Property development project, as he extensively explained in paragraphs 17-19 of his affidavit.

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c. *The expiration of the anticipated timeframe for subdivision of the lands*

[37] Trnski deposed that while he and Stankovic thought that the 3 year time period from 2010 to 2013 would be sufficient to complete the 77 Street land subdivision and the sales of subdivided lots, this timeline was not realized due to problems obtaining municipal approval for the proposed subdivision. Under the May 31, 2010 written agreement, the June 15, 2013 deadline for payment came and went; no monies were paid to Stankovic.

[38] Stankovic admitted that he "did not immediately commence legal proceedings, but allowed Trnski to continue to develop the 77 Street Property even though the 2010 Agreement had expired."

d. *The 2013 replacement option agreement and mortgage*

[39] Stankovic deposed that he and 153 entered into a new agreement, intended to replace and be substituted for the 2010 agreement. The replacement agreement dated May 31, 2013 is entitled "This Agreement for Sale (Option Agreement)", and indicates that 153 had paid Stankovic $500,000 "the receipt and sufficiency of which is hereby acknowledged". However, it is our understanding that no such payment was made by 153 to Stankovic.

[40] In the replacement agreement, Stankovic gives 153 an option to purchase the 77 Street land, but now at the increased price of $7.5 million; the option to be exercised at any time "up to June 15, 2015, but not after such date". By letter dated October 26, 2014, 153 advised of its intention to exercise this option.

[41] $7.5 million was to be paid to Stankovic by a $500,000 non-refundable deposit, and "$7,000,000 by way of Vendor Take Back financing Interest rate: 4% annually, compounding

> Term: 2 years
>
> Type of security: first mortgage
>
> Prepayment provision: open
>
> **Partial discharge on each sale of lot.**" [Emphasis added]

[42] Clause 3(b)(i) and (ii) provided that "[a]ll expenses and adjustable items with respect to the Property including without limitation all taxes, local improvement charges and assessments, rents, utilities and any recoveries . . . shall be adjusted and paid between the parties as of the Closing Date", defined as "on or before June 15, 2015". However, clause 23 supersedes clause 3(b)(ii), and provided:

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> Notwithstanding anything else herein contained, even if inconsistent herewith, **the closing date shall be 20 days after** [153] **has received the final subdivision approval** for the within lands, which [153] warrants it shall apply for forthwith. [153] upon such approval shall immediately exercise the within option. (Emphasis added).

It is also clear on the record that 153 had not obtained "final subdivision approval".

[43] Additionally, the parties acknowledged in writing that Stankovic's mortgage would be paid by "[p]artial discharge on each sale of lot", as per Clause 3(a)(ii). Arguably the parties had in contemplation the anticipated subdivision and sale of individual lots. Clause 36 of the Mortgage also provided for this option as follows: "Unless the Lender has otherwise agreed to the repayment of the loan from the closing of sales of individual units or lots comprising the Lands. . .". Further, the uncontroverted evidence is that Stankovic did not accelerate payment of the full balance due under the mortgage when a "lot" was sold to his son-in-law.

[44] While the chambers judge relies heavily on the "entire agreement" Clause 17 of the May 31, 2013 option agreement, that clause is superseded by Clause 23 set out above. Moreover, entire agreement clauses are not an impediment to the duty of honesty in contractual performance. As per ***Bhasin v Hrynew***, 2014 SCC 71 at paras 72 and 75, [2014] 3 SCR 494, the Supreme Court of Canada discussed "entire agreement" clauses and the duty of good faith as follows:

> . . . [A] party almost always has some amount of discretion in how to perform a contract. It would [be] difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.
>
> . . .
>
> [T]he entire agreement clause in [the Agreement] is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it.

See also ***Hole v Hole***, 2016 ABCA 34, 612 AR 164.

[45] Trnski's evidence was that this was not a straightforward, arm's length, creditor-debtor relationship but rather a good faith understanding between friends, and if disbelieved, compelled a credibility assessment. A dispute "depending on issues of credibility, can leave genuine issues requiring a trial": ***Weir-Jones*** at para 35.

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[46] A fair reading of ***Guarantee Co of North America v Gordon Capital***, [1999] 3 SCR 423 at para 31, 178 DLR (4th) 1, mandates that merely conclusory or argumentative statements that have no supporting evidence besides the claims themselves, ought to be given no weight. On this authority therefore, Stankovic's conclusory statement that the appellant had "no defence" ought to be accorded little weight. On the other hand, Trnski's evidence far exceeds the threshold of "detailed facts and supporting evidence".

[47] As noted in ***Axxess Mortgage Fund v 117620 Alberta Ltd***, 2018 ABQB 626 at paras 183-189, the legal viability of a prior oral agreement that shapes the apparently contrary features of a written instrument, has been recognized by this Court in ***Palachek v Canadian Imperial Bank of Commerce***, 1991 ABCA 8 at paras 8-10, 79 Alta LR (2d) 159; see also ***Strother v Darc***, 2016 BCCA 297 at paras 24-26, wherein the court discussed the concept of "umbrella" agreements.

[48] In ***Bank of Montreal v Wilder*** (1983), 149 DLR (3rd) 193 at para 146 (BCCA), aff'd [1986] 2 SCR 551, the British Columbia Court of Appeal found that "[u]nder the shade of the umbrella" agreement, documents were to be read and interpreted and applied as a unified whole. And further, "the umbrella agreement, as a collateral agreement, comes within the collateral agreement exception to the parol evidence rule, so long as it is a true collateral agreement, established by the evidence and not merely a unilateral oral representation in derogation from the express terms of the document . . .".

[49] Whether there was a true collateral umbrella agreement between Stankovic and 153 under which the written documents were to be read and interpreted as a unified whole, is a triable issue; indeed, the chambers judge acknowledged as much**.**

[50] Furthermore, 153 raised a defence in the nature of estoppel, which the chambers judge acknowledged but rejected as follows:

> There is no air of reality to the submissions that the plaintiff was estopped from enforcing the mortgage because there is simply no evidence to suggest any representation on the part of the plaintiff that it would not enforce the mortgage. Also, the defendant does not plead or provide evidence of reliance. It does not say it was induced to agree or make or exercise the option agreement by any particular commitment or representation or that it relied on any specific representation in signing an agreement containing terms contrary to what Mr Trnski now says the facts are. . . .

[51] In ***Ryan v Moore***, 2005 SCC 38 at para 51, [2005] 2 SCR 53, the Supreme Court commented that "the doctrine of estoppel is one of the most flexible and useful in the armoury of law", and cited with approval the following passage from ***Amalgamated Investment & Property Co v Texas Consumer International Bank Ltd***, [1981] 3 All ER 577 (Eng CA) at 584:

> . . . When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or law, and whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[52] The effect or outcome of promissory estoppel, if found, is that a party seeking to enforce its rights is prevented from enjoying the full benefit of a particular right.

[53] The facts underpinning an estoppel defence are crucial: what were the actions or words of the parties? Here, despite the volume of evidence relating to the assumptions underlying the parties' overall agreement, the chambers judge did not consider that 153 did not need to prove estoppel, rather it needed only to persuade the court that Stankovic could not meet his burden of proving no triable issue: ***Weir-Jones*** at para 35.

[54] We are persuaded that 153's defence and counterclaim and Trnski's evidence are factually and legally linked, and bear directly on the essential *enforceability* of the 77 Street Property mortgage. The chambers judge erred by granting partial summary judgment that the mortgage was in default, while at the same time finding that there were triable issues as to whether there was an overarching joint venture, a collateral agreement for Stankovic to provide funds to 153 and a breach of those arrangements. The defences advanced by 153 on the mortgage action and its claims in the counterclaim are sufficiently interconnected that it would be unjust to permit Stankovic to realize on the mortgage immediately, recover back the land and obtain a deficiency judgment against 153 while 153 would be limited to a damages claim against Stankovic to be determined at a future date. Moreover, the chambers judge's finding that there was a "default" on the mortgage involves inherent factual findings that could have *res judicata* implications on the issues to be determined on the counterclaim notwithstanding the chambers judge's direction to the contrary. In our view, Stankovic has not demonstrated that partial summary judgment would achieve a just result.

[55] In sum, we are satisfied there are triable issues as to the enforceability of the Stankovic mortgage, and the order under appeal does not comport with "overall considerations of fairness and the ability 'to achieve a just result'": ***Weir-Jones*** at para 40.

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VI. Conclusion

[56] Accordingly, the appeal is allowed and the chambers judge's order is set side.

Appeal heard on February 14, 2019

Memorandum filed at Calgary, Alberta
this 16th day of May, 2019

O'Ferrall J.A.

Authorized to sign for: Schutz J.A.

Strekaf J.A.

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Appearances:

S.C. Chimuk
J. Dhaliwal
for the Respondent

J.J. Irwin
for the Appellant

2019 ABCA 187 (CanLII)

Cabot Insurance Company Limited and Rex Gilbert Moore, deceased, by his Administratrix, Muriel Smith *Appellants*

v.

Peter Ryan *Respondent*

Indexed as: Ryan *v.* Moore

Neutral citation: 2005 SCC 38.

File No.: 29849.

2004: December 7; 2005: June 16.

Present: McLachlin C.J. and Major, Bastarache, LeBel, Deschamps, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR

Limitation of actions — Survival of action against deceased — Limitation periods — Estoppel by convention — Estoppel by representation — Discoverability rule — Confirmation of cause of action — Limitation period under Survival of Actions Act expiring one year after death of party to action or six months after date when letters of administration granted — Statement of claim for damages in relation to motor vehicle accident issued against defendant within two-year limitation period prescribed by Limitations Act — Defendant's death unknown to plaintiff until after shorter limitation period in Survival of Actions Act had expired — Whether doctrine of estoppel by convention or by representation applicable to prevent defendant from raising limitation defence — Whether confirmation of cause of action or discoverability rule applicable to extend limitation period of Survival of Actions Act — Survival of Actions Act, R.S.N.L. 1990, c. S-32, s. 5 — Limitations Act, S.N.L. 1995, c. L-16.1, ss. 5, 16.

Estoppel — Estoppel by convention — Requirements — Whether requirements of doctrine of estoppel by convention met.

Estoppel — Estoppel by representation — Limitation of actions — Whether defendant's silence regard-

Cabot Insurance Company Limited et feu Rex Gilbert Moore, représenté par son administratrice Muriel Smith *Appelants*

c.

Peter Ryan *Intimé*

Répertorié : Ryan *c.* Moore

Référence neutre : 2005 CSC 38.

Nº du greffe : 29849.

2004 : 7 décembre; 2005 : 16 juin.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, LeBel, Deschamps, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE-ET-LABRADOR

Prescription — Survie d'une action intentée contre une personne décédée — Délais de prescription — Préclusion par convention — Préclusion par assertion de fait — Règle de la possibilité de découvrir le dommage — Confirmation de la cause d'action — Délai de prescription prévu par la Survival of Actions Act expirant un an après le décès d'une partie à une action ou six mois après la date de délivrance de lettres d'administration — Déclaration relative à un préjudice résultant d'un accident d'automobile déposée contre le défendeur avant l'expiration du délai de prescription de deux ans fixé par la Limitations Act — Demandeur apprenant le décès du défendeur seulement après l'expiration du délai de prescription plus court établi par la Survival of Actions Act — La règle de la préclusion par convention ou par assertion de fait empêche-t-elle le défendeur d'invoquer la prescription comme moyen de défense? — La confirmation de la cause d'action ou la règle de la possibilité de découvrir le dommage a-t-elle pour effet de prolonger le délai de prescription prévu par la Survival of Actions Act? — Survival of Actions Act, R.S.N.L. 1990, ch. S-32, art. 5 — Limitations Act, S.N.L. 1995, ch. L-16.1, art. 5, 16.

Préclusion — Préclusion par convention — Conditions — Les conditions de la règle de la préclusion sont-elles remplies?

Préclusion — Préclusion par assertion de fait — Prescription — Le silence du défendeur concernant le

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ing shorter limitation period constitutes representation grounding estoppel.

On November 27, 1997, three vehicles operated by the respondent R, the appellant M, and a third party were involved in an accident. R decided to pursue a personal injury claim against M. He was unaware that, on December 26, 1998, M had died of causes unrelated to the accident. On February 16, 1999, Letters of Administration were granted to M's administratrix. On October 28, 1999, R issued his statement of claim naming M as the defendant; it was within the two-year limitation period prescribed by the *Limitations Act*, but outside the limitation period under the *Survival of Actions Act*, namely one year after the death of a party to an action or six months after letters of administration are granted. The appellant insurer sought an order striking out the statement of claim for being out of time. R also filed an application to amend the name of the defendant in the statement of claim. The Supreme Court of Newfoundland and Labrador denied the insurer's application to have the action dismissed and granted R's application. The Court of Appeal allowed, in part, both the appeal and cross-appeal, concluding that the *Survival of Actions Act* applied to the action, but that the appellants were nevertheless estopped from relying upon the shorter limitation period.

Held: The appeal should be allowed on the issue of estoppel and the statement of claim struck out. The decision of the Court of Appeal should otherwise be affirmed. There are no reasons based on any legal doctrine to preclude M's estate or the insurer from relying on the *Survival of Actions Act* limitation period.

The discoverability rule does not apply to the *Survival of Actions Act*. This rule cannot be relied on where, as here, the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action. By using a specific event as the starting point of the "limitation clock" under the *Survival of Actions Act*, the legislature displaced the discoverability rule in all situations to which the *Survival of Actions Act* applies. [24-25] [27]

Section 16 of the *Limitations Act* does not apply to the *Survival of Actions Act* either. Any confirmation of the cause of action would have no effect on the *Survival of Actions Act* limitation period because the *Survival of Actions Act* does not create a cause of action but simply confers a right to pursue a claim notwithstanding the fact

délai de prescription plus court constitue-t-il une assertion justifiant la préclusion?

Un accident impliquant trois véhicules conduits par l'intimé R, l'appelant M et une tierce personne est survenu le 27 novembre 1997. R a décidé d'intenter une action pour préjudice corporel contre M. Il ignorait que, le 26 décembre 1998, M était décédé de causes non liées à l'accident. Le 16 février 1999, des lettres d'administration ont été délivrées à l'administratrice de M. Le 28 octobre 1999, R a déposé sa déclaration désignant M comme défendeur; ce dépôt a été fait avant l'expiration du délai de prescription de deux ans fixé par la *Limitations Act*, mais après celle du délai de prescription prévu par la *Survival of Actions Act*, qui est d'un an suivant la date du décès d'une partie à une action ou de six mois suivant la délivrance de lettres d'administration. L'assureur appelant a sollicité une ordonnance de radiation de la déclaration pour cause de tardiveté. R a également présenté une demande de modification du nom de la partie défenderesse inscrit dans la déclaration. La Cour suprême de Terre-Neuve-et-Labrador a rejeté la demande de l'assureur visant à obtenir le rejet de l'action et a accueilli la demande de R. La Cour d'appel a accueilli en partie l'appel principal et l'appel incident, concluant que la *Survival of Actions Act* s'appliquait à l'action, mais que les appelants étaient néanmoins préclus d'invoquer le délai de prescription plus court.

Arrêt : Le pourvoi est accueilli en ce qui concerne la question de la préclusion et la déclaration est radiée. La décision de la Cour d'appel est par ailleurs confirmée. Il n'y avait aucune raison fondée sur quelque règle juridique d'empêcher la succession de M ou l'assureur d'invoquer le délai de prescription fixé par la *Survival of Actions Act*.

La règle de la possibilité de découvrir le dommage ne s'applique pas à la *Survival of Actions Act*. Cette règle ne peut pas être invoquée dans les cas où, comme en l'espèce, la loi applicable lie expressément le délai de prescription à un événement déterminé qui n'a rien à voir avec le moment où la partie lésée en prend connaissance ou avec le fondement de la cause d'action. En désignant un fait particulier comme élément déclencheur du « compte à rebours de la prescription », le législateur a écarté la règle de la possibilité de découvrir le dommage dans tous les cas où la *Survival of Actions Act* s'applique. [24-25] [27]

L'article 16 de la *Limitations Act* ne s'applique pas non plus à la *Survival of Actions Act*. Une confirmation de la cause d'action n'aurait aucun effet sur le délai de prescription fixé par la *Survival of Actions Act* parce que cette loi ne crée pas une cause d'action, mais ne fait que conférer un droit d'intenter une action malgré le décès

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that one of the parties has died. In any event, there was no confirmation of the cause of action in this case, as there was no admission of liability through the letters sent between the parties' representatives or through the payments made by the insurer to R's counsel for property damage or for medical reports. The letters and payments were intended only to promote the investigation and early resolution of certain aspects of the claim. [37] [42] [45-48]

The requirements to establish estoppel by convention — a communicated shared assumption between the parties, reliance on the shared assumption and detriment — are not met. None of the letters exchanged by R's counsel and the adjuster with respect to R's personal injury claim prove the existence of a common assumption that M was alive or that the limitation defence would not be relied on. The letters lack clarity and certainty. Even if one could conclude that there was a mutual assumption between the parties, it cannot realistically be asserted that R communicated to the appellants that he shared the mistaken assumption. Moreover, R not only did not rely on the alleged assumption, but his conduct does not show an intention to affect the legal relations between the parties. The record does not disclose that R changed his position in any way on the basis of this alleged mutual assumption. Rather, the evidence suggests that he never put his mind to the shorter *Survival of Actions Act* limitation period. Given that there was no shared assumption or reliance, the detriment requirement does not need to be addressed. It should be noted, however, that a detriment is not established by a reduced limitation period. [63-66] [70-72] [75]

Finally, R cannot rely on estoppel by representation. Estoppel by representation cannot arise from silence unless a party is under a duty to speak. In the present case, there was no duty on the appellants to advise R of a limitation period, to assist him in the prosecution of the claim, or to advise him of the consequences of the death of one of the parties. [76-77]

Cases Cited

Referred to: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Page v. Austin* (1884), 10 S.C.R. 132; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200; *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182; *Payne v. Brady* (1996), 140 D.L.R. (4th) 88,

de l'une des parties. De toute façon, la cause d'action n'a pas été confirmée en l'espèce étant donné que ni les lettres (échangées entre les représentants des parties) ni les paiements effectués (par l'assureur à l'avocat de R pour le préjudice matériel ou des rapports médicaux) ne traduisent une reconnaissance de responsabilité. Les lettres et les paiements étaient seulement destinés à faire avancer l'enquête et à favoriser le règlement rapide de certains aspects de la demande d'indemnité. [37] [42] [45-48]

Les conditions pour qu'il y ait préclusion par convention — présupposition commune communiquée entre les parties, avoir agi sur la foi de cette présupposition commune (acte de confiance) et préjudice — ne sont pas remplies. Aucune des lettres que l'avocat de R et l'expert en sinistres ont échangées relativement à l'action pour préjudice corporel de R n'établit l'existence d'une présupposition commune que M était vivant ou que la prescription ne serait pas invoquée comme moyen de défense. Ces lettres manquent de clarté et de certitude. Même si on pouvait conclure à l'existence d'une présupposition commune des parties, on ne saurait réalistement affirmer que R a informé les appelants qu'il partageait leur présupposition erronée. De plus, non seulement R ne s'est-il pas fié à la présupposition dont on allègue l'existence, mais encore sa conduite ne démontre aucune intention de modifier les rapports juridiques entre les parties. Le dossier ne montre pas que R a modifié de quelque façon que ce soit sa situation en raison de la présupposition commune dont on allègue l'existence. La preuve indique plutôt qu'il n'a jamais songé au délai de prescription plus court prévu par la *Survival of Actions Act*. Étant donné l'absence de présupposition commune ou d'acte de confiance, il n'est pas nécessaire d'examiner le critère du préjudice. Toutefois, il y a lieu de souligner qu'un délai de prescription plus court n'est pas une preuve de préjudice. [63-66] [70-72] [75]

Enfin, R ne peut pas invoquer la préclusion par assertion de fait. La préclusion par assertion de fait ne peut pas découler d'un silence, à moins qu'une partie ne soit tenue de parler. En l'espèce, les appelants n'étaient pas tenus d'informer R de l'existence d'un délai de prescription, de l'aider à intenter son action ou de l'aviser des conséquences du décès de l'une des parties. [76-77]

Jurisprudence

Arrêts mentionnés : *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *Page c. Austin* (1884), 10 R.C.S. 132; *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2; *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6; *Peixeiro c. Haberman*, [1997] 3 R.C.S. 549; *Fehr c. Jacob* (1993), 14 C.C.L.T. (2d) 200; *Snow c. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182; *Payne c. Brady* (1996), 140 D.L.R. (4th) 88,

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leave to appeal refused, [1997] 2 S.C.R. xiii; *Burt v. LeLacheur* (2000), 189 D.L.R. (4th) 193; *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370; *Canadian Red Cross Society (Re)*, [2003] O.J. No. 5669 (QL); *Edwards v. Law Society of Upper Canada (No. 1)* (2000), 48 O.R. (3d) 321; *MacKenzie Estate v. MacKenzie* (1992), 84 Man. R. (2d) 149; *Justice v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501; *Good v. Parry*, [1963] 2 All E.R. 59; *Surrendra Overseas Ltd. v. Government of Sri Lanka*, [1977] 2 All E.R. 481; *Podovinikoff v. Montgomery* (1984), 14 D.L.R. (4th) 716; *Wheaton v. Palmer* (2001), 205 Nfld. & P.E.I.R. 304; *MacKay v. Lemley* (1997), 44 B.C.L.R. (3d) 382; *Harper v. Cameron* (1892), 2 B.C.R. 365; *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce Intenational Bank Ltd.*, [1982] 1 Q.B. 84; *National Westminster Finance NZ Ltd. v. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548; *The "Indian Grace"*, [1998] 1 Lloyd's L.R. 1; *The "August Leonhardt"*, [1985] 2 Lloyd's L.R. 28; *The "Vistafjord"*, [1988] 2 Lloyd's L.R. 343; *Canacemal Investment Inc. v. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL); *Capro Investments Ltd. v. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL); *Troop v. Gibson*, [1986] 1 E.G.L.R. 1; *Hillingdon London Borough v. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL); *Baird Textile Holdings Ltd. v. Marks & Spencer plc*, [2002] 1 All E.R. (Comm) 737, [2001] EWCA Civ 274; *John v. George*, [1995] E.W.J. No. 4375 (QL); *Seechurn v. ACE Insurance S.A.-N.V.*, [2002] 2 Lloyd's L.R. 390, [2002] EWCA Civ 67; *Litwin Construction (1973) Ltd. v. Pan* (1988), 52 D.L.R. (4th) 459; *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.*, [2002] B.C.J. No. 1417 (QL), 2002 BCSC 934; *32262 B.C. Ltd. v. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227; *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641; *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87.

Statutes and Regulations Cited

Fatal Accidents Act, R.S.N.L. 1990, c. F-6.
Limitations Act, S.N.L. 1995, c. L-16.1, ss. 5, 16.
Survival of Actions Act, R.S.N.L. 1990, c. S-32, ss. 2, 5, 8(1).

Authors Cited

Bower, George Spencer. *The Law Relating to Estoppel by Representation*, 4th ed. by P. Feltham, D. Hochberg and T. Leech. London: LexisNexis UK, 2004.
Chitty on Contracts, vol. 1, 29th ed. London: Sweet & Maxwell, 2004.
Dawson, T. Brettel. "Estoppel and obligation: the modern role of estoppel by convention" (1989), 9 *L.S.* 16.

autorisation de pourvoi refusée, [1997] 2 R.C.S. xiii; *Burt c. LeLacheur* (2000), 189 D.L.R. (4th) 193; *Waschkowski c. Hopkinson Estate* (2000), 47 O.R. (3d) 370; *Canadian Red Cross Society (Re)*, [2003] O.J. No. 5669 (QL); *Edwards c. Law Society of Upper Canada (No. 1)* (2000), 48 O.R. (3d) 321; *MacKenzie Estate c. MacKenzie* (1992), 84 Man. R. (2d) 149; *Justice c. Cairnie Estate* (1993), 105 D.L.R. (4th) 501; *Good c. Parry*, [1963] 2 All E.R. 59; *Surrendra Overseas Ltd. c. Government of Sri Lanka*, [1977] 2 All E.R. 481; *Podovinikoff c. Montgomery* (1984), 14 D.L.R. (4th) 716; *Wheaton c. Palmer* (2001), 205 Nfld. & P.E.I.R. 304; *MacKay c. Lemley* (1997), 44 B.C.L.R. (3d) 382; *Harper c. Cameron* (1892), 2 B.C.R. 365; *Amalgamated Investment & Property Co. (In Liquidation) c. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84; *National Westminster Finance NZ Ltd. c. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548; *The « Indian Grace »*, [1998] 1 Lloyd's L.R. 1; *The « August Leonhardt »*, [1985] 2 Lloyd's L.R. 28; *The « Vistafjord »*, [1988] 2 Lloyd's L.R. 343; *Canacemal Investment Inc. c. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL); *Capro Investments Ltd. c. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL); *Troop c. Gibson*, [1986] 1 E.G.L.R. 1; *Hillingdon London Borough c. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL); *Baird Textile Holdings Ltd. c. Marks & Spencer plc*, [2002] 1 All E.R. (Comm) 737, [2001] EWCA Civ 274; *John c. George*, [1995] E.W.J. No. 4375 (QL); *Seechurn c. ACE Insurance S.A.-N.V.*, [2002] 2 Lloyd's L.R. 390, [2002] EWCA Civ 67; *Litwin Construction (1973) Ltd. c. Pan* (1988), 52 D.L.R. (4th) 459; *Vancouver City Savings Credit Union c. Norenger Development (Canada) Inc.*, [2002] B.C.J. No. 1417 (QL), 2002 BCSC 934; *32262 B.C. Ltd. c. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227; *Grundt c. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641; *Queen c. Cognos Inc.*, [1993] 1 R.C.S. 87.

Lois et règlements cités

Fatal Accidents Act, R.S.N.L. 1990, ch. F-6.
Limitations Act, S.N.L. 1995, ch. L-16.1, art. 5, 16.
Survival of Actions Act, R.S.N.L. 1990, ch. S-32, art. 2, 5, 8(1).

Doctrine citée

Bower, George Spencer. *The Law Relating to Estoppel by Representation*, 4th ed. by P. Feltham, D. Hochberg and T. Leech. London : LexisNexis UK, 2004.
Chitty on Contracts, vol. 1, 29th ed. London : Sweet & Maxwell, 2004.
Dawson, T. Brettel. « Estoppel and obligation : the modern role of estoppel by convention » (1989), 9 *L.S.* 16.

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Fridman, G. H. L. *The Law of Contract in Canada*, 4th ed. Scarborough, Ont.: Carswell, 1999.
Mew, Graeme. *The Law of Limitations*, 2nd ed. Markham, Ont.: LexisNexis Butterworths, 2004.
Wilken, Sean. *Wilken and Villiers: The Law of Waiver, Variation and Estoppel*, 2nd ed. Oxford: Oxford University Press, 2002.

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Wells C.J.N. and Cameron, Roberts and Welsh JJ.A., and Russell J. (*ex officio*)) (2003), 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181, 50 E.T.R. (2d) 8, [2003] N.J. No. 113 (QL), 2003 NLCA 19, reversing, in part, a decision of Orsborn J. (2001), 205 Nfld. & P.E.I.R. 211, 615 A.P.R. 211, 18 C.P.C. (5th) 95, 41 E.T.R. (2d) 287, 19 M.V.R. (4th) 120, [2001] N.J. No. 284 (QL). Appeal allowed.

Sandra R. Chaytor and *Jorge P. Segovia*, for the appellants.

Ian F. Kelly, *Q.C.*, and *Gregory A. French*, for the respondent.

The judgment of the Court was delivered by

BASTARACHE J. — We are asked to decide whether or not a shortened limitation period under s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32 (see Appendix), applicable upon the death of one of the parties to an action, can be enforced against a party who had no knowledge of the death until after the limitation period had expired. The respondent, Peter Ryan ("Ryan"), argues that the answer should be no; he invoked in front of our Court and in the courts below a number of legal principles which I shall address: discoverability, confirmation, estoppel by convention and estoppel by representation. The issue of estoppel was raised for the first time by the Court of Appeal itself.

The discoverability rule dictates that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by

Fridman, G. H. L. *The Law of Contract in Canada*, 4th ed. Scarborough, Ont. : Carswell, 1999.
Mew, Graeme. *The Law of Limitations*, 2nd ed. Markham, Ont. : LexisNexis Butterworths, 2004.
Wilken, Sean. *Wilken and Villiers : The Law of Waiver, Variation and Estoppel*, 2nd ed. Oxford : Oxford University Press, 2002.

POURVOI contre un arrêt de la Cour d'appel de Terre-Neuve-et-Labrador (le juge en chef Wells et les juges Cameron, Roberts et Welsh et le juge Russell (*ex officio*)) (2003), 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181, 50 E.T.R. (2d) 8, [2003] N.J. No. 113 (QL), 2003 NLCA 19, qui a infirmé, en partie, une décision du juge Orsborn (2001), 205 Nfld. & P.E.I.R. 211, 615 A.P.R. 211, 18 C.P.C. (5th) 95, 41 E.T.R. (2d) 287, 19 M.V.R. (4th) 120, [2001] N.J. No. 284 (QL). Pourvoi accueilli.

Sandra R. Chaytor et *Jorge P. Segovia*, pour les appelants.

Ian F. Kelly, *c.r.*, et *Gregory A. French*, pour l'intimé.

Version française du jugement de la Cour rendu par

1 LE JUGE BASTARACHE — La Cour est appelée à décider si le délai de prescription plus court que l'art. 5 de la *Survival of Actions Act*, R.S.N.L. 1990, ch. S-32 (voir l'annexe), prévoit en cas de décès de l'une des parties à une action peut s'appliquer à une partie qui n'a pris connaissance du décès qu'après l'expiration du délai de prescription. L'intimé Peter Ryan prétend qu'il faut répondre par la négative; il a invoqué, devant notre Cour et devant les tribunaux d'instance inférieure, un certain nombre de règles juridiques que je vais examiner : la possibilité de découvrir le dommage, la confirmation, la préclusion par convention et la préclusion par assertion de fait. C'est la Cour d'appel elle-même qui a soulevé pour la première fois la question de la préclusion.

2 Selon la règle de la possibilité de découvrir le dommage, une cause d'action prend naissance, pour les besoins de la prescription, au moment où les faits substantiels sur lesquels repose cette cause d'action

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the plaintiff by the exercise of reasonable diligence (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224).

3 Section 16(1) of the *Limitations Act*, S.N.L. 1995, c. L-16.1 (see Appendix), prescribes that confirmation of a cause of action occurs when a person acknowledges the cause of action of another person or makes a payment in respect of that cause of action. Thus, at that moment, the limitation clock is restarted, and the time before the date of the confirmation will not be counted.

4 Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are about to enter (G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 140, note 302). If they have acted upon the agreed assumption, then, as regards that transaction, each is estopped against the other from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it (G. S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp. 7-8).

5 Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it (*Page v. Austin* (1884), 10 S.C.R. 132, at p. 164).

6 None of these doctrines can find application in the present case. I will address each of these doctrines and in most cases adopt the reasons of the Court of Appeal with mere comment. One legal concept requires more attention from this Court, given that it is being asked to develop a legal test with regard to its application: estoppel by convention.

ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable (*Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, p. 224).

Le paragraphe 16(1) de la *Limitations Act*, S.N.L. 1995, ch. L-16.1 (voir l'annexe), prévoit qu'une cause d'action est confirmée si une personne reconnaît la cause d'action appartenant à autrui ou si elle effectue un paiement à l'égard de cette cause d'action. Ainsi, le compte à rebours recommence dès lors, et le temps écoulé avant la date de confirmation ne compte pas.

Il peut y avoir préclusion par convention lorsque les parties ont convenu de présupposer que certains faits sont véridiques et constituent le fondement de l'opération qu'elles s'apprêtent à conclure (G. H. L. Fridman, *The Law of Contract in Canada* (4e éd. 1999), p. 140, note 302). Si les parties ont agi sur la foi de cette présupposition conventionnelle, alors, en ce qui concerne l'opération, chaque partie est précluse, par rapport à l'autre, de mettre en doute la véracité ainsi présupposée de l'exposé des faits, dans le cas où il serait injuste de permettre à l'une d'elles de revenir sur cette présupposition (G. S. Bower, *The Law Relating to Estoppel by Representation* (4e éd. 2004), p. 7-8).

Pour que la préclusion par assertion de fait s'applique, une assertion positive doit avoir été faite par la partie que l'on souhaite voir liée par celle-ci afin que la partie avec qui elle traitait agisse sur la foi de cette assertion, et cette dernière doit avoir agi sur la foi de l'assertion de sorte qu'il serait inéquitable de permettre à l'auteur de l'assertion d'en mettre en doute la véracité ou d'agir de quelque manière incompatible avec elle (*Page c. Austin* (1884), 10 R.C.S. 132, p. 164).

Aucune de ces règles n'est applicable en l'espèce. Je vais examiner chacune de celles-ci et, dans la plupart des cas, approuver les motifs de la Cour d'appel en ajoutant un simple commentaire. Une notion juridique mérite que notre Cour s'y attarde davantage étant donné qu'elle est appelée à établir un critère juridique d'application : la préclusion par convention.

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I. Background

A. *Facts*

On November 27, 1997, three vehicles were involved in an accident. They were operated by the respondent, Ryan, the appellant, Rex Gilbert Moore, and a third party (not involved in this matter), David Crummey. Ryan decided to pursue a personal injury claim against Moore. He was unaware that, on December 26, 1998, Moore had died of causes unrelated to the accident. On February 16, 1999, Letters of Administration were granted to Moore's administratrix, Muriel Smith. On October 28, 1999, Ryan issued his statement of claim; it was within the two-year limitation period prescribed by the *Limitations Act*, but outside the applicable six-month limitation period from the granting of the letters of administration under the *Survival of Actions Act*. Ryan argues that the appellant is estopped from relying upon the shorter limitation period. Alternatively, he argues that the discoverability principle or the confirmation rule apply to extend this shorter limitation period.

As this case is centred on issues related to limitation periods, it is important to recollect the important events leading up to this litigation:

November 27, 1997	*The accident*
November 28, 1997	Cabot Insurance Co. ("Cabot Insurance") appoints adjuster Brian Lacey to look after the claim against its insured Moore. Ryan retains counsel who contacts the adjuster advising of his retainer and that Ryan, while his injuries are being assessed, will pursue his property damage claim directly with the adjuster.

I. Contexte

A. *Les faits*

Un accident impliquant trois véhicules est survenu le 27 novembre 1997. Ces véhicules étaient conduits par l'intimé M. Ryan, l'appelant Rex Gilbert Moore, ainsi qu'une tierce personne (non partie à l'instance), David Crummey. M. Ryan a décidé d'intenter une action pour préjudice corporel contre M. Moore. Il ignorait que, le 26 décembre 1998, M. Moore était décédé de causes non liées à l'accident. Le 16 février 1999, des lettres d'administration ont été délivrées à Muriel Smith, l'administratrice de M. Moore. M. Ryan a déposé sa déclaration le 28 octobre 1999, soit avant l'expiration du délai de prescription de deux ans fixé par la *Limitations Act*, mais après celle du délai de prescription de six mois qui, aux termes de la *Survival of Actions Act*, commence à courir à partir de la délivrance de lettres d'homologation ou d'administration. M. Ryan prétend que l'appelant est préclus d'invoquer le délai de prescription plus court. Subsidiairement, il fait valoir que ce délai plus court peut être prolongé en vertu de la règle de la possibilité de découvrir le dommage ou de la règle de la confirmation.

Étant donné que la présente affaire porte sur des questions liées aux délais de prescription, il importe de rappeler les principaux faits à l'origine du litige :

27 novembre 1997	*L'accident*
28 novembre 1997	Cabot Insurance Co. (« Cabot Insurance ») nomme l'expert en sinistres Brian Lacey qui s'occupera de la demande d'indemnité dont fait l'objet son assuré M. Moore. M. Ryan retient les services d'un avocat, qui communique avec l'expert en sinistres pour l'informer de son mandat et l'aviser qu'en attendant que ses blessures soient évaluées M. Ryan lui présentera directement sa demande d'indemnité pour préjudice matériel.

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December 1997 – December 1998	Cabot Insurance pays Ryan's property damage claim directly to him. Correspondence is exchanged between Ryan's counsel and the adjuster concerning Ryan's medical condition, the adjuster seeking documentation and updates on Ryan's condition, and the counsel providing the information requested. The counsel forwards Ryan's hospital chart to the adjuster, for which Cabot Insurance reimburses counsel the $40 fee.	décembre 1997 – décembre 1998	Cabot Insurance verse directement à M. Ryan une indemnité pour préjudice matériel. L'avocat de M. Ryan et l'expert en sinistres échangent une correspondance concernant l'état de santé de M. Ryan, l'expert en sinistres sollicitant des documents et des mises à jour sur l'état de santé de M. Ryan, et l'avocat fournissant les renseignements demandés. L'avocat fait parvenir à l'expert en sinistres le dossier hospitalier de M. Ryan, pour lequel Cabot Insurance rembourse à l'avocat des frais de 40 $.
December 26, 1998	*Moore dies at age 75 from causes unrelated to the accident.*	*26 décembre 1998*	*M. Moore décède à l'âge de 75 ans de causes non liées à l'accident.*
January 25, 1999	The adjuster writes to Ryan's counsel seeking medical information and reiterating that the insurer would pay a reasonable fee for a medical report. He refers to Moore as "Our Insured".	25 janvier 1999	L'expert en sinistres écrit à l'avocat de M. Ryan pour obtenir des renseignements médicaux et réitérer que l'assureur est disposé à payer des frais raisonnables pour un rapport médical. Il désigne M. Moore comme étant [TRADUCTION] « Notre assuré ».
February 16, 1999	*Letters of Administration of the Estate of Rex Moore are granted to Muriel Smith.*	*16 février 1999*	*Des lettres d'administration de la succession de Rex Moore sont délivrées à Muriel Smith.*
April 5, 1999	Ryan's counsel forwards to the adjuster an invoice for a medical report of Ryan's examination by an orthopaedic surgeon.	5 avril 1999	L'avocat de M. Ryan fait parvenir à l'expert en sinistres une facture pour un rapport d'examen médical de M. Ryan par un chirurgien orthopédique.
July 29, 1999	The adjuster forwards to Ryan's counsel a cheque for payment of the medical report. The cheque is payable to	29 juillet 1999	L'expert en sinistres envoie à l'avocat de M. Ryan un chèque pour payer le rapport médical. Le chèque est à l'ordre du

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	Dr. Landells. He refers to Moore as "Our Insured".		Dr Landells. Il désigne M. Moore comme étant [TRADUCTION] « Notre assuré ».
August 16, 1999	*Six months have passed since the grant of letters of administration of Moore's estate.*	*16 août 1999*	*Six mois se sont écoulés depuis la délivrance des lettres d'administration de la succession de M. Moore.*
October 28, 1999	The statement of claim is issued naming Rex Moore as defendant.	28 octobre 1999	Dépôt de la déclaration désignant Rex Moore comme défendeur.
February 10, 2000	Ryan's counsel writes to the adjuster seeking payment for the cost of obtaining the chart from Ryan's family physician. He refers to Moore as "Your Insured".	10 février 2000	L'avocat de M. Ryan écrit à l'expert en sinistres pour lui demander de payer les frais exigés pour le dossier tenu par le médecin de famille de M. Ryan. Il désigne M. Moore comme étant [TRADUCTION] « Notre assuré ».
March 2, 2000	Ryan's counsel writes to the adjuster requesting payment for the chart of another physician. He refers to Moore as "Your Insured".	2 mars 2000	L'avocat de M. Ryan écrit à l'expert en sinistres pour lui demander de payer les frais exigés pour le dossier tenu par un autre médecin. Il désigne M. Moore comme étant [TRADUCTION] « Notre assuré ».
May 18, 2000	*The adjuster learns of Moore's death.*	*18 mai 2000*	*L'expert en sinistres apprend le décès de M. Moore.*
September 22, 2000	*Ryan's counsel learns of Moore's death after attempting to serve the statement of claim.*	*22 septembre 2000*	*L'avocat de M. Ryan apprend le décès de M. Moore après avoir tenté de signifier la déclaration.*
October 24, 2000	Ryan's counsel suggests to Cabot Insurance's claims examiner, Valerie Moore, in a meeting (to discuss claims unrelated to this case) that there might be a problem with the limitation period.	24 octobre 2000	Lors d'une réunion (tenue pour discuter de demandes non liées à la présente affaire), l'avocat de M. Ryan laisse entendre à Valerie Moore, une rédactrice sinistres de Cabot Insurance, que le délai de prescription pourrait poser un problème.

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November 9, 2000 Cabot Insurance refuses to settle Ryan's claim because the action is outside the limitation period.

9 Cabot Insurance applied to intervene in the proceedings and sought an order striking out the statement of claim for being out of time. It further claimed that the statement of claim naming a dead person as defendant was a nullity and was not capable of being amended. Ryan also filed an application to amend the statement of claim to describe the defendant as "Rex Moore, Deceased, by his administratrix, Muriel Smith".

B. *Supreme Court of Newfoundland and Labrador* (2001), 205 Nfld. & P.E.I.R. 211

10 At the Supreme Court of Newfoundland and Labrador, Orsborn J. denied Cabot Insurance's application to have the action dismissed. First, he held that the discoverability rule did not apply to postpone the running of the *Survival of Actions Act* limitation period, since the fact of death was not an element of the cause of action and was not required to complete the cause of action (paras. 50-51). Second, Orsborn J. held that the confirmation provisions of s. 16 of the *Limitations Act* are not expressly confined to the limitation periods fixed by the *Limitations Act*. He saw no reason in principle why a cause of action continued under the *Survival of Actions Act* could not be confirmed and the limitation period fixed by that Act thus continued. He concluded that Cabot Insurance's payment for the medical report on July 29, 1999 constituted a confirmation of Ryan's cause of action. Since the action was commenced within six months of this payment, the proceeding was still within the short *Survival of Actions Act* limitation period and was not statute barred (paras. 52-63). Third, Orsborn J. concluded that in any event, on the facts of this case, the cause of action against Moore was not a cause of action to which the *Survival of Actions Act* applies. The *Survival of Actions Act* permits a cause of action to survive "for the benefit of or against" an estate

9 novembre 2000 Cabot Insurance refuse de régler la demande de M. Ryan parce que l'action a été intentée après l'expiration du délai de prescription.

Cabot Insurance a présenté une demande d'intervention dans l'instance et a sollicité une ordonnance de radiation de la déclaration pour cause de tardiveté. Elle a, en outre, fait valoir que la déclaration désignant une personne décédée comme défenderesse était nulle et ne pouvait pas être modifiée. M. Ryan a également présenté une demande de modification de la déclaration en vue de désigner le défendeur comme étant [TRADUCTION] « Feu Rex Moore, représenté par son administratrice Muriel Smith ».

B. *Cour suprême de Terre-Neuve-et-Labrador* (2001), 205 Nfld. & P.E.I.R. 211

Le juge Orsborn de la Cour suprême de Terre-Neuve-et-Labrador a rejeté la demande de Cabot Insurance visant à obtenir le rejet de l'action. Premièrement, il a conclu que la règle de la possibilité de découvrir le dommage ne s'appliquait pas pour reporter le point de départ du délai de prescription prévu par la *Survival of Actions Act*, étant donné que le décès en tant que tel ne constituait pas un élément de la cause d'action et n'était pas nécessaire pour compléter la cause d'action (par. 50-51). Deuxièmement, le juge Orsborn a estimé que l'application des dispositions de l'art. 16 de la *Limitations Act*, relatives à la confirmation, n'était pas expressément limitée aux délais de prescription fixés par la *Limitations Act*. Il ne voyait pas pourquoi, en principe, une cause d'action ayant subsisté en vertu de la *Survival of Actions Act* ne pouvait pas être confirmée de manière à maintenir le délai de prescription fixé par cette loi. Il a conclu que le paiement du 29 juillet 1999, que Cabot Insurance avait effectué pour le rapport médical, confirmait la cause d'action de M. Ryan. Étant donné que les procédures avaient été engagées dans les six mois suivant ce paiement, l'action respectait encore le court délai de prescription fixé par la *Survival of Actions Act* et n'était pas prescrite (par. 52-63). Troisièmement, le juge Orsborn

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(s. 2(b)). The *Survival of Actions Act* deals with the potential acquisition or dissipation of estate assets. However, in this case, Ryan's claim poses no risk to the assets of the estate. Instead, the risk lies on the insurer. Moore was a defendant in name only, and the real party to the action was the insurer. Thus, Ryan's cause of action was not extinguished on Moore's death (paras. 66-76). Fourth, Orsborn J. held that if Ryan's cause of action had not been confirmed and if the *Survival of Actions Act* was indeed applicable (which he held it was not), then the action would have been a nullity for being commenced outside the limitation period. However, as this was not the case, the plaintiff was not statute barred.

a décidé que, de toute façon, compte tenu des faits de la présente affaire, la cause d'action contre M. Moore n'était pas visée par la *Survival of Actions Act*. Cette loi permet qu'une cause d'action survive [TRADUCTION] « au profit » d'une succession ou « contre » celle-ci (al. 2b)). Elle traite de l'acquisition ou de la dissipation potentielles d'éléments d'actif de la succession. En l'espèce, cependant, la demande de M. Ryan ne présente aucun risque pour les biens de la succession. C'est plutôt l'assureur qui est exposé à un risque. M. Moore n'avait de défendeur que le nom, la véritable partie à l'action étant l'assureur. La cause d'action de M. Ryan ne s'était donc pas éteinte au décès de M. Moore (par. 66-76). Quatrièmement, le juge Orsborn a conclu que, si la cause d'action de M. Ryan n'avait pas été confirmée et que la *Survival of Actions Act* était effectivement applicable (ce qui n'était pas le cas, selon lui), alors l'action aurait été nulle pour cause de tardiveté. Toutefois, comme ce n'était pas le cas, l'action du demandeur n'était pas prescrite.

C. *Court of Appeal of Newfoundland and Labrador* (2003), 224 Nfld. & P.E.I.R. 181, 2003 NLCA 19

C. *Cour d'appel de Terre-Neuve-et-Labrador* (2003), 224 Nfld. & P.E.I.R. 181, 2003 NLCA 19

(1) Wells C.J. (for the majority)

(1) Le juge en chef Wells (au nom des juges majoritaires)

The majority of the Court of Appeal allowed, in part, both the appeal and cross-appeal. The applications judge's order to permit the intervention of Cabot Insurance and the amendment of the statement of claim was affirmed. Wells C.J. held that the applications judge made no error in considering the existence of insurance in determining whether or not the action posed a financial risk to the estate. He nevertheless held that the applications judge erred in holding that the cause of action against Moore is a cause of action to which the *Survival of Actions Act* did not apply. The court explained that unless the *Survival of Actions Act* applies, the action will be a nullity. The right to institute a tort action after death, or continue an action after death, derives from the statute. Without such a statute, this right does not otherwise exist.

11 La Cour d'appel, à la majorité, a accueilli en partie l'appel principal et l'appel incident. Elle a confirmé l'ordonnance du juge des requêtes autorisant l'intervention de Cabot Insurance et la modification de la déclaration. Le juge en chef Wells a conclu que le juge des requêtes n'avait commis aucune erreur en tenant compte de l'existence d'une assurance pour décider si l'action présentait un risque financier pour la succession. Il a néanmoins décidé que le juge des requêtes avait commis une erreur en concluant que la cause d'action contre M. Moore n'était pas visée par la *Survival of Actions Act*. La cour a expliqué que, à moins que la *Survival of Actions Act* ne s'applique, l'action était nulle. Le droit d'intenter une action délictuelle après le décès, ou de poursuivre une action après le décès, découle de la Loi. En l'absence d'une telle loi, ce droit n'existe pas.

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12 The majority agreed with the applications judge that the discoverability rule does *not* apply to postpone the running of the limitation period under the *Survival of Actions Act*. Concluding that the limitation period in the statute runs from an event that occurs without regard to the injured party's knowledge, the majority deemed that allowing the application of the discoverability rule would disrupt the exception to the common law rule, the courts thereby intruding into the legislature's jurisdiction.

Les juges majoritaires ont partagé l'opinion du juge des requêtes selon laquelle la règle de la possibilité de découvrir le dommage *ne* s'applique *pas* pour reporter le point de départ du délai de prescription prévu par la *Survival of Actions Act*. Concluant que le délai de prescription prévu par la Loi court à compter de la date d'un événement qui survient, peu importe que la partie lésée en ait connaissance ou non, les juges majoritaires ont considéré que l'application de la règle de la possibilité de découvrir le dommage aurait pour effet d'écarter l'exception à cette règle de common law, les tribunaux se trouvant alors à empiéter sur la compétence du législateur.

13 The majority disagreed with Orsborn J.'s holding that the confirmation provisions of the *Limitations Act* also apply to the limitation period under the *Survival of Actions Act*. Wells C.J. held that s. 16 of the *Limitations Act* provides confirmation of a cause of action and not of the right to commence it. The majority pointed out that the nature of the cause of action, or whether it is confirmed, is not relevant to the date of death or of grant of probate which triggers the limitation period created by the *Survival of Actions Act*. Confirmation did not arise in relation to the limitation period stemming from the *Limitations Act* because the statement of claim was issued within two years of the collision, i.e. within the prescribed delay.

Les juges majoritaires ont exprimé leur désaccord avec la conclusion du juge Orsborn selon laquelle les dispositions de la *Limitations Act* relatives à la confirmation s'appliquent également au délai de prescription fixé par la *Survival of Actions Act*. Le juge en chef Wells a statué que l'art. 16 de la *Limitations Act* prévoit la confirmation d'une cause d'action et non du droit d'intenter une action. Les juges majoritaires ont souligné que la nature de la cause d'action ou la question de savoir si la cause d'action est confirmée n'est pas pertinente en ce qui concerne la date de décès ou la délivrance de lettres d'homologation qui marque le point de départ du délai de prescription établi par la *Survival of Actions Act*. La question de la confirmation ne se posait pas en ce qui concernait le délai de prescription résultant de la *Limitations Act* étant donné que la déclaration avait été déposée dans les deux ans suivant la collision, c'est-à-dire dans le délai prévu.

14 Turning to the last issue, the majority held that Moore's estate and Cabot Insurance were barred by the principle of estoppel from relying on the fact of Moore's death and the granting of letters of administration. The particular form of estoppel invoked was estoppel by convention. Wells C.J., having reviewed Canadian and foreign authorities and decisions, concluded that estoppel by convention was established (para. 79). The majority held that detrimental reliance was not required. Consequently, Cabot Insurance and Moore were estopped from pleading that Moore died or that letters of

Quant au dernier point, les juges majoritaires ont conclu que la règle de la préclusion empêchait la succession de M. Moore et Cabot Insurance d'invoquer le décès en tant que tel de M. Moore et la délivrance de lettres d'administration. La forme de préclusion invoquée était la préclusion par convention. Après avoir passé en revue la doctrine et la jurisprudence canadiennes et étrangères, le juge en chef Wells a décidé que la préclusion par convention était établie (par. 79). Les juges majoritaires considéraient qu'aucun acte de confiance préjudiciable n'était nécessaire. Cabot Insurance et M. Moore

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administration were granted prior to May 2000 in order to invoke the shorter *Survival of Actions Act* limitation period. As a result, nullity could not be established and the statement of claim was amended to name the administratrix of Moore as defendant in the action.

étaient donc préclus d'invoquer le délai de prescription plus court fixé par la *Survival of Actions Act* en faisant valoir que M. Moore était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000. Par conséquent, la nullité ne pouvait pas être établie et la déclaration a été modifiée de manière à désigner l'administratrice de M. Moore comme partie défenderesse dans l'action.

(2) Cameron J.A. (dissenting)

In dissenting reasons, concurred in by Welsh J.A., Cameron J.A. disagreed with the estoppel analysis and held that it did not apply to the case at bar. After analysing case law and doctrine, she concluded that mutual misunderstanding (both parties assuming that Moore was alive) did not amount to a common assumption. The dissenting judges did not find that the letters sent by Cabot Insurance to Ryan's counsel referring to "Our Insured: Rex Moore" formed the basis on which the parties governed their conduct. The failure to commence the action within the *Survival of Actions Act*'s limitation period was *not* due to any arrangement between the parties, and consequently, there was no reliance on any convention. Therefore, this principle did not apply. Ryan's action was therefore time barred. The dissenting judges would have allowed the appeal.

(2) La juge Cameron (dissidente)

15 Dans ses motifs dissidents, auxquels le juge Welsh a souscrit, la juge Cameron s'est dite en désaccord avec l'analyse de la préclusion et a décidé que cette règle ne s'appliquait pas en l'espèce. Après avoir analysé la jurisprudence et la doctrine, elle a conclu qu'une méprise de part et d'autre (les deux parties ayant cru que M. Moore était vivant) ne constituait pas une présupposition commune. Les juges dissidents n'ont pas considéré que les lettres portant la mention [TRADUCTION] « Notre assuré : Rex Moore » que Cabot Insurance avait envoyées à l'avocat de M. Ryan avaient déterminé la conduite des parties. L'omission d'intenter l'action avant l'expiration du délai de prescription fixé par la *Survival of Actions Act n*'était *pas* le fruit d'un arrangement entre les parties, si bien que l'on ne s'était fondé sur aucune convention. Par conséquent, cette règle ne s'appliquait pas. L'action de M. Ryan était donc prescrite. Les juges dissidents auraient accueilli l'appel.

II. Analysis

II. Analyse

A. *Discoverability*

A. *La possibilité de découvrir le dommage*

(1) Statutory Limitation Periods

(1) Les délais de prescription légaux

16 The situation here is governed by two limitation periods: s. 5 of the *Limitations Act* (see Appendix) and s. 5 of the *Survival of Actions Act*. The limitation period in s. 5 of the *Limitations Act* applies initially. Section 5 of the *Survival of Actions Act* superimposes itself on s. 5 at a later point in time, but does not eliminate it. This follows from the fact that the *Survival of Actions Act* does not create a new cause of action, as will be explained later.

Deux délais de prescription s'appliquent en l'espèce : celui prévu par l'art. 5 de la *Limitations Act* (voir l'annexe) et celui prévu par l'art. 5 de la *Survival of Actions Act*. Le délai de prescription établi par l'art. 5 de la *Limitations Act* s'applique au départ. Il se superpose, par la suite, au délai fixé par l'art. 5 de la *Limitations Act*, sans toutefois l'éliminer. Cela découle du fait que la *Survival of Actions Act* ne crée pas une nouvelle cause d'action, comme je l'expliquerai plus loin.

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17 Pursuant to s. 5 of the *Limitations Act*, a person can bring an action for damages in respect of injury based on contract or tort within two years of the date on which the right to do so arose. Ryan, by issuing a statement of claim on October 28, 1999, naming Rex Moore as the defendant, therefore, met the prescribed limitation period in the *Limitations Act*. Nevertheless, unknown to the parties, Rex Moore had died on December 26, 1998, altering the fact scenario.

18 As stated by the Court of Appeal, it is well known that at common law a personal action in tort is extinguished on the death of the victim or the wrongdoer: *actio personalis moritur cum persona* (see G. Mew, *The Law of Limitations* (2nd ed. 2004), at p. 253). Being unable to sue the estate of a deceased tortfeasor was particularly severe as it left injured survivors of motor vehicle accidents without any means of recovery. This led legislatures to enact statutes to diminish the hardship of the common law rule. The *Fatal Accidents Act*, R.S.N.L. 1990, c. F-6, and the *Survival of Actions Act* were such statutes. Under the *Fatal Accidents Act*, the estate of a person who died as a result of the accident, or the survivors of that person, are accorded the right to maintain an action for death by wrongful act. Also, pursuant to s. 2 of the *Survival of Actions Act* (see Appendix), an action vested in or existing against a person who has died can be maintained by or against the deceased person's estate. However, s. 5 of the *Survival of Actions Act* prohibits an action brought six months after letters of probate or administration of the estate of the deceased have been granted, and after the expiration of one year from the date of death. Hence, the provision is meant to keep the action "alive" for a specific period of time. The *Survival of Actions Act* imposes an additional limitation period. As eloquently affirmed by Orsborn J., the *Survival of Actions Act* does not create a cause of action. It grafts its provision onto an existing cause of action, one which is complete in all of its elements before the operation of the *Survival of Actions Act* (para. 45).

Aux termes de l'art. 5 de la *Limitations Act*, une action en dommages-intérêts pour préjudice, fondée sur une inexécution de contrat ou sur un délit, peut être intentée dans les deux ans suivant la date à laquelle a pris naissance le droit de l'intenter. En déposant, le 28 octobre 1999, une déclaration désignant Rex Moore comme défendeur, M. Ryan a donc respecté le délai de prescription fixé par la *Limitations Act*. Cependant, Rex Moore était décédé le 26 décembre 1998, à l'insu des parties, ce qui modifiait le scénario.

Comme l'a affirmé la Cour d'appel, il est bien connu qu'en common law une action délictuelle personnelle s'éteint au décès de la victime ou de l'auteur de la faute : *actio personalis moritur cum persona* (voir G. Mew, *The Law of Limitations* (2e éd. 2004), p. 253). L'incapacité de poursuivre la succession de l'auteur d'un délit civil décédé était particulièrement lourde de conséquences du fait qu'elle privait de toute possibilité d'indemnisation les survivants blessés d'un accident d'automobile. Cela a amené des législatures à adopter des lois destinées à adoucir la règle de common law. La *Fatal Accidents Act*, R.S.N.L. 1990, ch. F-6, et la *Survival of Actions Act* comptent parmi ces lois. Aux termes de la *Fatal Accidents Act*, la succession d'une personne décédée à la suite d'un accident ou les personnes qui lui survivent ont le droit d'intenter une action pour décès causé par une faute. De plus, aux termes de l'art. 2 de la *Survival of Actions Act* (voir l'annexe), une action appartenant à une personne décédée ou existant contre elle peut être intentée par ou contre sa succession. Toutefois, l'art. 5 de la *Survival of Actions Act* prévoit qu'aucune action ne peut être intentée après les six mois qui suivent la délivrance de lettres d'homologation ou d'administration de la succession de la personne décédée et après l'expiration d'un délai d'un an suivant la date du décès. Cette disposition vise donc à assurer la « survie » de l'action pendant une période déterminée. La *Survival of Actions Act* fixe un autre délai de prescription. Comme le juge Orsborn l'a si bien dit, la *Survival of Actions Act* ne crée pas une cause d'action. Elle greffe sa disposition sur une cause d'action existante dont tous les éléments sont présents avant que la *Survival of Actions Act* soit appliquée (par. 45).

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In the case at bar, the *Survival of Actions Act* has the effect of shortening the time period within which the action could be taken because "an action founded in tort may only be taken by or against the estate of a deceased person if it is commenced within that period of time that is common to both limitations periods": *per* Wells C.J., at para. 37.

Ryan argues that the *Survival of Actions Act* contemplates that a cause of action can arise under the *Survival of Actions Act*. I fail to see how the expression "[c]auses of action under this Act" or "an action . . . under this Act" found in ss. 8(1) and 5 respectively can be seen to indicate the *creation* of a new cause of action. The *Survival of Actions Act* expressly contemplates the *survival* of causes of action *existing* against a person who has died (s. 2). I take that to mean that the cause of action existed prior to the application of the *Survival of Actions Act*. The survival of a cause of action for a time and its creation are two different things.

(2) Discoverability: The Judge-Made Rule

The debate concerning the use of the discoverability principle in tort actions has been settled by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, *Central Trust* and *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6.

The discoverability principle provides that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": *Central Trust*, at p. 224. In some provinces, the discoverability rule has been codified by statute; in others, it has been deemed redundant because of other remedial provisions.

While discoverability has been qualified in the past as a "general rule" (*Central Trust*, at p. 224; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at

19 En l'espèce, la *Survival of Actions Act* a pour effet de raccourcir le délai dans lequel l'action pourrait être intentée parce qu'[TRADUCTION] « une action délictuelle ne peut être intentée par ou contre la succession d'une personne décédée que pendant la période de chevauchement des deux délais de prescription » : le juge en chef Wells, par. 37.

20 Selon M. Ryan, la *Survival of Actions Act* prévoit qu'une cause d'action peut prendre naissance en vertu de ses dispositions. Je ne vois pas comment les expressions [TRADUCTION] « causes d'action en vertu de la présente loi » ou « action [. . .] intentée en vertu de la présente loi », contenues respectivement au par. 8(1) et à l'art. 5, peuvent être considérées comme indiquant la *création* d'une nouvelle cause d'action. La *Survival of Actions Act* prévoit expressément la *survie* des causes d'action *existant* contre une personne décédée (art. 2). À mon avis, cela signifie que la cause d'action existait avant que la *Survival of Actions Act* soit appliquée. La création d'une cause d'action et sa survie pendant un certain temps sont deux choses différentes.

(2) La possibilité de découvrir le dommage : la règle prétorienne

21 Dans les arrêts *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2, *Central Trust* et *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, notre Cour a tranché le débat concernant l'application de la règle de la possibilité de découvrir le dommage dans les actions délictuelles.

22 Selon la règle de la possibilité de découvrir le dommage, « une cause d'action prend naissance, aux fins de la prescription, lorsque les faits importants sur lesquels repose cette cause d'action ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable » : *Central Trust*, p. 224. Dans certaines provinces, la règle de la possibilité de découvrir le dommage a été codifiée; dans d'autres provinces, elle a été jugée redondante à cause de l'existence d'autres dispositions réparatrices.

23 Bien qu'elle ait été qualifiée, par le passé, de « règle générale » (*Central Trust*, p. 224; *Peixeiro c. Haberman*, [1997] 3 R.C.S. 549, par. 36), la règle

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para. 36), it must not be applied systematically without a thorough balancing of competing interests (*Peixeiro*, at para. 34). The rule is an interpretative tool for construing limitation statutes. I agree with the Manitoba Court of Appeal when it writes:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [Emphasis added.]

(*Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200, at p. 206)

See also *Peixeiro*, at para. 37; *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182 (Nfld. C.A.).

24 Thus, the Court of Appeal of Newfoundland and Labrador is correct in stating that the rule is "generally" applicable where the commencement of the limitation period is related by the legislation to the arising or accrual of the cause of action. The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action (see Mew, at p. 55).

(3) Discoverability Principle Does Not Apply to the *Survival of Actions Act*

25 Ryan submits that the discoverability rule applies to the limitation period contained in s. 5 of the *Survival of Actions Act*. He argues that the

de la possibilité de découvrir le dommage ne doit pas être appliquée systématiquement sans une évaluation complète des intérêts opposés (*Peixeiro*, par. 34). Cette règle est un outil d'interprétation des lois qui établissent des délais de prescription. Je partage l'opinion de la Cour d'appel du Manitoba lorsqu'elle écrit :

> [TRADUCTION] À mon avis, la règle prétorienne de la possibilité de découvrir le dommage n'est rien de plus qu'une règle d'interprétation. Dans tous les cas où une loi indique que l'action en justice doit être intentée dans un certain délai après un événement donné, il faut interpréter les termes de cette loi. Lorsque ce délai court à partir du « moment où naît la cause d'action » ou de tout autre événement qui peut être interprété comme ne survenant qu'au moment où la victime prend connaissance du dommage, c'est la règle prétorienne de la possibilité de découvrir le dommage qui s'applique. Toutefois, si le délai court à compter de la date d'un événement qui survient clairement, et sans égard à la connaissance qu'en a la victime, cette règle ne peut prolonger le délai fixé par le législateur. [Je souligne.]

(*Fehr c. Jacob* (1993), 14 C.C.L.T. (2d) 200, p. 206)

Voir également les arrêts *Peixeiro*, par. 37, et *Snow c. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182 (C.A.T.-N.).

Par conséquent, la Cour d'appel de Terre-Neuve-et-Labrador a raison de dire que la règle s'applique [TRADUCTION] « généralement » lorsque la loi lie le point de départ du délai de prescription à la naissance de la cause d'action. Il n'est pas permis, en droit, de recourir à la règle prétorienne de la possibilité de découvrir le dommage dans les cas où la loi applicable lie expressément le délai de prescription à un événement déterminé qui n'a rien à voir avec le moment où la partie lésée en prend connaissance ou avec le fondement de la cause d'action (voir Mew, p. 55).

(3) La règle de la possibilité de découvrir le dommage ne s'applique pas à la *Survival of Actions Act*

M. Ryan fait valoir que la règle de la possibilité de découvrir le dommage s'applique au délai de prescription prévu à l'art. 5 de la *Survival of Actions*

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limitation period should not begin to run until he knew, or ought reasonably to have known, the material facts which determine (i) his cause of action under the *Survival of Actions Act* and (ii) the limitation period. In sum, Ryan claims that the death of Moore is integral to the cause of action and that the limitation period should not start to run until he knew that he had a cause of action against the estate of Rex Moore. The appellants submit that the discoverability rule does not apply to the *Survival of Actions Act* as it would transcend the logic of statutory interpretation and the scheme enacted by the legislature. In addition, they say that the rule does not apply where time runs from a fixed event.

Act. Il prétend que ce délai de prescription ne devrait commencer à courir qu'à partir du moment où il a pris connaissance, ou aurait raisonnablement dû prendre connaissance, des faits substantiels déterminants en ce qui concerne (i) sa cause d'action en vertu de la *Survival of Actions Act* et (ii) le délai de prescription. Somme toute, M. Ryan affirme que le décès de M. Moore fait partie intégrante de la cause d'action et que le délai de prescription ne devait commencer à courir qu'à partir du moment où il a découvert qu'il avait une cause d'action contre la succession de Rex Moore. Les appelants soutiennent que la règle de la possibilité de découvrir le dommage ne s'applique pas à la *Survival of Actions Act* étant donné qu'elle transcenderait la logique de l'interprétation des lois et du régime établi par le législateur. Ils ajoutent que la règle ne s'applique pas lorsque le délai a pour point de départ un fait déterminé.

Like the Court of Appeal, I am of the view that the appellants' position is correct. For ease of reference, I reproduce s. 5 of the *Survival of Actions Act*:

26 À l'instar de la Cour d'appel, je suis d'avis que la position des appelants est correcte. Pour en faciliter la consultation, je reproduis l'art. 5 de la *Survival of Actions Act* :

5. An action shall not be brought under this Act unless proceedings are started within 6 months after letters of probate or administration of the estate of the deceased have been granted and proceedings shall not be started in an action under this Act after the expiration of 1 year after the date of death of the deceased.

[TRADUCTION]

5. Aucune action ne peut être intentée en vertu de la présente loi à moins que les procédures ne soient engagées dans les six mois suivant la délivrance de lettres d'homologation ou d'administration de la succession de la personne décédée, et, pour les besoins d'une action fondée sur la présente loi, les procédures ne doivent pas être engagées après l'expiration d'un an suivant la date du décès de la personne en question.

Pursuant to the *Survival of Actions Act*, the limitation period is triggered by the death of the defendant or the granting by a court of the letters of administration or probate. The section is clear and explicit: time begins to run from one of these two specific events. The Act does not establish a relationship between these events and the injured party's knowledge. I agree with the appellants that knowledge is not a factor: the death or granting of the letters occurs regardless of the state of mind of the plaintiff. We face here a situation in respect of which, as recognized by this Court in *Peixeiro*, the judge-made discoverability rule does not apply to extend the period the legislature has prescribed. Thus, I

27 Aux termes de la *Survival of Actions Act*, le délai de prescription court à compter du décès du défendeur ou de la délivrance, par un tribunal, de lettres d'administration ou d'homologation. L'article est clair et explicite : le délai commence à courir au moment où survient l'un de ces deux faits particuliers. La Loi n'établit aucun lien entre ces faits et le moment où la partie lésée en prend connaissance. Je conviens avec les appelants que la connaissance n'est pas un facteur à considérer : le décès ou la délivrance des lettres survient indépendamment de l'état d'esprit du demandeur. En l'espèce, nous nous trouvons devant une situation où, comme notre Cour l'a reconnu dans l'arrêt *Peixeiro*, la règle prétorienne de

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agree with the Court of Appeal that by using a specific event as the starting point of the "limitation clock", the legislature was displacing the discoverability rule in all the situations to which the *Survival of Actions Act* applies.

28 A number of the appellate courts have dealt with the question of discoverability in the context of actions by or against estates of deceased persons. The appellants rely extensively on *Payne v. Brady* (1996), 140 D.L.R. (4th) 88 (Nfld. C.A.), leave to appeal refused, [1997] 2 S.C.R. xiii. While the facts of that case are very similar to the present, it is not clear whether the Court of Appeal of Newfoundland decided that the rule of discoverability did not apply because death is always a possibility or because the appellant Payne had ample time after she became aware of the death of Brady to commence her action. What is clear is the point advanced by O'Neill J.A.: the death of a prospective defendant and the possibility of a shortened period to commence an action is a reality that claimants and their counsel have to guard against: *Payne*, at p. 94.

29 The Nova Scotia Court of Appeal decision in *Burt v. LeLacheur* (2000), 189 D.L.R. (4th) 193, is invoked by the respondent. However, the reasoning of that case cannot be applied in the case at bar. In *Burt*, the Court of Appeal held that the discoverability rule applied to s. 10 of the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163. The Nova Scotia Court of Appeal stated its position in the following manner (at p. 208):

> If the discoverability rule applies to a limitation period running from "when the damages were sustained" (*Peixeiro*) and from "the final determination of the action against the insured" (*Grenier*), I think it is not unreasonable to apply it to the period one year after the death so as to start time running only when the claimant knows or ought to know that the death might be a wrongful one. This, having in mind the statutory scheme of the *Fatal*

la possibilité de découvrir le dommage ne s'applique pas pour prolonger le délai fixé par le législateur. Je suis donc d'accord avec la Cour d'appel pour dire qu'en désignant un fait particulier comme élément déclencheur du « compte à rebours de la prescription », le législateur se trouvait à écarter la règle de la possibilité de découvrir le dommage dans tous les cas où la *Survival of Actions Act* s'applique.

Un certain nombre de cours d'appel ont examiné la question de la possibilité de découvrir le dommage dans le contexte d'actions intentées par ou contre les successions de personnes décédées. Les appelants invoquent abondamment l'arrêt *Payne c. Brady* (1996), 140 D.L.R. (4th) 88 (C.A.T.-N.), autorisation de pourvoi refusée, [1997] 2 R.C.S. xiii. Bien que les faits de cet arrêt ressemblent énormément à ceux de la présente affaire, on ne sait pas clairement si la Cour d'appel de Terre-Neuve y a décidé que la règle de la possibilité de découvrir le dommage ne s'appliquait pas parce que le décès est toujours une possibilité ou parce que l'appelante Payne avait eu amplement le temps d'intenter son action après avoir appris le décès de M. Brady. Ce qui est clair, c'est la remarque du juge O'Neill : le décès d'un éventuel défendeur et la possibilité d'un délai de prescription plus court sont des réalités contre lesquelles les demandeurs et leurs avocats doivent se prémunir (*Payne*, p. 94).

L'intimé invoque l'arrêt de la Cour d'appel de la Nouvelle-Écosse *Burt c. LeLacheur* (2000), 189 D.L.R. (4th) 193. Toutefois, le raisonnement adopté dans cette affaire ne peut pas s'appliquer en l'espèce. Dans l'arrêt *Burt*, la Cour d'appel a conclu que la règle de la possibilité de découvrir le dommage s'appliquait à l'art. 10 de la *Fatal Injuries Act*, R.S.N.S. 1989, ch. 163. La Cour d'appel de la Nouvelle-Écosse a exposé son point de vue en ces termes (p. 208) :

> [TRADUCTION] Si la règle de la possibilité de découvrir le dommage s'applique à un délai de prescription qui court à compter de la date « où les dommages ont été subis » (*Peixeiro*) et du « règlement final de l'action intentée contre l'assuré » (*Grenier*), je ne pense pas qu'il soit déraisonnable de l'appliquer à ce délai un an après le décès de sorte qu'il ne commence à courir qu'au moment où le demandeur prend connaissance ou aurait

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Injuries Act, is no greater a stretch of the language than was made by the courts in *Peixeiro*, *Grenier* and other cases, all for the purpose of preventing a potential injustice.

We must avoid the accusation of usurping the role of the Legislature, but in my opinion to apply the discoverability rule here is consistent with what has already been done before. On the true consideration of s. 10 of the *Fatal Injuries Act*, time does not run simply from a fixed event, but from constituent elements of the cause of action created by the statute. [Emphasis added.]

In *Burt*, the death of a person for which an action can be brought under the *Fatal Injuries Act* does not merely refer to the time of death as provided in the *Survival of Actions Act*, but to a "wrongful" death. It is not an event totally unrelated to the accrual of the cause of action. Hence, the death of the person there is in fact a "constituent elemen[t] of the cause of action", contrary to the present case.

In my view, the case that best assists this Court in the present matter is the one giving rise to the Ontario Court of Appeal's decision in *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370. The court had to determine the possible application of the discoverability rule to s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23, the statutory provision in Ontario permitting an action in tort by or against the estate of a deceased person and limiting the period during which such actions may be commenced. Abella J.A., as she then was, concluded, at para. 16, that the discoverability rule did not apply to the section since the state of actual or attributed knowledge of an injured person in a tort claim is not germane when a death has occurred. She explained at paras. 8-9:

In s. 38(3) of the *Trustee Act*, the limitation period runs from a death. Unlike cases where the wording of the limitation period permits the time to run, for example,

dû prendre connaissance du fait qu'il se pourrait que le décès ait été causé par la faute d'autrui. Compte tenu de l'économie de la *Fatal Injuries Act*, ce n'est pas aller plus loin que les tribunaux l'ont fait dans les arrêts *Peixeiro*, *Grenier* et autres, toujours dans le but d'écarter un risque d'injustice.

Bien qu'il nous faille éviter d'être accusés d'usurper le rôle du législateur, j'estime qu'appliquer la règle de la possibilité de découvrir le dommage en l'espèce est compatible avec ce qui a déjà été fait. Un examen attentif de l'art. 10 de la *Fatal Injuries Act* révèle que le délai commence à courir non pas simplement à compter du moment où survient un fait déterminé, mais dès que sont établis les éléments constitutifs de la cause d'action créée par la loi. [Je souligne.]

30 Dans l'arrêt *Burt*, la mention du décès d'une personne qui peut faire l'objet d'une action fondée sur la *Fatal Injuries Act* renvoie non pas simplement au moment du décès, comme c'est le cas dans la *Survival of Actions Act*, mais à un décès « causé par la faute d'autrui ». Il ne s'agit pas d'un fait dépourvu de tout lien avec la naissance de la cause d'action. Par conséquent, le décès de la personne dans cette affaire est, en fait, un « élémen[t] constituti[f] de la cause d'action », contrairement à ce qui se passe en l'espèce.

31 À mon avis, l'affaire la plus utile à notre Cour en l'espèce est celle qui est à l'origine de l'arrêt de la Cour d'appel de l'Ontario *Waschkowski c. Hopkinson Estate* (2000), 47 O.R. (3d) 370. La cour devait décider si la règle de la possibilité de découvrir le dommage pouvait être appliquée au par. 38(3) de la *Loi sur les fiduciaires*, L.R.O. 1990, ch. T.23, la disposition législative ontarienne qui prévoit qu'une action délictuelle peut être intentée par ou contre la succession d'une personne décédée et qui limite le délai dans lequel ces actions peuvent être intentées. La juge Abella (maintenant juge de notre Cour) a conclu, au par. 16, que la règle de la possibilité de découvrir le dommage ne s'appliquait pas à cette disposition puisque, dans une action délictuelle, l'état des connaissances d'une personne lésée ou celui qu'on lui attribue n'a aucune pertinence en cas de décès. Elle a expliqué ceci, aux par. 8-9 :

[TRADUCTION] Aux termes du par. 38(3) de la *Loi sur les fiduciaires*, le délai de prescription court à compter d'un décès. Contrairement aux affaires dans lesquelles

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from "when the damage was sustained" (*Peixeiro*) or when the cause of action arose (*Kamloops*), there is no temporal elasticity possible when the pivotal event is the date of a death. Regardless of when the injuries occurred or matured into an actionable wrong, s. 38(3) of the *Trustee Act* prevents their transformation into a legal claim unless that claim is brought within two years of the death of the wrongdoer or the person wronged.

The underlying policy considerations of this clear time limit are not difficult to understand. The draconian legal impact of the common law was that death terminated any possible redress for negligent conduct. On the other hand, there was a benefit to disposing of estate matters with finality. The legislative compromise in s. 38 of the *Trustee Act* was to open a two-year window, making access to a remedy available for a limited time without creating indefinite fiscal vulnerability for an estate. [Emphasis added.]

See also *Canadian Red Cross Society (Re)*, [2003] O.J. No. 5669 (QL) (C.A.), and *Edwards v. Law Society of Upper Canada (No. 1)* (2000), 48 O.R. (3d) 321 (C.A.).

32 Ryan's cause of action arose prior to Moore's death and Ryan was well aware of his cause of action both before Moore's death and before the expiration of the *Survival of Actions Act* limitation period. In fact, the day following the accident, Ryan retained a solicitor to pursue a claim for damages against Moore for injuries alleged to have resulted from the accident. At that point, Ryan could have sued Moore as all the elements of his cause of action were known. He did not need to have knowledge of the death in question to prove his claim or issue and serve the statement of claim. Moore's subsequent death had no impact whatsoever on the accrual of Ryan's cause of action. Consequently, I agree with the conclusion of the applications judge, at para. 50:

The fact of death is of no relevance to the cause of action in question. It is not an element of the cause of action and is not required to complete the cause of action. Whatever the nature of the cause of action, it is existing

le délai de prescription peut, en raison de sa formulation, avoir pour point de départ, par exemple, la date « où les dommages ont été subis » (*Peixeiro*) ou le moment où la cause d'action a pris naissance (*Kamloops*), aucune élasticité temporelle n'est possible lorsque la date de décès est l'élément décisif. Peu importe le moment où le préjudice a été causé ou est devenu une faute ouvrant droit à une action, le par. 38(3) de la *Loi sur les fiduciaires* empêche qu'il donne lieu à une action en justice, à moins que cette action ne soit intentée dans les deux ans suivant le décès de l'auteur de la faute ou de la personne lésée.

Les considérations de politique générale qui sous-tendent ce délai précis ne sont pas difficiles à comprendre. L'effet juridique draconien de la common law était que le décès écartait toute possibilité de réparation pour une conduite négligente. Par contre, il était avantageux de régler les questions de succession de manière définitive. Le compromis législatif à l'art. 38 de la *Loi sur les fiduciaires* consistait à ouvrir une brèche de deux ans afin de donner accès à une réparation pendant un temps limité, sans placer indéfiniment une succession dans une situation de vulnérabilité financière. [Je souligne.]

Voir aussi *Canadian Red Cross Society (Re)*, [2003] O.J. No. 5669 (QL) (C.A.), et *Edwards c. Law Society of Upper Canada (No. 1)* (2000), 48 O.R. (3d) 321 (C.A.).

La cause d'action de M. Ryan a pris naissance avant le décès de M. Moore, et M. Ryan était bien au fait de sa cause d'action tant avant le décès de M. Moore qu'avant l'expiration du délai de prescription fixé par la *Survival of Actions Act*. En réalité, M. Ryan a, le lendemain de l'accident, retenu les services d'un avocat en vue d'intenter une action en dommages-intérêts contre M. Moore pour des blessures qui auraient été causées par l'accident. M. Ryan aurait alors pu poursuivre M. Moore étant donné que tous les éléments de sa cause d'action étaient connus. Il n'avait pas besoin d'être au courant du décès en question pour établir le bien-fondé de sa demande ou pour déposer et signifier sa déclaration. Le décès subséquent de M. Moore n'avait absolument aucune incidence sur la naissance de la cause d'action de M. Ryan. En conséquence, je suis d'accord avec la conclusion du juge des requêtes, au par. 50 :

[TRADUCTION] Le décès en tant que tel n'a aucune pertinence en ce qui concerne la cause d'action en question. Il ne constitue pas un élément de la cause d'action et n'est pas nécessaire pour compléter la cause d'action.

and complete before the *Survival of Actions Act* operates, in the case of a death, to maintain it and provide a limited time window within which it must be pursued. The fact of the death is irrelevant to the cause of action and serves only to provide a time from which the time within which to bring the action is to be calculated.

A further reason for the non-application of the discoverability rule is the evident impact such a rule would have on the distribution of assets to the beneficiaries. Without a time limit, an executor or an administrator would not feel free to distribute the assets of an estate until all reasonable possibilities of claim had been addressed. This would be cumbersome and unrealistic. "An estate should not be held to ransom interminably by the advancement of claims which are not proceeded with in a timely manner": *MacKenzie Estate v. MacKenzie* (1992), 84 Man. R. (2d) 149 (Q.B.), at para. 18, cited in *Justice v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501 (Man. C.A.), at p. 510.

The *Survival of Actions Act* is itself a legislative exception to a common law rule. Thus, it would displace the intention of the legislature to "stretch" the limitation period. Borrowing the words of Marshall J.A. in *Snow*, at para. 43, to apply the rule of construction of reasonable discoverability to such a provision would be tantamount to mounting a fiction transcending the limits of logical statutory interpretation. Hence, it would constitute an impermissible incursion into the legislative process.

(4) Special Circumstances

Ryan submits, as an alternative, that if the discoverability rule does not apply, the limitation period should be extended because of the "special circumstances" principle. He claims that, pursuant to this principle, fairness and justice require that an innocent plaintiff should not be deprived of compensation through no fault of his own. This argument was not invoked in front of the applications judge or the Court of Appeal, and is not supported by any evidence; under these circumstances, it is, in my view, without merit.

Quelle que soit la nature de la cause d'action, elle existe et est complète avant que la *Survival of Actions Act* s'applique, en cas de décès, pour la maintenir et fixer un délai limité dans lequel l'action devra être intentée. Le décès en tant que tel n'est pas pertinent en ce qui concerne la cause d'action et sert seulement de point de départ pour calculer le délai dans lequel l'action devra être intentée.

33 Une autre raison de ne pas appliquer la règle de la possibilité de découvrir le dommage est l'incidence évidente que cette règle aurait sur la distribution de l'actif aux bénéficiaires. En l'absence d'un délai, un exécuteur ou un administrateur hésiterait à distribuer l'actif d'une succession avant d'avoir examiné toutes les possibilités raisonnables de réclamation, ce qui serait peu pratique et irréaliste. [TRADUCTION] « Une succession ne devrait pas être gardée indéfiniment en otage par des réclamations non traitées promptement » : *MacKenzie Estate c. MacKenzie* (1992), 84 Man. R. (2d) 149 (B.R.), par. 18, cité dans l'arrêt *Justice c. Cairnie Estate* (1993), 105 D.L.R. (4th) 501 (C.A. Man.), p. 510.

34 La *Survival of Actions Act* constitue en soi une exception législative à la règle de common law. « Prolonger » le délai de prescription aurait pour effet d'écarter l'intention du législateur. Comme l'a dit le juge Marshall dans l'arrêt *Snow*, au par. 43, appliquer à une telle disposition la règle d'interprétation de la possibilité raisonnable de découvrir le dommage reviendrait à créer une fiction qui transcenderait les limites de l'interprétation logique des lois. Du même coup, il s'agirait d'une incursion inacceptable dans le processus législatif.

(4) Circonstances spéciales

35 Subsidiairement, M. Ryan fait valoir que, si la règle de la possibilité de découvrir le dommage ne s'applique pas, le délai de prescription doit être prolongé en raison du principe des « circonstances spéciales ». Il soutient que selon ce principe, l'équité et la justice commandent qu'un demandeur innocent ne soit pas privé d'indemnisation s'il n'a lui-même commis aucune faute. Cet argument n'a été avancé ni devant le juge des requêtes ni devant la Cour d'appel, et ne repose sur aucun élément de preuve; dans ces circonstances, je le considère non fondé.

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B. *Confirmation*

36 Ryan claims that the confirmation of the cause of action pursued under s. 16 of the *Limitations Act* applies to extend the limitation period contained in s. 5 of the *Survival of Actions Act*. He argues that the correspondence exchanged between Cabot Insurance's adjuster and his previous counsel, the payment made by Cabot Insurance for his property damage claim, as well as a payment of $500 to his previous counsel for a medical report, prove acknowledgment (as contemplated by the *Limitations Act*) and therefore confirmation.

37 The appellants submit that s. 16 of the *Limitations Act* does not apply to the *Survival of Actions Act*. They claim that any confirmation of the cause of action would have no effect on the *Survival of Actions Act* limitation period because the *Survival of Actions Act* does not create a cause of action but simply confers a right to pursue a claim notwithstanding the fact that one of the parties has died. Finally, they argue that there was no confirmation of the cause of action in this case as there was no admission of liability through the letters nor the payments made.

38 I agree with the appellants' position as accepted by the Court of Appeal.

39 The relevant portions of s. 16 of the *Limitations Act* provide:

16. (1) A confirmation of a cause of action occurs where a person

(a) acknowledges that cause of action, right or title of another person; or

(b) makes a payment in respect of that cause of action, right or title of another.

(2) Where a person against whom an action lies confirms that cause of action, the time before the date of that confirmation shall not count when determining the limitation period for a person having the benefit of the confirmation against the person bound by that confirmation.

B. *Confirmation*

M. Ryan prétend que la confirmation de la cause d'action prévue à l'art. 16 de la *Limitations Act* s'applique pour prolonger le délai de prescription fixé à l'art. 5 de la *Survival of Actions Act*. Il fait valoir que l'échange de correspondance entre l'expert en sinistres de Cabot Insurance et son ancien avocat, le paiement effectué par Cabot Insurance relativement à sa demande d'indemnité pour préjudice matériel et le versement de 500 $ à son ancien avocat pour un rapport médical prouvent qu'il y a eu reconnaissance (comme le prévoit la *Limitations Act*) et donc confirmation.

Les appelants soutiennent que l'art. 16 de la *Limitations Act* ne s'applique pas à la *Survival of Actions Act*. Selon eux, une confirmation de la cause d'action n'aurait aucun effet sur le délai de prescription fixé par la *Survival of Actions Act* parce que cette loi ne crée pas une cause d'action, mais ne fait que conférer un droit d'intenter une action malgré le décès de l'une des parties. Enfin, ils affirment que la cause d'action n'a pas été confirmée en l'espèce étant donné que ni les lettres ni les paiements effectués ne traduisent une reconnaissance de responsabilité.

Je partage le point de vue des appelants, qui a été retenu par la Cour d'appel.

Voici les parties pertinentes de l'art. 16 de la *Limitations Act* :

[TRADUCTION]

16. (1) Une cause d'action est confirmée si, selon le cas, une personne :

a) reconnaît cette cause d'action, ce droit ou ce titre appartenant à autrui;

b) effectue un paiement à l'égard de cette cause d'action, de ce droit ou de ce titre appartenant à autrui.

(2) En cas de confirmation, la période antérieure à la date de la confirmation est exclue du calcul de la prescription de l'action de la personne qui bénéficie de cette confirmation par rapport à celle qui est liée par celle-ci.

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(3) Subsection (2) applies only to a right of action where the confirmation is given before the expiration of the limitation period for that right of action.

. . .

(5) In order to be effective a confirmation must be in writing and signed by

(a) the person against whom that cause of action lies; or

(b) his or her agent

and given to the person or agent of the person having the benefit of that cause of action.

When a person acknowledges the cause of action of another person or makes a payment in respect of that cause of action, a confirmation of that cause of action occurs. Consequently, the time accrued before the date of that confirmation shall not be considered when determining the limitation period (s. 16(2)). Confirmation must, of course, be made prior to the expiration of the limitation period (s. 16(3)).

Section 16 can only apply to a limitation period which limits the time during which an action may be taken. Since the limitation period which arises under the *Survival of Actions Act* supersedes the first limitation period of the *Limitations Act*, and does not create or revive an action, but merely permits it to continue, s. 16 cannot apply to it as found by the Court of Appeal (para. 67).

Even if this were not the case, the facts here do not support a finding of confirmation on the part of the appellants. I will address this issue briefly as a matter of principle.

In order to establish confirmation, one of two events must be proven: (1) that the party acknowledged the cause of action; or (2) that there was a payment made in respect of the cause of action (see Mew, at p. 115).

The term "acknowledges" as used in s. 16(1)(a) of the *Limitations Act* has been described by Lord Denning in *Good v. Parry*, [1963] 2 All E.R. 59 (C.A.), at p. 61, as requiring an "admission". While

(3) Le paragraphe (2) ne vise un droit d'action que si la confirmation a lieu avant l'expiration du délai de prescription applicable à ce droit d'action.

. . .

(5) La confirmation est valide si elle est consignée dans un écrit, signée par l'une des personnes suivantes et remise à la personne qui bénéficie de cette cause d'action ou à son mandataire :

a) soit la personne visée par la cause d'action,

b) soit son mandataire.

40 Il y a confirmation lorsqu'une personne reconnaît la cause d'action d'autrui ou effectue un paiement à l'égard de cette cause d'action. Par conséquent, la période antérieure à la date de cette confirmation est exclue du calcul du délai de prescription (par. 16(2)). La confirmation doit évidemment avoir lieu avant l'expiration du délai de prescription (par. 16(3)).

41 L'article 16 ne peut s'appliquer qu'au délai dans lequel une action peut être intentée. Comme l'a conclu la Cour d'appel, l'art. 16 ne peut pas s'appliquer au délai de prescription fixé par la *Survival of Actions Act* étant donné qu'il supplante le premier délai de prescription fixé par la *Limitations Act* et ne crée pas et ne relance pas une action, mais lui permet simplement de suivre son cours (par. 67).

42 Même si ce n'était pas le cas, les faits de la présente affaire ne permettent pas de conclure à une confirmation de la part des appelants. Je vais, par principe, examiner brièvement cette question.

43 Pour prouver qu'il y a eu confirmation, il est nécessaire d'établir l'existence de l'un des deux faits suivants : (1) la partie a reconnu la cause d'action, ou (2) un paiement a été effectué à l'égard de la cause d'action (voir Mew, p. 115).

44 Le terme « *acknowledges* » (« reconnaît ») utilisé à l'al. 16(1)a) de la *Limitations Act* a été décrit par lord Denning, dans l'arrêt *Good c. Parry*, [1963] 2 All E.R. 59 (C.A.), p. 61, comme nécessitant une

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care must be shown when applying English case law, as the English *Limitation Act*, 1939, 2 & 3 Geo. 6, c. 21, does not provide for the acknowledgment of the "cause of action" but the acknowledgment of the "claim", it is still persuasive authority for the present interpretation.

45 Thus, a party can only be held to have acknowledged the claim if that party has in effect admitted his or her liability to pay that which the claimant seeks to recover (see *Surrendra Overseas Ltd. v. Government of Sri Lanka*, [1977] 2 All E.R. 481 (Q.B.)). As the British Columbia Court of Appeal concluded in *Podovinikoff v. Montgomery* (1984), 14 D.L.R. (4th) 716, at p. 721, a person can acknowledge as a bare fact that someone has asserted (by making a claim) a cause of action against him, without acknowledging any liability. Simple acknowledgment of the "existence" of a cause of action is insufficient to meet the requirements of s. 16(1)(a). Acknowledgment must involve acknowledgment of some liability.

46 Consequently, the letters from the adjuster to Ryan's counsel (i.e. letters of November 18, 1998 and January 25, 1999) do not restart the clock as they do not constitute an admission of liability on the part of Cabot Insurance. These were obviously only requests for information and part of the normal investigation process. As submitted by the appellants, if mere investigation of claims were to constitute confirmation, then potential defendants, in order to protect limitation defence, would have no choice but to refuse to investigate until a statement of claim is issued. This would destroy the possibility of early settlements and lead to increased litigation and costs.

47 The same conclusion applies to the second way that confirmation can occur, through payment. Of importance is the fact that both payments mentioned by Ryan, payments for Ryan's medical chart

« *admission* » (« admission »). Bien que la jurisprudence anglaise doive être appliquée avec prudence, étant donné qu'en Angleterre la *Limitation Act*, 1939, 2 & 3 Geo. 6, ch. 21, prévoit non pas la reconnaissance de la « cause d'action » mais la reconnaissance de la « demande d'indemnité », cette jurisprudence reste convaincante pour les besoins de l'interprétation en l'espèce.

Ainsi, il est possible de conclure qu'une partie a reconnu la demande d'indemnité seulement si elle a effectivement admis qu'elle était tenue de payer ce que le demandeur tente de recouvrer (voir *Surrendra Overseas Ltd. c. Government of Sri Lanka*, [1977] 2 All E.R. 481 (B.R.)). Comme l'a conclu la Cour d'appel de la Colombie-Britannique, dans l'arrêt *Podovinikoff c. Montgomery* (1984), 14 D.L.R. (4th) 716, p. 721, une personne peut simplement reconnaître que quelqu'un a fait valoir (en présentant une demande d'indemnité) une cause d'action contre elle sans reconnaître quelque responsabilité que ce soit. La simple reconnaissance de l'« existence » d'une cause d'action est insuffisante pour satisfaire aux exigences de l'al. 16(1)a). La reconnaissance doit comporter une admission de responsabilité quelconque.

Par conséquent, les lettres (du 18 novembre 1998 et du 25 janvier 1999) que l'expert en sinistres a envoyées à l'avocat de M. Ryan ne font pas recommencer le compte à rebours étant donné qu'elles ne constituent pas une reconnaissance de responsabilité de la part de Cabot Insurance. Il est évident que ces lettres n'étaient que des demandes de renseignements et faisaient partie du processus normal d'enquête. Comme l'ont prétendu les appelants, si le simple fait d'enquêter sur une demande devait constituer une confirmation, alors pour conserver le droit d'invoquer la prescription comme moyen de défense, les défendeurs éventuels n'auraient d'autre choix que de refuser d'enquêter jusqu'à ce qu'une déclaration soit déposée. Cela écarterait la possibilité d'un règlement rapide et entraînerait une augmentation de l'incidence et du coût des procès.

La même conclusion s'applique à la deuxième façon de confirmer, c'est-à-dire au moyen d'un paiement. Il importe de souligner que les deux paiements mentionnés par M. Ryan, à savoir ceux effectués pour

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and Dr. Landells' medical report, were not evidence of liability by Cabot Insurance; nor did they indemnify Ryan, at least in part, for damages caused by the accident. Thus, they cannot be payments in respect of the "cause of action". Ryan relies on the Newfoundland Court of Appeal decision in *Wheaton v. Palmer* (2001), 205 Nfld. & P.E.I.R. 304, for the proposition that a payment made to a physician, but sent to the plaintiff's solicitor will constitute confirmation. With respect, I am of the view that the Court of Appeal erred in this determination. I prefer the contrary position of the British Columbia Court of Appeal in *MacKay v. Lemley* (1997), 44 B.C.L.R. (3d) 382, at para. 21. Payment for a medical report with a cheque payable to a physician, but sent to the plaintiff's solicitor, does not constitute confirmation of the plaintiff's cause of action:

> The mere fact that the payment, although made payable to the doctor, was directed through the lawyer's office for forwarding does not, in my view, bring the payment into the express wording of the section. The payment here, as in *Germyn*, was intended to pay to the doctor. The doctor was not a person through whom the appellant could claim. This was not a reimbursement to anyone for having paid for the medical report but a direct payment to the doctor by [the Insurance Corporation of British Columbia].

The purpose for which these types of payments and correspondence are made is critical. In this case, they were not intended as admissions of liability, but only to promote investigation and early resolution of certain aspects of the claim.

C. *Estoppel*

Moore's estate and Cabot Insurance submit that the majority of the Court of Appeal erred when it concluded that they were estopped from relying on the fact of Moore's death and the granting of letters of administration, thus preventing them from arguing that Ryan's action was outside the *Survival of Actions Act* limitation period. They claim that neither estoppel by convention nor estoppel by

le dossier médical de M. Ryan et le rapport médical du D[r] Landells, ne constituaient pas une preuve de responsabilité de la part de Cabot Insurance, et n'indemnisaient pas non plus M. Ryan, en partie du moins, pour le préjudice causé par l'accident. Ainsi, ils ne sauraient être des paiements à l'égard de la « cause d'action ». M. Ryan se fonde sur la décision rendue par la Cour d'appel de Terre-Neuve dans l'affaire *Wheaton c. Palmer* (2001), 205 Nfld. & P.E.I.R. 304, pour affirmer qu'un paiement fait à un médecin, mais envoyé à l'avocat du demandeur, constitue une confirmation. En toute déférence, j'estime que cette décision de la Cour d'appel est erronée. Je préfère le point de vue contraire que la Cour d'appel de la Colombie-Britannique a exprimé dans l'arrêt *MacKay c. Lemley* (1997), 44 B.C.L.R. (3d) 382, par. 21. Le paiement pour un rapport médical, effectué par chèque à l'ordre d'un médecin mais envoyé à l'avocat du demandeur, ne constitue pas une confirmation de la cause d'action du demandeur :

> [TRADUCTION] J'estime que le simple fait d'avoir transmis par le bureau de l'avocat le paiement destiné au médecin n'en fait pas un paiement au sens du libellé exprès de la disposition. Le paiement effectué en l'espèce était, comme dans l'affaire *Germyn*, destiné au médecin. Le médecin n'était pas une personne dont l'appelant pouvait se servir comme intermédiaire pour présenter une demande d'indemnité. Il s'agissait non pas d'un remboursement destiné à une personne ayant payé le rapport médical, mais d'un paiement direct fait au médecin par [l'Insurance Corporation of British Columbia].

48 Le but de ces types de paiement et de correspondance est crucial. En l'espèce, ils étaient censés non pas constituer une reconnaissance de responsabilité, mais seulement faire avancer l'enquête et favoriser le règlement rapide de certains aspects de la demande d'indemnité.

C. *La préclusion*

49 La succession de M. Moore et Cabot Insurance soutiennent que les juges majoritaires de la Cour d'appel ont eu tort de conclure qu'ils étaient préclus d'invoquer le décès en tant que tel de M. Moore et la délivrance des lettres d'administration, ce qui les empêchait de faire valoir que l'action de M. Ryan avait été intentée après l'expiration du délai de prescription fixé par la *Survival of Actions Act*. Elles

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representation applies to the facts of the present case. Ryan argues that the appellants are precluded or estopped from relying on the limitation period in the *Survival of Actions Act* because of the application of either of these two types of estoppel.

50 While the principle of estoppel is often referred to in connection with cases of waiver, election, abandonment, acquiescence and laches, in the context of commercial and contractual relationships, the case law in Canada on this subject is not as abundant as that in the United Kingdom. It is therefore useful for this Court to address the issue in some detail, especially where it has long been accepted that estoppels are to be received with caution and applied with care (see *Harper v. Cameron* (1892), 2 B.C.R. 365 (Div. Ct.), at p. 383).

51 The state of the law of estoppel was articulated by Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), at p. 122, as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

prétendent que ni la préclusion par convention ni la préclusion par assertion de fait ne s'applique aux faits de la présente affaire. Selon M. Ryan, les appelants sont préclus d'invoquer le délai de prescription fixé par la *Survival of Actions Act* en raison de l'application de l'un ou l'autre de ces deux types de préclusion.

Bien que la règle de la préclusion soit souvent mentionnée à l'égard d'affaires de renonciation, d'exercice d'un choix, d'abandon, d'acquiescement et de manque de diligence dans le contexte de rapports commerciaux et contractuels, la jurisprudence canadienne sur ce sujet n'est pas aussi abondante que celle du Royaume-Uni. Il est donc utile que notre Cour procède à un examen assez approfondi de la question, d'autant plus qu'il est reconnu depuis longtemps que les préclusions doivent être admises avec prudence et appliquées avec soin (voir *Harper c. Cameron* (1892), 2 B.C.R. 365 (Div. Ct.), p. 383).

Dans l'arrêt *Amalgamated Investment & Property Co. (In Liquidation) c. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), p. 122, lord Denning a décrit ainsi l'état du droit en matière de préclusion :

> [TRADUCTION] La règle de la préclusion est l'une des plus souples et des plus utiles de l'arsenal du droit. Cependant, elle a été appliquée dans une multitude d'affaires. C'est pourquoi je ne les ai pas toutes examinées dans le présent jugement. Cette règle a connu, au cours des 150 dernières années, une évolution en plusieurs étapes : la préclusion propriétale, la préclusion par assertion de fait, la préclusion par acquiescement et la préclusion promissoire. On a par ailleurs cherché à en limiter la portée au moyen d'une série de maximes : la préclusion n'est qu'une règle de preuve, la préclusion ne peut pas donner naissance à une cause d'action, la préclusion n'élimine pas la nécessité de s'interroger, et ainsi de suite. On peut maintenant considérer que toutes ces maximes forment une seule règle générale dénuée de restriction. Lorsque les parties à une opération se fondent sur une présupposition sous-jacente — de fait ou de droit — peu importe qu'elle découle d'une affirmation inexacte ou d'une erreur — qui a guidé leurs rapports —, aucune d'elles ne peut revenir sur cette présupposition lorsqu'il serait inéquitable ou injuste de lui permettre de le faire. Si l'une des parties souhaite revenir sur la présupposition, les tribunaux accorderont à l'autre partie la réparation qui s'impose en equity.

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The jurisprudence discloses six types of estoppel: estoppel by representation of fact, proprietary estoppel, promissory estoppel, estoppel by convention, estoppel by deed and estoppel by negligence (see Bower, at pp. 3-9). I will examine here the ones at the centre of this dispute, estoppel by convention and estoppel by representation.

(1) Estoppel by Convention

(a) *Definition and Principles*

The origin of the doctrine of estoppel by convention can be traced to estoppel by deed for which sealing and delivery were essential, and for which the foundation of duty lay not in the agreement itself, or any reliance thereon, but in the formal solemnity of the deed, reflecting the concern of ancient jurisprudence with form as opposed to substance. The modern rule has evolved enormously (see Bower, at pp. 179-80; T. B. Dawson, "Estoppel and obligation: the modern role of estoppel by convention" (1989), 9 *L.S.* 16).

Bower defines the modern concept of estoppel by convention as follows (at p. 180):

> An estoppel by convention, it is submitted, is an estoppel by representation of fact, a promissory estoppel or a proprietary estoppel, in which the relevant proposition is established, not by representation or promise by one party to another, but by mutual, express or implicit, assent. This form of estoppel is founded, not on a representation made by a representor and believed by a representee, but on an agreed statement of facts or law, the truth of which has been assumed, by convention of the parties, as a basis of their relationship. When the parties have so acted in their relationship upon the agreed assumption that the given state of facts or law is to be accepted between them as true, that it would be unfair on one for the other to resile from the agreed assumption, then he will be entitled to relief against the other according to whether the estoppel is as to a matter of fact, or promissory, and/or proprietary.

52 Six types de préclusion se dégagent de la jurisprudence : la préclusion par assertion de fait, la préclusion propriétale, la préclusion promissoire, la préclusion par convention, la préclusion du fait d'un acte formaliste et la préclusion fondée sur la négligence (voir Bower, p. 3-9). J'examinerai ici celles qui sont au cœur du présent litige, soit la préclusion par convention et la préclusion par assertion de fait.

(1) Préclusion par convention

a) *Définition et principes*

53 Les origines de la règle de la préclusion par convention remontent à la préclusion du fait d'un acte formaliste, pour laquelle le cachetage et la remise étaient essentiels et où le fondement de l'obligation résidait non pas dans la convention elle-même, ou dans le fait de s'y fier, mais dans le caractère solennel et officiel de l'acte, ce qui traduisait l'intérêt de la jurisprudence ancienne pour la forme plutôt que pour le fond. La règle moderne a changé énormément (voir Bower, p. 179-180; T. B. Dawson, « Estoppel and obligation : the modern role of estoppel by convention » (1989), 9 *L.S.* 16).

54 Bower définit ainsi la notion moderne de préclusion par convention (p. 180) :

> [TRADUCTION] La préclusion par convention, soutient-on, est une préclusion par assertion de fait, une préclusion promissoire ou une préclusion propriétale où la proposition pertinente est établie non par voie d'assertion ou de promesse faite par une partie à une autre, mais par voie d'assentiment réciproque, exprès ou implicite. Cette forme de préclusion repose non pas sur une assertion faite par une personne et crue par celle à qui elle est destinée, mais sur un exposé conjoint des faits ou du droit dont la véracité est supposée constituer, par convention entre les parties, un fondement de leurs rapports. Lorsque, dans leurs rapports, les parties ont agi en fonction de la présupposition conventionnelle qu'elles devraient tenir pour véridique l'état de fait ou de droit en question, de sorte qu'il serait inéquitable pour l'une d'elles que l'autre revienne sur cette présupposition conventionnelle, alors cette partie aura un recours contre l'autre selon qu'il s'agit d'une préclusion relative à une question de fait, ou encore d'une préclusion promissoire ou propriétale, ou les deux à la fois.

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55 S. Wilken, *Wilken and Villiers: The Law of Waiver, Variation and Estoppel* (2nd ed. 2002), at p. 223, affirms that estoppel by convention will occur where:

> (i) the parties have established, by their construction of their agreement or a common apprehension as to its legal effect, a convention basis; (ii) on that basis the parties have regulated their subsequent dealings; (iii) one party would suffer detriment if the other were to be permitted to resile from that convention.

See also *Chitty on Contracts* (29th ed. 2004), vol. 1, at p. 283.

56 The Court of Appeal of Newfoundland and Labrador, after a review of the case law in the United Kingdom and in Canada, formulated the following four elements which need to be proven (at para. 79):

> (i) The evidence establishes an assumption in common between the parties as to a state of facts;
>
> (ii) The parties have adopted the common assumption as the conventional basis for a transaction into which they have entered;
>
> (iii) The dispute in respect of which the estoppel by convention is asserted arises out of that transaction; and,
>
> (iv) A detriment would flow to the party asserting the estoppel if the other party is permitted to resile from the assumed stated facts.

These requirements were accepted by the respondent.

57 The appellants submit that there are six requirements for the estoppel by convention. They cite as support the New Zealand Court of Appeal decision in *National Westminster Finance NZ Ltd. v. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548, at p. 550. In fact, they simply advocate a more detailed description of the requirements also found in other foreign cases.

58 The jurisprudence in the United Kingdom is indeed abundant in contrast to that in Canada (see,

Dans *Wilken and Villiers : The Law of Waiver, Variation and Estoppel* (2e éd. 2002), p. 223, S. Wilken affirme qu'il y a préclusion par convention lorsque :

> [TRADUCTION] (i) les parties ont, par leur interprétation de leur convention ou par leur compréhension commune de ses effets juridiques, établi un fondement conventionnel; (ii) les parties ont réglé leurs rapports subséquents sur ce fondement; (iii) une des parties subirait un préjudice s'il était permis à l'autre partie de revenir sur cette convention.

Voir également *Chitty on Contracts* (29e éd. 2004), vol. 1, p. 283.

Après avoir examiné la jurisprudence du Royaume-Uni et du Canada, la Cour d'appel de Terre-Neuve-et-Labrador a énoncé les quatre éléments suivants qui doivent être prouvés (par. 79) :

> [TRADUCTION]
>
> (i) la preuve établit l'existence d'une présupposition commune aux parties quant à un état de fait;
>
> (ii) les parties ont adopté la présupposition commune comme fondement conventionnel de l'opération qu'elles ont conclue;
>
> (iii) le litige à l'égard duquel la préclusion par convention est invoquée découle de cette opération;
>
> (iv) la partie qui invoque la préclusion subirait un préjudice s'il était permis à l'autre partie de revenir sur l'état de fait présupposé.

L'intimé a reconnu ces conditions.

Les appelants affirment que six conditions doivent être remplies pour qu'il y ait préclusion par convention. À l'appui de cette affirmation, ils citent l'arrêt de la Cour d'appel de la Nouvelle-Zélande *National Westminster Finance NZ Ltd. c. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548, p. 550. En fait, ils préconisent simplement une description plus détaillée des conditions qui sont également énoncées dans d'autres décisions étrangères.

La jurisprudence du Royaume-Uni est effectivement abondante comparativement à celle qui existe

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e.g., *The "Indian Grace"*, [1998] 1 Lloyd's L.R. 1 (H.L.), at p. 10; *The "August Leonhardt"*, [1985] 2 Lloyd's L.R. 28 (C.A.), at pp. 34-35; *The "Vistafjord"*, [1988] 2 Lloyd's L.R. 343 (C.A.), at pp. 349-53).

This Court is not bound by any of the above analytical frameworks. After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:

(1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).

(2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.

(3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

See Wilken, at pp. 227-28; *Canacemal Investment Inc. v. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL) (S.C.), at para. 35; *Capro Investments Ltd. v. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL) (Gen. Div.), at para. 31.

(b) *Application of the Law*

The majority of the Court of Appeal held that estoppel by convention applied in the circumstances of this case. It concluded that there was an assumption between the parties as to a state of facts, namely: that Moore was alive; that the parties adopted this assumption as the basis upon which

au Canada (voir, par exemple, *The « Indian Grace »*, [1998] 1 Lloyd's L.R. 1 (H.L.), p. 10; *The « August Leonhardt »*, [1985] 2 Lloyd's L.R. 28 (C.A.), p. 34-35; *The « Vistafjord »*, [1988] 2 Lloyd's L.R. 343 (C.A.), p. 349-353).

59 Notre Cour n'est liée par aucun des cadres analytiques susmentionnés. Après avoir examiné la jurisprudence du Royaume-Uni et du Canada ainsi que les commentaires de certains auteurs sur le sujet, j'estime que les critères suivants constituent le fondement de la règle de la préclusion par convention :

(1) Les rapports des parties doivent avoir reposé sur une présupposition de fait ou de droit commune : la préclusion exige qu'une assertion manifeste émanant d'une déclaration ou d'une conduite ait créé une présupposition commune. La préclusion peut néanmoins résulter (implicitement) d'un *silence*.

(2) Une partie doit avoir agi sur la foi de cette présupposition commune, et ses actes doivent avoir entraîné une modification de sa situation juridique.

(3) Il doit également être injuste ou inéquitable de permettre à l'une des parties de revenir sur la présupposition commune ou de s'en écarter. La partie qui cherche à établir la préclusion doit donc démontrer que, s'il est permis à l'autre partie de revenir sur la présupposition, elle subira un préjudice en raison du changement de la situation présupposée.

Voir Wilken, p. 227-228; *Canacemal Investment Inc. c. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL) (C.S.), par. 35; *Capro Investments Ltd. c. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL) (Div. gén.), par. 31.

b) *Application du droit*

60 La Cour d'appel, à la majorité, a décidé que la préclusion par convention s'appliquait en l'espèce. Elle a conclu que les parties avaient présupposé l'existence d'un état de fait, à savoir que M. Moore était vivant, que les parties avaient convenu d'agir sur la foi de cette présupposition dans leurs

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their transactions relating to Ryan's claim were to be conducted; that the dispute in respect of which the estoppel was asserted arose out of the transactions between the parties in dealing with Ryan's claim; and that detriment would flow to Ryan if Moore's estate or the insurer were permitted to resile from the common assumption. As will be evidenced from the analysis below, I cannot agree with this conclusion.

(i) Assumption Shared and Communicated

61 The crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of "a like mind" (*Troop v. Gibson*, [1986] 1 E.G.L.R. 1 (C.A.), at p. 5; *Hillingdon London Borough v. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL) (C.A.), at para. 49). The court must determine what state of affairs the parties have accepted, and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity: *Troop*, at p. 6; see also *Baird Textile Holdings Ltd. v. Marks & Spencer plc*, [2002] 1 All E.R. (Comm) 737, [2001] EWCA Civ 274, at para. 84.

62 While it may not be necessary that the assumption by the party raising estoppel be created or encouraged by the estopped party, it must be shared in the sense that each is aware of the assumption of the other (*John v. George*, [1995] E.W.J. No. 4375 (QL) (C.A.), at para. 37). Mutual assent is what distinguishes the estoppel by convention from other types of estoppel (Bower, at p. 184). The courts have described communications complying with this requirement as "crossing the line". In *The "August Leonhardt"*, at pp. 34-35, Kerr L.J. held that

> [a]ll estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by

opérations relatives à la demande de M. Ryan, que le litige à l'égard duquel la préclusion était invoquée découlait des opérations que les parties avaient conclues en traitant la demande de M. Ryan, et que M. Ryan subirait un préjudice s'il était permis à la succession de M. Moore ou à l'assureur de revenir sur la présupposition commune. Comme le montrera l'analyse ci-dessous, je ne puis souscrire à cette conclusion.

(i) Présupposition commune et communiquée

La condition essentielle de la préclusion par convention, qui la distingue des autres types de préclusion, est que les deux parties soient, au moment pertinent, [TRADUCTION] « sur la même longueur d'onde » (*Troop c. Gibson*, [1986] 1 E.G.L.R. 1 (C.A.), p. 5; *Hillingdon London Borough c. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL) (C.A.), par. 49). La cour doit déterminer quel état de fait a été accepté par les parties, et décider si les conditions de la convention sont assez claires et dénuées d'ambiguïté pour donner naissance à un droit exécutoire en equity : *Troop*, p. 6; voir également *Baird Textile Holdings Ltd. c. Marks & Spencer plc*, [2002] 1 All E.R. (Comm) 737, [2001] EWCA Civ 274, par. 84.

Même s'il se peut qu'il ne soit pas nécessaire que la présupposition de la partie qui invoque la préclusion ait été créée ou encouragée par la partie précluse, elle doit être commune en ce sens que chacune des parties est au courant de la présupposition de l'autre (*John c. George*, [1995] E.W.J. No. 4375 (QL) (C.A.), par. 37). C'est l'assentiment réciproque qui distingue la préclusion par convention des autres types de préclusion (Bower, p. 184). Les tribunaux ont affirmé que les communications qui satisfont à cette exigence sont celles [TRADUCTION] « qui passent » de leur auteur à leur destinataire. Dans l'arrêt *The « August Leonhardt »*, p. 34-35, le lord juge Kerr a conclu que

> [TRADUCTION] [t]oute préclusion doit comporter une déclaration ou une conduite de la partie qui serait précluse, à laquelle le prétendu destinataire de l'assertion était en droit de se fier et s'est effectivement fié. En ce sens, toute préclusion peut être considérée comme nécessitant une assertion manifeste émanant soit d'une

statement or conduct. It may be an express statement or it may be implied from conduct, e.g. a failure by the alleged representor to react to something said or done by the alleged representee so as to imply a manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. . . .

There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that — across the line between the parties — his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered. To that extent at least, therefore, the alleged representor must be open to criticism. [Emphasis added.]

See also *The "Vistafjord"*, at p. 350. Thus, it is not enough that each of the two parties acts on an assumption not communicated to the other (*The "Indian Grace"*, at p. 10). Further, the estopped party must have, at the very least, communicated to the other that he or she is indeed sharing the other party's (*ex hypothesi*) mistaken assumption (*John*, at para. 81; Bower, at p. 184).

In the present case, the record discloses 14 letters exchanged by Ryan's counsel and the adjuster with respect to the respondent's personal injury claim (A.R., vol. II, at pp. 150-70). However, none of these prove the existence of a common assumption. The letters lack clarity and certainty. The mere fact that communications occurred between the parties does not establish that they both assumed that Moore was alive. It is unlikely the question of whether Moore was alive or dead crossed the minds of either the appellants or the respondent. The fact that Ryan's counsel had originally diarized the claim as having a two-year limitation period under the *Limitations Act* shows that he had not turned his mind to the possibility of a shorter limitation period under the *Survival of*

déclaration soit d'une conduite, qui passe de son auteur à son destinataire. Cette assertion peut prendre la forme d'une déclaration expresse ou découler implicitement d'une conduite, comme l'omission du prétendu auteur de l'assertion de réagir à quelque chose qui a été dit ou fait par son prétendu destinataire, qui semble manifester un assentiment donnant lieu à une préclusion par silence ou acquiescement. De même, dans les soi-disant cas de préclusion par convention, les parties doivent adopter une conduite manifeste de part et d'autre qui est fondée sur une présupposition commune, mais erronée. . .

Il ne saurait y avoir de préclusion à moins que le prétendu auteur de l'assertion n'ait dit ou fait quelque chose, ou omis de faire quelque chose, de sorte que — de manière générale entre les parties — son action ou son inaction a fait naître une certaine croyance ou attente dans l'esprit du prétendu destinataire de l'assertion, qui fait que, selon les circonstances, il ne serait plus acceptable de permettre au prétendu auteur de l'assertion de revenir sur celle-ci en contestant la croyance ou l'attente qu'elle a engendrée. Par conséquent, le prétendu auteur de l'assertion doit, tout au moins dans cette mesure, prêter le flanc à la critique. [Je souligne.]

Voir également *The « Vistafjord »*, p. 350. Il ne suffit donc pas que chacune des deux parties agisse sur la foi d'une présupposition non communiquée à l'autre (*The « Indian Grace »*, p. 10). En outre, la partie précluse doit, à tout le moins, avoir informé l'autre partie qu'elle partageait effectivement sa présupposition erronée (*ex hypothesi*) (*John*, par. 81; Bower, p. 184).

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En l'espèce, le dossier révèle que l'avocat de M. Ryan et l'expert en sinistres ont échangé 14 lettres relativement à l'action pour préjudice corporel de l'intimé (d.a., vol. II, p. 150-170). Cependant, aucune de ces lettres n'établit l'existence d'une présupposition commune. Les lettres manquent de clarté et de certitude. Le seul fait que des communications aient eu lieu entre les parties n'établit pas qu'elles ont toutes les deux présupposé que M. Moore était vivant. Il est peu probable que la question de savoir si M. Moore était vivant ou mort ait traversé l'esprit des appelants ou de l'intimé. Le fait que l'avocat de M. Ryan ait, au départ, inscrit dans son calendrier que l'action était assujettie à un délai de prescription de deux ans en vertu de la *Limitations Act* démontre qu'il n'avait pas songé à la possibilité qu'un délai

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Actions Act. Effectively, this Court is in the presence of mutual ignorance, not mutual assumption.

de prescription plus court s'applique en vertu de la *Survival of Actions Act*. En réalité notre Cour se trouve en présence d'une ignorance de part et d'autre et non d'une présupposition commune.

64 Ryan submits, and it was agreed by the Court of Appeal, that the subject line in the letters exchanged between his counsel and the adjuster which read "Your Insured: Rex Moore" or "Our Insured: Rex Moore" is self-explanatory and indicates an assumption by both parties, that Moore was alive. I strongly disagree. This is an unrealistic interpretation of the subject line in the letters. Such an expression can mean one thing only: the named insured under the automobile insurance policy was Rex Moore. The words are a mere identification of the file the undersigned is dealing with. The Court of Appeal erred by giving weight to the subject line of these letters, which, properly interpreted, provide no evidence of a mutual assumption that Moore was alive.

M. Ryan prétend, ce dont la Cour d'appel a convenu, que l'objet des lettres échangées par son avocat et l'expert en sinistres, qui se lit [TRADUCTION] « Votre assuré : Rex Moore » ou « Notre assuré : Rex Moore », est éloquent et indique que les deux parties présupposaient que M. Moore était vivant. Je ne suis pas du tout d'accord. Il s'agit là d'une interprétation irréaliste de l'objet de ces lettres. Une telle mention ne peut signifier qu'une chose : la personne assurée en vertu de la police d'assurance automobile était Rex Moore. Ces mots ne servent qu'à identifier le dossier dont traite le signataire de la lettre. La Cour d'appel a commis une erreur en accordant de l'importance à la mention de l'objet de ces lettres qui, interprétée correctement, n'établit pas l'existence d'une présupposition commune que M. Moore était vivant.

65 Nor did the fact that the parties were conferring without regard to the limitation period establish a shared assumption that the limitation defence would not be relied on. The letters contain limited and simple requests for details of the claim, and do not establish a convention between the parties (see *Hillingdon London Borough*, at paras. 57 and 60; *Seechurn v. ACE Insurance S.A.-N.V.*, [2002] 2 Lloyd's L.R. 390, [2002] EWCA Civ 67, at p. 396). In fact, the matter did not proceed beyond the preliminary stage of investigating the merits of the personal injury claim. There were no negotiations or settlement discussions, no admission of liability, and no agreement to forego a possible limitation defence.

Le fait que les parties se soient entretenues sans tenir compte du délai de prescription n'établissait pas non plus l'existence d'une présupposition commune que la prescription ne serait pas invoquée comme moyen de défense. Ces lettres renferment de simples demandes de détails concernant l'action et n'établissent pas l'existence d'une convention entre les parties (voir *Hillingdon London Borough*, par. 57 et 60; *Seechurn c. ACE Insurance S.A.-N.V.*, [2002] 2 Lloyd's L.R. 390, [2002] EWCA Civ 67, p. 396). En fait, l'affaire n'a pas dépassé le stade préliminaire de l'enquête relative au bien-fondé de l'action pour préjudice corporel. Il n'y a eu aucune négociation ou discussion de conciliation, aucune reconnaissance de responsabilité ou entente de renonciation à la possibilité d'invoquer la prescription comme moyen de défense.

66 Even if one could conclude that there was a mutual assumption between the parties, I am of the view that it cannot realistically be asserted that the respondent communicated to the appellants that he indeed shared the mistaken assumption. In this regard, I agree with the dissenting members of the Court of Appeal when they affirm (at para. 108):

Même si on pouvait conclure à l'existence d'une présupposition commune des parties, j'estime qu'on ne saurait réalistement affirmer que l'intimé a informé les appelants qu'il partageait effectivement leur présupposition erronée. À cet égard, je suis du même avis que les juges dissidents de la Cour d'appel lorsqu'ils affirment (par. 108) :

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It is true that both parties assumed Mr. Moore was alive. That, as noted above, is not sufficient to establish estoppel by convention. Prior to Mr. Moore's death, any reference to him implying he was alive was a reflection of the truth at that time. That cannot be said to be a communication which becomes the basis of a convention that they will proceed on the assumption that Mr. Moore is alive, even beyond his death. There is no direct or circumstantial evidence which would lead to such a conclusion. The question becomes: could any agreement have arisen after Mr. Moore's death? The two letters written by the adjuster after Mr. Moore's death were in error when they said "Our insured – Rex Moore" but there is no communication to the other party and acceptance that they are to govern their future conduct on that basis.

[TRADUCTION] Il est vrai que les deux parties ont présupposé que M. Moore était vivant. Comme nous l'avons déjà souligné, cela n'est pas suffisant pour établir la préclusion par convention. Avant le décès de M. Moore, toute mention de son nom laissant entendre qu'il était vivant reflétait alors la réalité. On ne saurait dire que cela constitue une communication sur la foi de laquelle les parties ont convenu d'agir en présupposant que M. Moore serait vivant, même après son décès. Aucune preuve directe ou indirecte ne permet d'arriver à une telle conclusion. Il faut alors se demander si une convention aurait pu survenir après le décès de M. Moore. Les deux lettres écrites par l'expert en sinistres après le décès de M. Moore étaient erronées lorsqu'elles mentionnaient « Notre assuré – Rex Moore », mais aucune partie n'a informé l'autre partie ou accepté que cela déterminerait leur conduite future.

(ii) Detrimental Reliance

(ii) L'acte de confiance préjudiciable

The appellants submit that detrimental reliance is a requirement that must be proven in order to find convention estoppel. I agree. The Court of Appeal erred in finding this condition fulfilled by simple proof that a detriment would flow to the party asserting the estoppel if the other party were permitted to resile from the assumed stated facts, without a finding of reliance.

67 Selon les appelants, l'acte de confiance préjudiciable est une condition dont l'existence doit être prouvée pour que l'on puisse conclure à la préclusion par convention. Je suis d'accord. La Cour d'appel a eu tort de conclure que, pour que cette condition soit remplie, il suffisait de prouver que la partie invoquant la préclusion subirait un préjudice s'il était permis à l'autre partie de revenir sur l'état de fait présupposé, sans qu'il soit nécessaire de conclure à l'existence d'un acte de confiance.

The jurisprudence and academic comments support the requirement of detrimental reliance as lying at the heart of true estoppel (see Bower, at pp. 6 and 184; *John*, at para. 86; *Hillingdon London Borough*; *The "August Leonhardt"*, at p. 35; *Litwin Construction (1973) Ltd. v. Pan* (1988), 52 D.L.R. (4th) 459 (B.C.C.A.), at pp. 469-70; *Canacemal*, at paras. 33-35; *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.*, [2002] B.C.J. No. 1417 (QL), 2002 BCSC 934, at para. 74; *32262 B.C. Ltd. v. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227 (B.C.S.C.), at pp. 235-36).

68 La jurisprudence et la doctrine confirment que la condition de l'acte de confiance préjudiciable est au cœur de la véritable préclusion (voir Bower, p. 6 et 184; *John*, par. 86; *Hillingdon London Borough*; *The « August Leonhardt »*, p. 35; *Litwin Construction (1973) Ltd. c. Pan* (1988), 52 D.L.R. (4th) 459 (C.A.C.-B.), p. 469-470; *Canacemal*, par. 33-35; *Vancouver City Savings Credit Union c. Norenger Development (Canada) Inc.*, [2002] B.C.J. No. 1417 (QL), 2002 BCSC 934, par. 74; *32262 B.C. Ltd. c. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227 (C.S.C.-B.), p. 235-236).

Detrimental reliance encompasses two distinct, but interrelated, concepts: reliance and detriment. The former requires a finding that the party seeking to establish the estoppel changed his or her course of conduct by acting or abstaining from acting in reliance upon the assumption, thereby altering his

69 L'acte de confiance préjudiciable englobe deux notions distinctes, mais connexes : l'acte de confiance et le préjudice. La première notion exige de conclure que la partie qui cherche à établir la préclusion a modifié sa conduite en agissant ou en s'abstenant d'agir sur la foi de la présupposition, ce

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or her legal position. If the first step is met, the second requires a finding that, should the other party be allowed to abandon the assumption, detriment will be suffered by the estoppel raiser because of the change from his or her assumed position (see Wilken, at p. 228; *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641 (Austl. H.C.), at p. 674).

70 Returning to the case at bar, even if one were to assume the existence of a communicated common assumption between the parties, there is no evidence that the respondent relied on this assumption. The evidence suggests that the respondent never put his mind to the shorter *Survival of Actions Act* limitation period. First, Ryan's counsel diarized the matter as a two-year limitation period. Second, the issue of estoppel by convention was raised for the first time by the Court of Appeal itself and was never discussed before the applications judge. Moreover, in the affidavit of Ryan's counsel, nowhere does he state that he believed that the adjuster intended him to act or refrain from acting in reliance on any agreement (A.R., vol. II, at pp. 137-46). From the date of the accident, November 27, 1997, to the expiry of the *Survival of Actions Act* limitation period, August 16, 1999, there was never any discussion by the respondent of the limitation period. On October 24, 2000, when Ryan's counsel indicated for the first time to Cabot Insurance's claim examiner that there might be a problem with the limitation period, he did not refer to a mutual understanding that Moore was to be treated as being alive for the purposes of Ryan's claim, nor did he raise the existence of an agreement.

71 It was not open to Ryan's counsel to refrain from bringing an action against Rex Gilbert Moore based solely on the limited communications between counsel. The letters relied upon were limited to the collection of medical information and documentation about Ryan's alleged injuries — nothing more. I have already spoken about the subject line; one

qui a eu pour effet de modifier sa situation juridique. Lorsque la première étape est franchie, la deuxième exige de conclure que, s'il est permis à l'autre partie de revenir sur la présupposition, la partie invoquant la préclusion subira un préjudice en raison du changement de sa situation présupposée (voir Wilken, p. 228; *Grundt c. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641 (H.C. Austr.), p. 674).

Pour revenir aux faits de la présente affaire, même si on présumait l'existence d'une présupposition commune communiquée entre les parties, rien ne prouve que l'intimé s'est fié à cette présupposition. La preuve indique que l'intimé n'a jamais songé au délai de prescription plus court prévu par la *Survival of Actions Act*. Premièrement, l'avocat de M. Ryan a inscrit dans son calendrier que l'affaire était assujettie à un délai de prescription de deux ans. Deuxièmement, la question de la préclusion par convention a été soulevée pour la première fois par la Cour d'appel elle-même et n'a jamais été débattue devant le juge des requêtes. En outre, dans son affidavit, l'avocat de M. Ryan ne mentionne nulle part qu'il croyait que l'expert en sinistres souhaitait qu'il agisse ou s'abstienne d'agir sur la foi d'une convention quelconque (d.a., vol. II, p. 137-146). Entre la date de l'accident, soit le 27 novembre 1997, et la date d'expiration du délai de prescription prévu par la *Survival of Actions Act*, soit le 16 août 1999, l'intimé n'a jamais discuté du délai de prescription. Lorsque, le 24 octobre 2000, l'avocat de M. Ryan a indiqué pour la première fois à la rédactrice sinistres de Cabot Insurance que le délai de prescription pourrait poser un problème, il n'a pas mentionné que les parties s'étaient entendues pour traiter M. Moore comme s'il était vivant pour les besoins de la demande de M. Ryan et n'a pas soulevé non plus l'existence d'une convention.

Il n'était pas loisible à l'avocat de M. Ryan de s'abstenir de poursuivre Rex Gilbert Moore en raison seulement des communications limitées qui ont eu lieu entre les avocats. Les lettres invoquées ne concernaient que le rassemblement de renseignements et de documents médicaux concernant les blessures qu'aurait subi M. Ryan, rien de plus. J'ai

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cannot disregard the fact that all negotiations/communications were also done on a "without prejudice" basis.

Consequently, I agree with the dissenting members of the Court of Appeal that the respondent not only did not rely on this alleged assumption, but his conduct does not show an intention to affect the legal relations between the parties. The record does not disclose that the respondent changed in any way his position on the basis of this alleged mutual assumption.

(iii) Detriment

Once the party seeking to establish estoppel shows that he acted on a shared assumption, he must prove detriment. For the plea to succeed, it must be unjust or unfair to allow a party to resile from the common assumption (Wilken, at p. 228). It is often said that the fact that there will have been a change from the presumed legal position will facilitate the establishment of detriment: "This is because there is an element of injustice inherent within the concept of the shared assumption — one party has acted unjustly in allowing the belief or expectation to 'cross the line' and arise in the other's mind": Wilken, at p. 228.

This final requirement of estoppel has been described as proving that it would be "unjust", "unconscionable" or "unfair" to permit a party to resile from the mutual assumption (see, e.g., Bower, at p. 181; *John*; *The "Indian Grace"*; *The "Vistafjord"*). However, it may be preferable to refrain from using "unconscionable", in order to avoid confusion with this last concept which has developed a special meaning in relation to inequality of bargaining power in the law of contracts (where we speak of unconscionable transactions, for instance) (see *Litwin Construction*, at p. 468).

In the case at bar, given that there was no shared assumption or reliance, the detriment criterion does not need to be addressed. I would note, however,

déjà parlé de la mention de l'objet; on ne peut faire abstraction du fait que toutes les négociations et communications ont également été effectuées sous réserve de tous droits.

72 Par conséquent, je suis d'accord avec les juges dissidents de la Cour d'appel pour dire que non seulement l'intimé ne s'est pas fié à la présupposition dont on allègue l'existence, mais encore sa conduite ne démontre aucune intention de modifier les rapports juridiques entre les parties. Le dossier ne montre pas que l'intimé a modifié de quelque façon que ce soit sa situation en raison de la présupposition commune dont on allègue l'existence.

(iii) Préjudice

73 Dès que la partie qui cherche à établir la préclusion démontre qu'elle a agi sur la foi d'une présupposition commune, elle doit prouver l'existence d'un préjudice. Pour que ce moyen soit retenu, il doit être injuste ou inéquitable de permettre à une partie de revenir sur la présupposition commune (Wilken, p. 228). On dit souvent que le fait qu'il y ait eu modification de la situation juridique présupposée facilite l'établissement de l'existence d'un préjudice : [TRADUCTION] « Cela est dû au fait que la notion de présupposition commune comporte forcément un élément d'injustice — une partie a agi de manière injuste en permettant que la croyance ou l'attente "passe" dans l'esprit de l'autre » : Wilken, p. 228.

74 On a dit que cette dernière condition de la préclusion prouve qu'il serait « injuste », « inique » ou « inéquitable » de permettre à une partie de revenir sur la présupposition commune (voir, par exemple, Bower, p. 181; *John*; *The « Indian Grace »*; *The « Vistafjord »*). Cependant, il peut être préférable de s'abstenir d'utiliser le mot « inique » afin d'éviter toute confusion avec cette dernière notion, qui a pris un sens particulier en ce qui concerne l'inégalité du pouvoir de négociation en droit des contrats (où l'on parle d'opérations iniques, par exemple) (voir *Litwin Construction*, p. 468).

75 En l'espèce, étant donné l'absence de présupposition commune ou d'acte de confiance, il n'est pas nécessaire d'examiner le critère du préjudice.

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that a detriment is not established by a reduced limitation period, as suggested by the respondent. Limitation periods and prescriptions, in the diverse areas of the law, have the similar effect and impact. The *Survival of Actions Act* has provided a benefit not available at common law; this benefit cannot legitimately be characterized as unfair and unjust.

(2) Estoppel by Representation

76 Where there is no shared assumption, as in the present case, there can be no estoppel by convention, no matter how unjust the other party's conduct may appear to be. However, in some circumstances, the party seeking to establish estoppel may be able to rely on estoppel by representation, an alternative here advocated by the respondent. The added difficulty in such a case is that an estoppel by representation cannot arise from silence unless a party is under a duty to speak. Silence or inaction will be considered a representation if a legal duty is owed by the representor to the representee to make a disclosure, or take steps, the omission of which is relied upon as creating an estoppel: see Wilken, at p. 227; Bower, at pp. 46-47.

77 Ryan submits that in the present case silence constituted a representation grounding estoppel because there was a duty to disclose relevant information as it would be unfair for the appellants to benefit from non-disclosure. I disagree. In the present case, there was no duty on the appellants, who were at the time only potential defendants, to advise Ryan of a limitation period, to assist him in the prosecution of the claim, or to advise him of the consequences of the death of one of the parties. There is no fiduciary or contractual relationship here (contrast with *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87). The appellants had no duty to exercise reasonable care, nor to divulge any information.

Je tiens toutefois à souligner qu'un délai de prescription plus court n'est pas une preuve de préjudice, comme l'a laissé entendre l'intimé. Le délai de prescription et la prescription ont, dans les divers domaines du droit, un effet et une incidence similaires. La *Survival of Actions Act* procure un avantage que n'offre pas la common law; on ne saurait légitimement qualifier cet avantage d'inéquitable et injuste.

(2) Préclusion par assertion de fait

En l'absence de présupposition commune, comme c'est le cas en l'espèce, il ne peut y avoir de préclusion par convention, aussi injuste que puisse paraître la conduite de l'autre partie. Toutefois, dans certaines circonstances, la partie qui cherche à établir la préclusion peut être en mesure d'invoquer la préclusion par assertion de fait, une solution que l'intimé préconise en l'espèce. La difficulté additionnelle qui se pose dans un tel cas tient au fait que la préclusion par assertion de fait ne peut pas découler d'un silence, à moins qu'une partie ne soit tenue de parler. Le silence ou l'inaction seront considérés comme une assertion si l'auteur de l'assertion avait envers le destinataire de celle-ci une obligation légale de divulguer ou de prendre des mesures, et que l'omission de le faire est invoquée comme donnant lieu à la préclusion : voir Wilken, p. 227; Bower, p. 46-47.

M. Ryan prétend que, dans la présente affaire, le silence constituait une assertion justifiant la préclusion parce qu'il y avait une obligation de divulguer les renseignements pertinents due au fait qu'il serait inéquitable que les appelants profitent de l'absence de divulgation. Je ne suis pas d'accord. En l'espèce, les appelants, qui n'étaient à l'époque que des défendeurs éventuels, n'étaient pas tenus d'informer M. Ryan de l'existence d'un délai de prescription, de l'aider à intenter son action ou de l'aviser des conséquences du décès de l'une des parties. Il n'existe aucun rapport fiduciaire ou contractuel en l'espèce (contrairement à l'affaire *Queen c. Cognos Inc.*, [1993] 1 R.C.S. 87). Les appelants n'étaient tenus ni de faire preuve de diligence raisonnable ni de divulguer quelque renseignement que ce soit.

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Hence, there was no representation, no duty to speak, no intention to affect legal relations and no reliance in this case.

III. Conclusion

The legislature created an exception to the common law rule by enacting the *Survival of Actions Act*. It extended the rights of the parties to permit them to continue an action against a deceased. The relevant provision modifies the common law. It is not this Court's role to interfere with the scheme established by the legislature.

There are no reasons based on estoppel, or any other legal doctrine, to preclude Moore's estate or Cabot Insurance from relying on the *Survival of Actions Act* limitation period. Accordingly, I would allow the appeal on the issue of estoppel, affirm the decision of the Court of Appeal on the other issues, and strike the statement of claim, with costs throughout, at all levels of court.

APPENDIX

Limitations Act, S.N.L. 1995, c. L-16.1

5. [Limitation period 2 years] Following the expiration of 2 years after the date on which the right to do so arose, a person shall not bring an action

(a) for damages in respect of injury to a person or property, including economic loss arising from the injury whether based on contract, tort or statutory duty;

. . .

16. [Confirmation] (1) A confirmation of a cause of action occurs where a person

(a) acknowledges that cause of action, right or title of another person; or

(b) makes a payment in respect of that cause of action, right or title of another.

78 Il n'y avait donc, en l'espèce, aucune assertion, aucune obligation de parler, aucune intention de modifier les rapports juridiques ni aucun acte de confiance.

III. Conclusion

79 Le législateur a créé une exception à la règle de common law en édictant la *Survival of Actions Act*. Il a élargi la portée des droits des parties afin de leur permettre de poursuivre une action contre une personne décédée. La disposition pertinente modifie la common law. Il n'appartient pas à notre Cour de modifier le régime établi par le législateur.

80 Il n'y a aucune raison fondée sur la préclusion ou quelque autre règle juridique d'empêcher la succession de M. Moore ou Cabot Insurance d'invoquer le délai de prescription fixé par la *Survival of Actions Act*. Par conséquent, je suis d'avis d'accueillir le pourvoi en ce qui concerne la question de la préclusion, de confirmer la décision de la Cour d'appel relativement aux autres questions et de radier la déclaration, avec dépens dans toutes les cours.

ANNEXE

Limitations Act, S.N.L. 1995, ch. L-16.1

[TRADUCTION]

5. [Délai de prescription de 2 ans] Les actions suivantes se prescrivent par deux ans suivant la date à laquelle a pris naissance le droit de les intenter :

a) l'action en dommages-intérêts pour préjudice corporel ou matériel, y compris la perte économique découlant du préjudice, que ce soit pour un délit, une inexécution de contrat ou un manquement à une obligation légale;

. . .

16. [Confirmation] (1) Une cause d'action est confirmée si, selon le cas, une personne :

a) reconnaît cette cause d'action, ce droit ou ce titre appartenant à autrui;

b) effectue un paiement à l'égard de cette cause d'action, de ce droit ou de ce titre appartenant à autrui.

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(2) Where a person against whom an action lies confirms that cause of action, the time before the date of that confirmation shall not count when determining the limitation period for a person having the benefit of the confirmation against the person bound by that confirmation.

(3) Subsection (2) applies only to a right of action where the confirmation is given before the expiration of the limitation period for that right of action.

. . .

(5) In order to be effective a confirmation must be in writing and signed by

(a) the person against whom that cause of action lies; or

(b) his or her agent

and given to the person or agent of the person having the benefit of that cause of action.

Survival of Actions Act, R.S.N.L. 1990, c. S-32

2. [Causes of action to survive] Actions and causes of action

(a) vested in a person who has died; or

(b) existing against a person who has died,

shall survive for the benefit of or against his or her estate.

5. [Limitation of action] An action shall not be brought under this Act unless proceedings are started within 6 months after letters of probate or administration of the estate of the deceased have been granted and proceedings shall not be started in an action under this Act after the expiration of 1 year after the date of death of the deceased.

Appeal allowed with costs.

Solicitors for the appellants: Cox Hanson O'Reilly Matheson, St. John's.

Solicitors for the respondent: Curtis, Dawe, St. John's.

(2) En cas de confirmation, la période antérieure à la date de la confirmation est exclue du calcul de la prescription de l'action de la personne qui bénéficie de cette confirmation par rapport à celle qui est liée par celle-ci.

(3) Le paragraphe (2) ne vise un droit d'action que si la confirmation a lieu avant l'expiration du délai de prescription applicable à ce droit d'action.

. . .

(5) La confirmation est valide si elle est consignée dans un écrit, signée par l'une des personnes suivantes et remise à la personne qui bénéficie de cette cause d'action ou à son mandataire :

a) soit la personne visée par la cause d'action,

b) soit son mandataire.

Survival of Actions Act, R.S.N.L. 1990, ch. S-32

[TRADUCTION]

2. [Survie des causes d'action] Les actions et causes d'action :

a) appartenant à une personne décédée survivent au profit de sa succession;

b) existant contre une personne décédée survivent contre sa succession.

5. [Prescription des actions] Aucune action ne peut être intentée en vertu de la présente loi à moins que les procédures ne soient engagées dans les six mois suivant la délivrance de lettres d'homologation ou d'administration de la succession de la personne décédée, et, pour les besoins d'une action fondée sur la présente loi, les procédures ne doivent pas être engagées après l'expiration d'un an suivant la date du décès de la personne en question.

Pourvoi accueilli avec dépens.

Procureurs des appelants : Cox Hanson O'Reilly Matheson, St. John's.

Procureurs de l'intimé : Curtis, Dawe, St. John's.

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In the Court of Appeal of Alberta

Citation: Agrium v Orbis Engineering Field Services, 2022 ABCA 266

Date: 20220808
Docket: 2101-0020AC
Registry: Calgary

Between:

Agrium, Inc.

Appellant

- and -

Orbis Engineering Field Services Ltd., Elliott Turbomachinery Canada Inc. and Elliott Company

Respondents

- and -

Colt Engineering Corporation, Worleyparsons Canada Services Ltd., ACM Automation Inc., Invensys Systems Canada, Inc., Schneider Electric Systems Canada Inc., Rockwell Automation, Inc. and Allen-Bradley

Not Parties to the Appeal

Corrected judgment: A corrigendum was issued on August 11, 2022; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Justice Thomas W. Wakeling
The Honourable Justice Michelle Crighton
The Honourable Justice Bernette Ho

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Memorandum of Judgment of the Honourable Justice Crighton and the Honourable Justice Ho

Dissenting Memorandum of Judgment of the Honourable Justice Wakeling

Appeal from the Order by
The Honourable Justice N. Dilts
Pronounced the 22nd day of December, 2020
Filed the 6th day of May, 2021
(2020 ABQB 807; Docket: 1601-03869)

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Memorandum of Judgment

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The Majority:

I. Background

[1] The appellant Agrium, Inc. (Agrium) contracted with the respondent Orbis Engineering Field Services Ltd. (Orbis) and the respondents Elliott Turbomachinery Canada Inc. and Elliott Company (collectively Elliott) to provide specified work and services that are not germane to this appeal.

[2] What is significant to this appeal is the provision in the contract (the Agrium Contract) relating to the resolution of disputes:

> 28. PROPER LAW and DISPUTE RESOLUTION:
>
> (a) Unless otherwise stated on the face of [the Agrium Contract], [the Agrium Contract] shall for all purposes be construed and interpreted according to the laws of the Province of Alberta and the federal laws of Canada applicable therein, excluding reference to conflict of laws principles. Neither the Uniform Commercial Code, nor the United Nations Convention for the International Sale of Goods shall apply to [the Agrium Contract]. Any dispute relating to [the Agrium Contract] shall be resolved by arbitration in Calgary, Alberta, Canada, pursuant to the UNCITRAL Model Law and Rules. The courts having exclusive supervisory jurisdiction with respect to the matters relating to [the Agrium Contract] shall be the courts of the Province of Alberta.

[3] A dispute arose and rather than proceed to arbitration, Agrium commenced a civil action against Orbis and Elliott only days before the limitation period expired. Thereafter, Agrium served Orbis and Elliott mere days before the time for service would have lapsed. At no time between the loss and service of the statement of claim were Orbis or Elliott aware of the loss.

[4] By the time the civil claim was served on Orbis and Elliott, the time limit for commencing an arbitration proceeding had long expired.

[5] Orbis and Elliott defended the statement of claim alleging among other general defences that the contractual arbitration provision barred the action.

[6] Two years later, Orbis and Elliott applied to the master in chambers to strike the action against them.

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[7] The master dismissed the Orbis and Elliott applications. The master recognized that undue delay could not ground a stay under the *Arbitration Act*, RSA 2000, c A-43, after the time for arbitration had elapsed, but instead relied on his supervisory jurisdiction to stay the action on grounds of waiver and attornment on the part of Orbis and Elliott.

[8] Orbis and Elliott appealed to a justice of the Court of Queen's Bench and Agrium applied to strike both appeals on the grounds that s 7(6) of the *Arbitration Act* barred appeals from the master's decision.

[9] The justice in chambers heard the Orbis and Elliott appeals together with Agrium's application to strike the appeals. She first dismissed Agrium's application to strike the appeals from the master: 2020 ABQB 807 at paras 21-31. Having made that determination, she then allowed Orbis and Elliott's appeals from the master, resulting in Agrium's civil action against them being struck: at paras 44-57.

[10] Largely for the reasons given by the chambers judge, we dismiss Agrium's appeal.

II. Issue on Appeal and Standard of Review

[11] As follows, two issues arise in this appeal:

1. whether the masters' decision refusing to stay the action is a decision under s 7 of the *Arbitration Act*; and

2. whether s 7(6) of the *Arbitration Act* bars an appeal from the master in chambers to a justice of the Court of Queen's Bench.

[12] The parties agree the chambers judge did not decide the first question. In the hearing before the panel, Orbis took no position on whether this Court should remit the question or decide it. Agrium and Elliott both agreed that if the panel accepts Agrium's argument that s 7(6) bars an appeal from the master to a justice of the Court of Queen's Bench, this Court should nevertheless remit the first question to the court below for determination. Accordingly, if the panel decides that s 7(6) of the *Arbitration Act* bars an appeal from the master to a justice of the Court of Queen's Bench, then the matter must be remitted to the Court of Queen's Bench to determine whether the master's decision is a decision under s 7(1) of the *Arbitration Act*.

[13] If the panel decides that s 7(6) does not bar an appeal from the master to a justice of the Court of Queen's Bench, Agrium does not appeal the chambers judge's findings on the merits and the appeal must be dismissed.

[14] It is important to recognize that the parties do not dispute there is a valid mandatory arbitration provision in the Agrium Contract that binds the parties. There is no issue relative to

the arbitrability of the dispute and the parties do not dispute that the time for commencing arbitration proceedings has expired.

[15] There is no disagreement regarding the standard of review. The issue on appeal is a question of law that engages principles of statutory interpretation to which the standard of correctness applies: ***TELUS Communications Inc. v Wellman***, 2019 SCC 19 at para 30, [2019] 2 SCR 144.

III. Analysis

[16] The chambers judge identified the applicable principles of statutory interpretation and considered the ordinary meaning of the words used in s 7(6) of the *Arbitration Act* within the legislative framework governing appeals from a master. That framework includes the *Court of Queen's Bench Act*, RSA 2000, c C-31, the *Interpretation Act*, RSA 2000, c I-8, and the *Alberta Rules of Court*, Alta Reg 124/2010.

[17] Section 7 of the *Arbitration Act* reads as follows:

> (1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the application of another party to the arbitration agreement, stay the proceeding.
>
> (2) The court may refuse to stay the proceeding in only the following cases:
>
> > (a) a party entered into the arbitration agreement while under a legal incapacity;
> >
> > (b) the arbitration agreement is invalid;
> >
> > (c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;
> >
> > (d) the application to stay the proceeding was brought with undue delay;
> >
> > (e) the matter in dispute is a proper one for default or summary judgment.
>
> (3) An arbitration of the matter in dispute may be commenced or continued while the application is before the court.
>
> (4) If the court refuses to stay the proceeding,
>
> > (a) no arbitration of the matter in dispute shall be commenced, and

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> (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.
>
> (5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that
>
> (a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and
>
> (b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.
>
> (6) There is no appeal from the court's decision under this section.

[18] Section 1(1)(c) of the *Arbitration Act* defines "court" as follows:

> "court" means,
>
> (i) in sections 6 and 7, the Court of Queen's Bench and the Provincial Court, and
>
> (ii) in all other sections, the Court of Queen's Bench.

[19] Section 28(1)(k) of the *Interpretation Act* defines the "Court of Queen's Bench" as the Court of Queen's Bench of Alberta.

[20] Section 2 of *the Interpretation Act* states that the *Interpretation Act* applies "to every enactment whether enacted before or after the commencement of this Act."

[21] Section 12 of the *Court of Queen's Bench Act* states that "[a]n appeal lies to a judge in chambers from a decision of a master in chambers."

[22] Rule 6.14 of the *Rules of Court* states the following:

> Appeal from master's judgment or order
>
> (1) If a master makes a judgment or order, the applicant or respondent to the application may appeal the judgment or order to a judge.

[23] The chambers judge concluded the *Court of Queen's Bench Act* and the *Arbitration Act* were not in conflict, but rather could be interpreted in a manner that made one harmonious with the other without straining the language used in either. We agree with her analysis.

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[24] While there are many recognized principles of statutory interpretation, the context will define the principle or principles that are the most relevant.

[25] We agree with Agrium that the words of the statute are "to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." ***Rizzo & Rizzo Shoes Ltd. (Re),*** [1998] 1 SCR 27 at para 21, 1998 CanLII 837 (SCC).

[26] We also agree that courts should resist interpreting a statute in a way that overwhelms the statute's plain language: ***Re: Sound v Motion Picture Theatre Associations of Canada***, 2012 SCC 38 at para 33, [2012] 2 SCR 376.

[27] As this case involves numerous pieces of legislation, it is also important to keep in mind the principles for harmonizing different statutes. In ***R v Ulybel Enterprises Ltd,*** 2001 SCC 56 at para 30, [2001] 2 SCR 867, the Supreme Court of Canada adopted Professor Sullivan's statement of those principles:

> …The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. …Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred.

[28] It is also an important principle of statutory interpretation that conflict avoidance strategies such as the "specific overrides the general" or "reading legislation down in certain circumstances and liberally in others", should be avoided where no genuine conflict exists: see the discussion in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed, (Markham, Ont: LexisNexis Canada Inc, 2014) at chapter 11. Here, Agrium's attempt to ignore the statutory right of appeal that exists between the two levels of decision making within the Court of Queen's Bench of Alberta manufactures a conflict that does not necessarily exist.

[29] In the context of statutory interpretation, conflict is a narrow concept meaning the two acts under review cannot stand together and cannot both operate without interfering with the other. The Court in ***Toronto Railway Co. v Paget,*** (1909) 42 SCR 488 at 499, 1909 CanLII 10 (SCC) said this:

> It is not enough to exclude the application of the general Act that it deals somewhat differently with the same subject matter. It is not "inconsistent" unless the two provisions cannot stand together.

[30] It is also a recognized principle of statutory interpretation that legislation is presumed to have been enacted in compliance with the Constitution: *Sullivan*, at § 16.3. For over a hundred years, Alberta courts have characterized any deference to the decisions of provincially-appointed

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masters as fettering the discretionary jurisdiction of federally-appointed s 96 judges. As a result, the decision of a master in Alberta has always been subject to review by a s 96 judge, who has always heard the appeal on a *de novo* basis. See for example, the discussions in ***Polson Iron Works v Munns***, (1915) 9 WWR 231, 1915 CanLII 340 (AB QB), ***Menduk v Gore Mutual Insurance Company***, (1969) 67 WWR 573, 1969 CanLII 1069 (AB QB), ***Wright v Disposal Services Ltd***., 8 AR 394, 1977 CanLII 619 (AB QB) at para 13, ***Willman v Coreman***, 1979 ABCA 332 at para 20, 11 Alta LR (2d) 110 and ***Van Camp v Chrome Horse Motorcycle Inc.***, 2012 ABQB 175 at paras 15-31, 535 AR 271. At paragraph 29 in ***Van Camp*** the court states:

> … A rule of law based on the constitutional foundations of the respective jurisdictions of a Judge and a Master is not subject to change through an amendment to the Rules of Court.

To that we add that neither is that same rule of law subject to change through an implied amendment to a provincial statute.

[31] For these reasons, and those of the chambers judge, we decline to follow the reasoning in the Ontario decision of ***Wang v Mattamy Corporation***, 2020 ONSC 7012, [2020] OJ No 5004. The courts in Ontario have not seen s 96 of the *Constitution Act, 1867* as prohibiting the province from appointing an officer of the court (a master) who may exercise some judicial functions. Thus, Ontario is more willing to give greater deference to a master's decisions, which includes permitting them to be the final word on certain types of decisions.

[32] Even if s 12 of the *Court of Queen's Bench Act*, which confers a right of appeal from a master to a justice of the same court, conflicts with the statutory prohibition in s 7(6) of the *Arbitration Act* as Agrium argues, we do not agree that the *Arbitration Act* is the more specific provision that would override the right of appeal in the *Court of Queen's Bench Act*. Rather, the provision that specifically addresses the right of appeal is that in the *Court of Queen's Bench Act*.

[33] We agree with the chambers judge that the two acts can be interpreted harmoniously without derogating from the rights conferred by one or the purpose intended by the other. An appeal is not available under s 7(6) of the *Arbitration Act* beyond the Court of Queen's Bench where the court's decision means the decision of a master that was either not appealed or the time for doing so has expired, or the decision of a justice of the Court of Queen's Bench having decided the issue. This interpretation respects the constitutional limitations on the master's decision, the statutory right of appeal in the *Court of Queen's Bench Act*, and the statutory intention that arbitration matters not become bogged down in multiple levels of appeal reflected in the *Arbitration Act*.

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[34] For all of the above reasons, the appeal is dismissed and we find it unnecessary to consider the first issue.

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Appeal heard on June 15, 2022

Memorandum filed at Calgary, Alberta
this 8th day of August, 2022

Crighton J.A.

Ho J.A.

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Wakeling, J.A. (dissenting):

I. Introduction

[35] This is an important statutory interpretation and constitutional case.

[36] Agrium, Inc. appeals orders[1] of Justice Dilts dismissing applications by Agrium to strike appeals by Orbis Engineering Field Services Ltd., Elliott Turbomachinery Canada Inc. and Elliott Company, on the ground that the appeals are prohibited by section 7(6) of the *Arbitration Act.*[2] The appeal judge allowed the appeals and struck Agrium's actions against the respondents.

[37] I would allow the appeal.

II. Questions Presented

[38] Each of Orbis Engineering and the Elliott companies applied to the presiding master in chambers for an order striking or staying the actions Agrium commenced against them.[3] They invoked[4] section 7(1) of the *Arbitration Act*.[5] Master Prowse, after finding that Agrium, Orbis Engineering and the Elliott companies were bound by a mandatory arbitration agreement, dismissed their applications.[6] He held that he had "the discretion to allow Agrium's action to continue in the face of the mandatory arbitration provisions in the contracts between the parties".[7]

[39] Master Prowse did not apply section 7(2) of the *Arbitration Act*[8] – the provision that directs an adjudicator to grant a stay unless one of five criteria applies – because the time for arbitration had elapsed.[9]

---

[1] Appeal Records 71 & 73.

[2] R.S.A. 2000, c. A-43.

[3] Appeal Records 40 & 43.

[4] The recital of the order pronounced on January 20, 2020 and filed January 31, 2020 contained this passage: "Upon the application of the Defendant Orbis Engineering Field Services Ltd. … to stay or strike the Action against it *under section 7(1) of the Arbitration Act* …; And upon the application of the Defendants Elliott Turbomachinery Canada Inc. and Elliott Company … to stay or strike the Action against each of them *under section 7(1) of the Arbitration Act* … ." Appeal Record 57 (emphasis added).

[5] Id.

[6] *Agrium, Inc. v. Colt Engineering Corp*., 2020 ABQB 53, ¶¶ 12 & 13.

[7] Id. (heading).

[8] R.S.A. 2000, c. 43.

[9] Id. ¶ 27.

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[40] Section 7(6) of the *Arbitration Act* states that "[t]here is no appeal from the court's decision under this section". Section 1(1)(c) of the *Arbitration Act* defines "court" as follows: "in sections 6 and 7, the Court of Queen's Bench and the Provincial Court".

[41] Is a decision of a master in chambers a decision of the Court of Queen's Bench?

[42] If so, was the order of Master Prowse pronounced on January 20, 2020 and filed January 31, 2020[10] a decision under section 7(1) of the *Arbitration Act*? What are the benchmarks of a "decision under this section"?

[43] If the order of Master Prowse was a "decision under this section", does section 7(6) of the *Arbitration Act* apply and a judge of the Court of Queen's Bench has no jurisdiction to hear an appeal against Master Prowse's order?

[44] What is the effect of section 12 of the *Court of Queen's Bench Act*?[11] Section 12 states that "[a]n appeal lies to a judge in chambers from a decision of a master in chambers".

[45] Does section 7(6) of the *Arbitration Act* trump section 12 of the *Court of Queen's Bench Act* and preclude an appeal of Master Prowse's order under section 7(1) to a judge of the Court of Queen's Bench?

[46] The respondents argue that section 96 of the *Constitution Act, 1867*[12] – "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick" – deprives the Legislative Assembly of Alberta of the authority to make an order of a master in chambers under section 7(1) of the *Arbitration Act* final and not subject to appellate review by the Court of Queen's Bench of Alberta – a superior court.

[47] Section 96 of the *Constitution Act, 1867* preserves the integrity of superior courts and allows them to act as the guardians of the rule of law.

[48] Does section 96 of the *Constitution Act, 1867* assist the respondents?

[49] If the Court of Queen's Bench had jurisdiction to hear an appeal against Master Prowse's order, did Justice Dilts make any reversible errors?

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[10] Appeal Record 57.

[11] R.S.A. 2000, c. C-31.

[12] 30 & 31 Vict., c. 3 (U.K.).

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III. Brief Answers

[50] The decision of a master in chambers is a decision of the Court of Queen's Bench of Alberta. Master Prowse's decision is a decision of the Court of Queen's Bench.

[51] There are four benchmarks of a "decision under this section". First, there must be an application under section 7(1) of the *Arbitration Act*.[13] Second, the moving and nonmoving parties must have agreed to submit their differences to arbitration. Third, the nonmoving party has commenced a court action against the moving party. Fourth, a judge or a master in chambers of the Court of Queen's Bench or a judge of The Provincial Court of Alberta must issue a decision – stay the action or dismiss the stay application.

[52] Master Prowse's order was a decision under section 7(1) of the *Arbitration Act*. The order's recital acknowledges that the applicants invoked section 7(1) of the *Arbitration Act*.[14] This is not debatable. And Master Prowse concluded that the parties were bound by an agreement to submit their disputes to arbitration. This is not debatable. He posed this question:[15] "Do I have the discretion to allow Agrium's action to continue in the face of the mandatory arbitration provisions in the contracts between the parties?" There was no doubt that Agrium had commenced actions against the moving parties and that Master Prowse dismissed their stay applications.

[53] Section 7(6) of the *Arbitration Act* is in play. Section 7(6) deprives a judge of the Court of Queen's Bench of his or her jurisdiction to hear an appeal from an order of a master in chambers under section 7(1). This is crystal clear. "No appeal" means "no appeal".

[54] Section 96 of the *Constitution Act, 1867* does not assist the respondents. This is so even if section 96 of the *Constitution Act, 1867*[16] precludes Alberta from adopting a legislative regime that makes a master in chambers' section 7(1) decision final.

[55] There are two reasons.

[56] First, section 40(1) of the *Supreme Court Act*[17] allows the party that is dissatisfied with the section 7(1) decision to apply for permission to appeal to the Supreme Court of Canada. This means that a master in chambers' section 7(1) decision is not final and unreviewable. The Supreme Court of Canada is a superior court. Alberta does not have the constitutional authority to regulate

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[13] R.S.A. 2000, c. A-43.

[14] Appeal Record 57.

[15] *Agrium, Inc. v. Colt Engineering Corp*., 2020 ABQB 53, ¶¶ 5, 12 & 13 (heading).

[16] 30 & 31 Vict., c. 3 (U.K.).

[17] R.S.C. 1985, c. S-26.

the jurisdiction of the Supreme Court of Canada – deny the Supreme Court the jurisdiction to hear leave to appeal applications arising from section 7(1) orders.

[57] Second, a good argument may be made that a party adversely affected by a section 7(1) order may apply to a judge of the Court of Queen's Bench of Alberta – a superior court – for judicial review. Section 7(6) of the *Arbitration Act* does not preclude judicial review of a section 7(1) order.

[58] It follows that Justice Dilts had no jurisdiction to hear the appeals of Orbis Engineering and the Elliott companies and that her decision is of no effect.

[59] I would allow the appeal – Justice Dilts' order is set aside with the result that Master Prowse's order is in effect.

IV. Statement of Facts

A. Agrium Commenced a Claim Against Orbis Engineering and Others

[60] In 2013 Agrium engaged Orbis Engineering and the Elliott companies to provide services in relation to upgrading its production plant in Carseland, Alberta.[18] The purchase orders that Agrium provided to Orbis Engineering and the Elliott companies included an arbitration clause among its terms and conditions.[19]

[61] On March 22, 2014 there was a system failure at the production plant.[20]

[62] On March 18, 2016 Agrium commenced, in the Court of Queen's Bench of Alberta, a claim against Orbis Engineering, the Elliott companies and seven other corporations that had been

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[18] Statement of Claim filed March 18, 2016, ¶¶ 28-30, 58, 67 & 72. Appeal Record 7, 11, 14 & 15.

[19] Affidavit of Gabriel Salcedo (In Response to the Summary Dismissal Application of the Defendant, Orbis Engineering Field Services Ltd) filed November 1, 2019, ¶¶ 6, 8 & 10 & Exhibit C, Agrium Services Purchase Order dated June 17, 2013, Canadian Standard Purchasing Terms and Conditions ("28. PROPER LAW AND DISPUTE RESOLUTION (a) ... Any dispute relating to this Order shall be resolved by arbitration in Calgary, Alberta, Canada, pursuant to the UNCITRAL Model Law and Rules. The courts having exclusive supervisory jurisdiction with respect to the matters relating to this Order shall be the courts of the Province of Alberta. (b) Buyer [Agrium] shall include provisions within its other agreements which relate to this Order a dispute resolution provision substantially similar to that which is contained herein. Vendor [Orbis Engineering] shall participate, upon the request of Buyer, in any arbitration arising in connection with the Goods, the Services or this Order, as if the Vendor were a direct party to the issue in dispute"). Appellant's Extracts of Key Evidence 8 & 23 & Affidavit of Gabriel Salcedo (In Response to the Summary Dismissal Application of the Defendants, Elliott Turbomachinery Canada Inc. and Elliott Company) filed November 1, 2019, ¶ 6. Appellant's Extracts of Key Evidence 29.

[20] Statement of Claim filed March 18, 2016, ¶ 33. Appeal Record 7.

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involved in its facility upgrades seeking damages of just over $100 million for the resulting losses.[21]

[63] Around this time, the limitation period for invoking the arbitration process expired.[22]

[64] On March 14, 2017 Agrium served the statement of claim on Orbis Engineering and the Elliott companies *ex juris*.[23]

[65] On May 25, 2018 Agrium requested a statement of defence within 60 days.[24]

[66] Orbis Engineering filed its defence on June 27, 2018, denying responsibility for the losses, alternatively claiming contribution and indemnity from the other defendants.[25]

[67] On June 28, 2018 Orbis Engineering amended its defence to primarily plead the mandatory arbitration provision in its agreement with Agrium. It claimed that the court did not have jurisdiction in respect of the claim and sought a stay pursuant to the *Arbitration Act*.[26]

[68] The Elliott companies filed their defence on July 9, 2018, denying liability and alternatively relying on the limitation of liability in the governing contract.[27] They later claimed contribution and indemnity from the codefendants.[28]

[69] On June 24, 2019 the Elliott companies applied for permission to amend their defence.[29] The amended defence filed January 20, 2020 primarily pleaded a mandatory arbitration clause in

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[21] Id. ¶ 108. Appeal Record 22-23.

[22] *Agrium Inc. v. Colt Engineering Corp.*, 2020 ABQB 807, ¶ 6 ("The parties agree that service of the Statement of Claim occurred after the expiry of the limitation period for commencing arbitration"). See *Arbitration Act*, R.S.A. 2000, c. A-43, s. 51(1) ("The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a matter in dispute in the arbitration were a cause of action") & *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1) ("Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known, (i) that the injury for which the claimant seeks a remedial order had occurred, (ii) that the injury was attributable to conduct of the defendant, and (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or (b) 10 years after the claim arose, whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim").

[23] *Agrium Inc. v. Colt Engineering Corp.*, 2020 ABQB 807, ¶ 6.

[24] Id. ¶ 7.

[25] Statement of Defence filed June 27, 2018, ¶¶ 2-3 & 10. Appeal Record 26 & 27.

[26] Amended Statement of Defence filed June 28, 2018, ¶¶ 2 & 9. Appeal Record 28 & 30.

[27] Statement of Defence filed June 9, 2018, ¶¶ 9, 10, 14-16. Appeal Record 33 & 34.

[28] *Agrium Inc. v. Colt Engineering Corp.*, 2020 ABQB 807, ¶ 9.

[29] Id.

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the terms and conditions that Elliott Turbomachinery provided to Agrium with its quotations – requiring arbitration in New York – and alternatively a mandatory arbitration clause in the terms and conditions that Agrium included in its purchase orders to Elliott Turbomachinery – requiring arbitration in Calgary under the UNCITRAL Model Law and Rules – submitting that the court accordingly lacks jurisdiction to hear Agrium's claim and asking that the action be stayed or struck.[30]

B. Master Prowse Permitted Agrium's Claim To Continue

[70] In 2019 each of Orbis Engineering and the Elliott companies applied to have Agrium's action against them stayed or struck on the basis that the governing contracts mandated resolution by arbitration, the time for commencing arbitration had expired, and the Court of Queen's Bench of Alberta had no jurisdiction to hear the action.[31] The Elliott companies added that the claims against it must also be stayed[32] if the arbitration is to take place in New York.

[71] Agrium asserted that Orbis Engineering and the Elliott companies did not move promptly in their applications and that by participating in the litigation waived their right to arbitrate and attorned to the court's jurisdiction.[33]

[72] Master Prowse held that "undue delay under section 7(2) of the *Arbitration Act* cannot be used to stay an action under the *Arbitration Act* after the time for arbitration has elapsed".[34]

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[30] Amended Statement of Defence filed January 20, 2020, ¶¶ 7, 8, 14 & 21. Appeal Record 36-39.

[31] Application of Orbis Engineering filed March 4, 2019, ¶¶ 5-7 and Application of Elliott Turbomachinery Canada, Inc. and Elliott Company filed June 21, 2019, ¶¶ 9-11. Appeal Record 41 & 45.

[32] Application of Elliott Turbomachinery Canada, Inc. and Elliott Company filed June 21, 2019, ¶ 12. Appeal Record 45.

[33] *Agrium, Inc. v. Colt Engineering Corp.*, 2020 ABQB 53 (Master), ¶ 8.

[34] Id. ¶ 27. A court may stay a proceeding in The Provincial Court of Alberta or the Court of Queen's Bench of Alberta under section 7(1) of the *Arbitration Act* even if the limitation period for the commencement of an arbitration has expired. The text of section 7 supports this conclusion. Section 7(1) unambiguously directs a court to stay a proceeding commenced by the nonmoving party in contravention of a binding arbitration agreement unless one of the five conditions set out in section 7(2) apply. The expiration of the limitation period governing the commencement of arbitration proceedings is not one of the five. If the Legislative Assembly of Alberta thought the expiration of the limitation period for the commencement of an arbitration proceeding a good reason to deny a stay it could have said so. And if the Legislative Assembly subsequently concludes that section 7(2) needs to be revised it can do so. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 93, 94 & 96 (2012) ("The principle that a matter not covered is so obvious that it seems absurd to recite it. … The absent provision cannot be supplied by the courts. … Judicial amendment flatly contradicts democratic self-governance"). In addition, Justice Fruman's judgment in *Agrium Inc. v. Babcock & Wilcox Canada Ltd.*, 2005 ABCA 82, ¶ 12; 11 C.P.C. 6th 108, 112 is consistent with this position: "In this case the parties used mandatory [arbitration] language and none of the s. 7(2) exceptions apply. Because the underlying arbitration is statute-barred, the statement of claim should be dismissed". This Court expressly approved *Agrium Inc. v. Babcock & Wilcox Canada Ltd.* in *HOOPP Realty Inc. v. A.G. Clark Holdings Ltd*., 2014

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[73] Master Prowse concluded that he had the discretion to consider whether Agrium's claim should continue notwithstanding the existence of mandatory arbitration provisions in the contracts between the parties.[35]

[74] The master determined that fairness was the controlling measure: "[W]hether in the circumstances it would be unfair to a plaintiff to allow a defendant to go back on its choice to participate in litigation".[36]

[75] Master Prowse noted[37] Orbis Engineering and the Elliott companies' participation in the court process to date – including serving their defences and filing notices of claim against the codefendants – and the stage of those proceedings – no examinations yet took place and Agrium was in the process of preparing its document production – and concluded that[38]

> given the 2 year or more delay in applying to stay or strike, and the participation in the proceedings (in particular, use of the proceedings to advance claims against other defendants) it would be unfair to Agrium to allow Orbis and Elliott to go back on their choice to participate in this litigation. Accordingly I dismiss the applications of Orbis and Elliott to stay or strike these proceedings against them.

C. Justice Dilts Struck Agrium's Claim

ABCA 20, ¶ 7; 31 C.L.R. 4th 173, 177, leave to appeal ref'd, [2014] S.C.C.A. No. 87 "The chambers judge correctly interpreted this Court's decision in *Babcock & Wilcox*, which holds that if the parties have agreed that they must arbitrate a dispute, but one party has issued a statement of claim and has not commenced arbitration within the limitation period for arbitration, then the court must strike out the claim". This answers the question Master Schlosser posed in *Fath v. Quadrant Construction Ltd.*, 2019 ABQB 151, ¶¶ 17 & 32; 89 C.L.R. 4th 107, 114 & 121: "If a plaintiff has sued in time but has not sought arbitration, the question is whether the Court can allow the lawsuit to go ahead and, in particular, whether the Court can permit this based on the grounds in s. 7(2) of the *Arbitration Act*. Some cases suggest that the Court can consider whether the relief was sought in a timely way (ie. s. 7(2)(d)), or whether the lawsuit is suitable for summary disposition (ie. s. 7(2)(e)), *even after the limitation has expired*; though post-limitation, if the lawsuit cannot proceed, the remedy is to strike. Other cases say that you cannot. .... With respect, this divided dicta leaves me in considerable doubt about the applicability of the s. 7(2) factors in a post-limitation stay or strike application" (emphasis in original). See also B. Casey, Arbitration Law of Canada: Practice and Procedure 152 (3d ed. 2017) ("Limitation periods may apply in arbitration in the same manner as a court action. It is therefore important that counsel carefully consider whether or not an arbitration agreement applies to the dispute. If the wrong choice is made, for example an action is brought rather an arbitration, and the court later determines that the matter should be arbitrated, the limitation period may well have expired, leaving the claimant without a remedy") & K. McEwen & L. Herbst, Commercial Arbitration in Canada 3-31 (looseleaf rel. 17, 11/2020) ("If an action commenced by a plaintiff is stayed due to the applicability of an arbitration agreement and an applicable statutory limitation expires before an arbitration is commenced, the claim may be statute barred").

[35] Id. ¶¶ 12-13.

[36] Id. ¶ 30.

[37] Id. ¶¶ 41-45.

[38] Id. ¶ 51.

[76] Orbis Engineering and the Elliott companies appealed Master Prowse's decision.[39]

[77] Agrium applied to strike the appeals.[40] It invoked section 7(6) of the *Arbitration Act*.[41]

[78] Orbis Engineering and the Elliott companies argued that section 7(6) has no application to this case because the master's decision was not "under" section 7 of the *Arbitration Act*. They emphasized that Master Prowse relied on authority outside of the *Arbitration Act* to deny a stay and that the *Arbitration Act* cannot remove the authority of a judge of the Court of Queen's Bench to review a master's decision.[42]

[79] Justice Dilts accepted these arguments:[43]

> I am satisfied Elliott and Orbis are entitled to appeal the decision of the Master to a Justice of the Court of Queen's Bench. They are entitled to do so as a right if the Master's decision was not made under the *Arbitration Act*, and I am satisfied that they are entitled to do so notwithstanding s. 7(6) of the *Arbitration Act*. I say this looking at both the legislative framework governing appeals from a Master and the jurisprudence in Alberta relating to the interpretation of s. 7(6) of the *Arbitration Act*.
>
> ….
>
> If the Master's decision was made outside of s. 7 of the *Arbitration Act*, and instead was made based on some residual discretion inherent in the court, that decision can be appealed. Elliott and Orbis are entitled to access all the court processes, including appellate review: ... . If the Master's decision was made under s. 7 of the *Arbitration Act*, Elliott and Orbis are entitled to appeal that decision relying on s. 12 of the *Court of Queen's Bench Act* and the Rules of Court. Section 7(6) does not preclude an appeal of the Master's decision to a Justice in Chambers. Given this conclusion, I need not address whether the Master's decision was made under s. 7 of the *Arbitration Act*.

[80] In essence, Justice Dilts took the view that the bar in section 7(6) of the *Arbitration Act*[44] to appeals from decisions on applications to stay court proceedings in favor of arbitration should

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[39] Notices of Appeal filed February 7, 2020. Appellant's Extracts of Key Evidence 45 & 47.

[40] Application to Strike Appeals filed February 14, 2020. Appeal Record 47.

[41] R.S.A. 2000, c. A-43.

[42] *Agrium Inc. v. Colt Engineering Corp.*, 2020 ABQB 807, ¶ 20.

[43] Id. ¶¶ 21 & 30.

[44] R.S.A. 2000, c. A-43 ("There is no appeal from the court's decision under this section").

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not, "[a]bsent express language, ... be read in a manner that would be inconsistent with ... [the] legislated right"[45] of appeal from a master's decision available under section 12 of the *Court of Queen's Bench Act*[46] and rule 6.14 of the *Alberta Rules of Court*.[47] While she accepted that a decision under section 7 made by a judge of the Court of Queen's Bench could not be appealed to the Court of Appeal, she held a decision of a master under section 7 could be appealed to a judge of the Court of Queen's Bench.[48]

[81] Justice Dilts proceeded to consider the appeal on the merits. She concluded that the court has jurisdiction, as part of the supervisory function that it retains with respect to matters governed by arbitration agreements, to consider whether parties waived reliance on the arbitration clause or attorned to the court's jurisdiction regardless of whether the time to arbitrate has expired.[49]

[82] The chambers judge took the view that the analysis of waiver and attornment is not a fairness assessment as Master Prowse determined, nor is it undertaken as an analysis of undue delay that is a basis for refusing to grant a stay under section 7(2)(d) of the *Arbitration Act*.[50] Rather, she approached the inquiry in the context of waiver, and examined whether the defendants' conduct "indicate[d] the voluntary intention to forego reliance on the mandatory arbitration provision or an engagement ... in the merits of the [a]ction".[51]

[83] Justice Dilts determined that, on the facts of this case, the conduct of neither Orbis Engineering nor the Elliott companies was sufficient to make out a waiver of their right to arbitrate. Orbis Engineering pleaded the arbitration provision from the outset, putting Agrium on notice of its intention to rely on it, its actions in filing a defence and bringing contribution or indemnity claims against the other defendants were "largely defensive" and "are of little value in determining whether the defendant has signalled an agreement to litigate" given that rules of court required such steps be taken within a prescribed time, and applied to strike or stay the action within one year after filing its defence.[52] While the Elliott companies delayed relying on the arbitration

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[45] *Agrium Inc. v. Colt Engineering Corp.*, 2020 ABQB 807, ¶ 23.

[46] R.S.A. 2000, c. C-31 ("An appeal lies to a judge in chambers from a decision of a master in chambers").

[47] Alta. Reg. 124/2010 ("If a master makes a judgment or order, the applicant or respondent to the application may appeal the judgment or order to a judge").

[48] *Agrium Inc. v. Colt Engineering Corp.*, 2020 ABQB 807, ¶ 25.

[49] Id. ¶¶ 44, 45, 47 & 48.

[50] Id. ¶ 53.

[51] Id. ¶¶ 54-55.

[52] Id. ¶ 55.

provision for over a year after filing their initial defence, this, she held, is not sufficient to constitute waiver of their right to arbitrate.[53]

[84] The orders pronounced on December 22, 2020 and filed May 6, 2021 dismissed Agrium's applications to strike the appeals against Master Prowse's orders, allowed the appeals and struck Agrium's claims against Orbis Engineering and the Elliott companies.[54]

D. Agrium Appeals Justice Dilts' Order

[85] Agrium appealed Justice Dilts' order.[55]

V. Applicable Legislation and Arbitration Provisions

A. *Arbitration Act*

[86] The important sections of the *Arbitration Act*[56] are reproduced below:

> 1(1) In this Act,
>
> …
>
> (c) "court" means,
>
> (i) in sections 6 and 7, the Court of Queen's Bench and the Provincial Court, and
>
> (ii) in all other sections, the Court of Queen's Bench.
>
> …
>
> 3 The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except sections 5(2), 19, 39, 44(2), 45, 47 and 49.
>
> …

[53] Id. ¶ 56.

[54] Appeal Records 71 & 73.

[55] Civil Notice of Appeal filed January 20, 2021. Appeal Record 75.

[56] R.S.A. 2000, c. A-43 (emphasis added).

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6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:

(a) to assist the arbitration process;

(b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;

(c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;

(d) to enforce awards.

7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court *shall*, on the application of another party to the arbitration agreement, stay the proceeding.

(2) The court may refuse to stay the proceeding in only the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;

(d) the application to stay the proceeding was brought with undue delay;

(e) the matter in dispute is a proper one for default or summary judgment.

(3) An arbitration of the matter in dispute may be commenced or continued while the application is before the court.

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the matter in dispute shall be commenced, and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.

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(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that

(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and

(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

(6) There is no appeal from the court's decision under this section.

B. *Judicature Act*

[87] Section 3(b)(iv)(A) of the *Judicature Act*[57] is in this form:

3 The Court of Appeal

…

(b) has jurisdiction and power, subject to the Rules of Court, to hear and determine

…

(iv) all appeals or applications in the nature of appeals respecting a judgment, order or decision of

(A) a judge of the Court of Queen's Bench … .

C. *Court of Queen's Bench Act*

[88] The key provisions of the *Court of Queen's Bench Act*,[58] as they read before June 15, 2022, follow:

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[57] R.S.A. 2000, c. J-2.

[58] R.S.A. 2000, c. C-31. Effective June 15, 2022, masters in chambers are called "applications judges". *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 27(1)(b) ("The Lieutenant Governor in Council may amend ... [section 8(1)] so that ... officers appointed under section 8(1) are called something other than masters in chambers") & O.C. 250/2022 ("The Lieutenant Governor in Council amends section 8(1) of the Court of Queen's Bench Act by striking out "masters in chambers" and substituting "applications judges"). Consequential amendments to the remainder of the *Act* will come into effect on September 1, 2022. *Court of Queen's Bench (Various Regulations) Amendment Regulation*, Alta. Reg. 137/2022, s. 3.

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> 8(1) The Lieutenant Governor in Council may appoint officers of the Court called masters in chambers.
>
> …
>
> 12 An appeal lies to a judge in chambers from a decision of a master in chambers.

D. *Alberta Rules of Court*

[89] Rules 6.14(1) and 14.4(1) of the *Alberta Rules of Court*[59] are set out below:

> 6.14(1) If a master makes a judgment or order, the applicant or respondent to the application may appeal the judgment or order to a judge.
>
> …
>
> 14.4(1) Except as otherwise provided, an appeal lies to the Court of Appeal from the whole or any part of a decision of a Court of Queen's Bench judge sitting in court or chambers, or the verdict or finding of a jury.

E. *Supreme Court Act*

[90] Sections 2(1), in part, and 40(1) of the *Supreme Court Act*[60] read as follows:

> 2(1) In this Act,
>
> "appeal" includes any proceeding to set aside or vary any judgment of the court appealed from;
>
> …
>
> "court appealed from" means the court from which the appeal is brought directly to the Supreme Court, whether that court is one of original jurisdiction or a court of appeal;
>
> "final judgment" means any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding … .

[59] Alta. Reg. 124/2010.

[60] R.S.C. 1985, c. S-26.

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…

40(1) … [A]n appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

F. *Constitution Act, 1867*

[91] Portions of part VII of the *Constitution Act, 1867*[61] are set out below:

VII. Judicature

96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97 Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

…

99 (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

…

100 The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts … shall be fixed and provided by the Parliament of Canada.

[61] 30 & 31 Vict., c. 3 (U.K.).

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G. Arbitration Clauses

[92] The arbitration clause in the governing contracts[62] between Agrium and each of Orbis Engineering and the Elliott companies[63] states as follows:[64]

> 28. PROPER LAW AND DISPUTE RESOLUTION
>
> (a) Unless otherwise stated on the face of this Order, this Order shall for all purposes be construed and interpreted according to the laws of the Province of Alberta and the federal laws of Canada applicable herein, excluding reference to conflicts of laws principles. Neither the Uniform Commercial Code, nor the United Nations Convention for the International Sale of Goods shall apply to this Order. Any dispute relating to this Order shall be resolved by arbitration in Calgary, Alberta, Canada, pursuant to the UNCITRAL Model Law and Rules. The courts having exclusive supervisory jurisdiction with respect to the matters relating to this Order shall be the courts of the Province of Alberta.
>
> (b) Buyer [Agrium] shall include provisions within its other agreements which relate to this Order a dispute resolution provision substantially similar to that which is contained herein. Vendor [Orbis Engineering] shall participate, upon the request of Buyer, in any arbitration arising in connection with the Goods, the Services or this Order, as if the Vendor were a direct party to the issue in dispute.

VI. Analysis

A. The Governing Statutory Interpretation Principles

[93] The proper approach to interpreting statutory provisions is not contentious.[65]

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[62] The applicability or effect of the mandatory arbitration provision that Elliott Turbomachinery presented to Agrium with its quotations is not before the Court.

[63] *Agrium Inc. v. Colt Engineering Corp.*, 2020 ABQB 807, ¶ 3; Affidavit of Gabriel Salcedo (In Response to the Summary Dismissal Application of the Defendant, Orbis Engineering Field Services Ltd.) filed November 1, 2019, ¶¶ 6 & 8 & Affidavit of Gabriel Salcedo (In Response to the Summary Dismissal Application of the Defendants, Elliott Turbomachinery Canada Inc. and Elliott Company) filed November 1, 2019, ¶ 6. Appellant's Extracts of Key Evidence 8 & 29.

[64] Affidavit of Gabriel Salcedo (In Response to the Summary Dismissal Application of the Defendant, Orbis Engineering Field Services Ltd.) filed November 1, 2019, Exhibit C, Services Purchase Order dated June 17, 2013, Canadian Standard Purchasing Terms and Conditions. Appellant's Extracts of Key Evidence 23.

[65] *Alexis v. Alberta*, 2020 ABCA 188, ¶ 42; 8 Alta. L.R. 7th 314, 333, leave to appeal ref'd, [2020] S.C.C.A. No. 227 per Wakeling & Greckol, JJ.A. ("The basic approach to a statutory interpretation problem is easy to state") & *Re:Sound v. Motion Picture Theatre Assocs. of Canada*, 2012 SCC 38, ¶ 25; [2012] 2 S.C.R. 376, 386 per LeBel, J. ("The main

1. Basic Rules

[94] "[A] tribunal must read the entire statute"[66] – other parts of a statute may affect the meaning of words in the contested provision – and statutes on the same subject matter.[67] An adjudicator must understand the comprehensive statutory regime.

[95] In reading statutory text a tribunal must be mindful that statutes "obviate some mischief, ... supply an inadequacy, ... [or] formulate a plan of government".[68] The goal is to identify a statutory purpose that animates the text.[69]

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issue in this appeal involves the application of well-known principles of statutory interpretation"). See *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 41 per Iacobucci, J. ("Elmer Driedger in Construction of Statutes (2d ed. 1983) best encapsulates the approach upon which I prefer to rely. … 'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'").

[66] *Alexis v. Alberta*, 2020 ABCA 188, ¶ 43; 8 Alta. L.R. 7th 314, 334, leave to appeal ref'd, [2020] S.C.C.A. No. 227 per Wakeling and Greckol, JJ.A. See also *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 41 per Iacobucci, J. ("the words of an Act are to be read in their entire context"); *Estate of Hicklin v. Hicklin*, 2019 ABCA 136, ¶ 49; [2019] 6 W.W.R. 238, 255 ("an adjudicator interpreting a … statute must read the whole … statute"); *K & S Lake City Freighters Pty. Ltd. v. Gordon & Gotch Ltd*., 1985 HCA 48; 157 C.L.R. 309, 315 per Mason, J. ("to read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context"); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) per Cardozo, J. ("the meaning of a statute is to be looked for not in any single section, but in all the parts together, and in their relation to the end in view"); R. Sullivan, The Construction of Statutes 395 (7th ed. 2022) ("In looking at the Act as a whole, the courts focus on any provision or series of provisions that in their opinion is capable of shedding light on the interpretive problem at hand") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012) ("Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts").

[67] *Alexis v. Alberta*, 2020 ABCA 188, n. 32; 8 Alta. L.R. 7th 314, n. 32, leave to appeal ref'd, [2020] S.C.C.A. No. 227 per Wakeling & Greckol, JJ.A. ("legislatures undoubtedly intend to create a network of obligations and responsibilities that are consistent and to use text in a consistent manner, even though the same subject matter is dealt with in more than one enactment"); *Acciona Infrastructure Canada Inc. v. Posco Daewoo Corp.*, 2019 ABCA 241, ¶ 76; 91 Alta. L.R. 6th 59, 80-81 per Wakeling, J.A. ("It is necessary to examine the entire *International Commercial Arbitration Act* and its sister enactment, the *Arbitration Act*, in order to determine whether the enactments' use of the singular and plural forms are consistent. When does the plural include the singular or the singular include the plural?"); R. Sullivan, The Construction of Statutes 408 (7th ed. 2022) ("The provisions of related legislation are read in the context of others and the presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single Act"); D. Pearce, Statutory Interpretation in Australia 119 (9th ed. 2019) ("reference may be made to similar statutes within the same jurisdiction in ascertaining the meaning of an Act before the court") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 252 (2012) ("laws dealing with the same subject … should if possible be interpreted harmoniously").

[68] Frankfurter, "Some Reflections on the Reading of Statutes", 47 Colum. L. Rev. 527, 538-39 (1947).

[69] *Alexis v. Alberta*, 2020 ABCA 188, ¶ 44; 8 Alta. L.R. 7th 314, 335 leave to appeal ref'd, [2020] S.C.C.A. No. 227 per Wakeling & Greckol, JJ.A. ("a tribunal must attempt to identify why the legislature passed the statute").

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[96] The completion of these necessary tasks puts the tribunal in the best position to undertake the next part of the protocol – "identify the potential permissible meanings [of the statute's words] taking into account their ordinary meanings".[70] In *Alexis v. Alberta*,[71] this Court stated that "[a] permissible meaning is one that a reasonable reader who uses the language correctly would give the text at the time of its production".

[97] It goes without saying that a tribunal may never give statutory text a meaning it "cannot possibly bear".[72]

[98] If the statutory text – a word, a phrase, or a sentence – bears only one plausible meaning, the interpretative inquiry is at an end.[73]

[99] Suppose city councillors receive numerous complaints that some residents are mowing their lawns after dark and disturbing the peace and quiet of neighborhoods to such a degree that

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[70] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109; [2017] 7 W.W.R. 343, 375, leave to appeal ref'd, [2017] S.C.C.A. No. 228. See *The Queen v. D.A.I.*, 2012 SCC 5, ¶ 26; [2012] 1 S.C.R. 149, 166 per McLachlin, C.J. ("The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision"); *The Queen v. Secretary of State for the Environment, Transport and the Regions, ex p. Spath, Holme Ltd.*, [2001] 2 A.C. 349, 397 per Lord Nicholls ("language is to be taken to bear its ordinary meaning in the general context of the statute") & *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917) per Day, J. ("Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them").

[71] 2020 ABCA 188, ¶ 47; 8 Alta. L.R. 7th 314, 335-36, leave to appeal ref'd, [2020] S.C.C.A. No. 227 per Wakeling & Greckol, JJ.A.

[72] *Zuk v. Alberta Dental Ass'n*, 2018 ABCA 270, ¶ 159; 426 D.L.R. 4th 496, 539, leave to appeal ref'd, [2018] S.C.C.A. No. 439. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 31 (2012) ("A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear"); *Alexis v. Alberta*, 2020 ABCA 188, ¶ 73; 8 Alta. L.R. 7th 314, 343, leave to appeal ref'd, [2020] S.C.C.A. No. 227 per Wakeling & Greckol, JJ.A. ("Words cannot be given a meaning they cannot possibly bear"); *Canada v. Canada North Group Inc.*, 2019 ABCA 314, ¶ 112; 437 D.L.R. 4th 122, 172, aff'd, 2021 SCC 30 per Wakeling, J.A. ("Fidelity to statutory text is a fundamental feature of statutory interpretation. Courts that ignore the text act as unauthorized legislators. They disregard the primacy of parliament and the paramountcy of the rule of law in our legal system") & *SZTAL v. Minister of Immigration and Border Protection*, [2017] HCA 34, ¶ 94; 347 A.L.R. 405, 429 per Edelman, J. ("where a statute employs a term in its ordinary sense there can be no warrant for the extension of the meaning beyond its ordinary sense"). E.g., *Lafarge Canada Inc. v. City of Edmonton*, 2013 ABCA 376, ¶ 31; 25 C.L.R. 4th 208, 216 ("To treat this Statement of Claim as a form of notification of arbitration under s. 23 does not amount to giving a liberal reading to s. 23 of the Act but bursts its conceptual boundaries").

[73] *Thomson v. Canada*, [1992] 1 S.C.R. 385, 399 per Cory, J. ("when the words used in the statute are clear and unambiguous, no other step is needed to identify the intention of Parliament") & *Alexis v. Alberta*, 2020 ABCA 188, ¶ 49; 8 Alta. L.R. 7th 314, 337, leave to appeal ref'd, [2020] S.C.C.A. No. 227 per Wakeling & Greckol, JJ.A. ("If the statutory text supports only one plausible or permissible meaning, the inquiry is complete. In this scenario there is no need to take into account the enactment's purpose"). See *Canada v. Canada North Group Inc.*, 2019 ABCA 314, ¶ 124; 437 D.L.R. 4th 122, 176, aff'd, 2021 SCC 30 per Wakeling, J.A. ("A court has no authority to ignore or revise clear and unambiguous text that bears only one meaning just because the court considers the substantive norm embodied in the text to be unwise or dangerous").

children cannot sleep. Council passes a bylaw to ameliorate the problem: "A person in areas designated residential zones must not operate a lawn mower between 9:00 p.m. and 8:00 a.m. the next day". The bylaw does not define a lawn mower. A bylaw enforcement officer charges a person operating a reel push lawn mower with a contravention of this bylaw. The adjudicator convicts the accused, satisfied that a reel push lawn mower is a lawn mower – Webster's Third New International Dictionary of the English Language uses a picture of a reel push lawn mower to illustrate its definition: "lawn mower …: hand-operated or power-operated machine for cutting grass on lawns". This is the correct disposition. The bylaw prohibits in unambiguous terms the use of a lawn mower during prescribed hours. The text could have focused on gasoline-powered lawn mowers or lawn mowers that generate an amount of noise beyond a prescribed level but it did not.

[100] If statutory text may have more than one plausible meaning, the tribunal must "select the option that best advances the purpose that accounts for the text".[74] Section 10 of the *Interpretation Act*[75] confirms the merit of this part of the protocol: "An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects".

[101] To repeat, a tribunal must not rely on the purpose of an enactment to give text a meaning it cannot plausibly bear.[76]

[102] Suppose a workers' compensation act compensates a worker who suffers an injury arising out of and in the course of employment. Injury is defined to exclude a death attributable solely to the decision of a worker to take his or her own life. The board administering the act could not ignore the text's treatment of suicide and award compensation to the dependents of a worker who commits suicide because the board is convinced this is the right decision – the worker left a wife

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[74] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109; [2017] 7 W.W.R. 343, 375-76, leave to appeal ref'd, [2017] S.C.C.A. No. 228. See *McBratney v. McBratney*, 59 S.C.R. 550, 561 (1919) per Duff, J. ("where you have rival constructions of which the language of the statute is capable you must resort to the object ... of the statute ... [and adopt] the construction which best gives effect to the governing intention"); *Celgene Corp. v. Canada*, 2011 SCC 1, ¶ 21; [2011] 1 S.C.R. 3, 13 per Abella, J. ("The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute") & *Hamilton v. Rathbone*, 175 U.S. 414, 419 (1899) per Brown, J. ("where a statute is ... susceptible upon its face of two constructions, the court may look into ... the purpose intended to be accomplished by it, to determine its proper construction").

[75] R.S.A. 2000, c. I-8.

[76] *Re:Sound v. Motion Picture Theatre Assocs. of Canada*, 2012 SCC 38, ¶ 33; [2012] 2 S.C.R. 376, 389 per LeBel, J. ("Although statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament"); *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, 642 per McLachlin, J. ("the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act ... . Where the provision at issue is clear and unambiguous, its terms must simply be applied"); *Covert v. Nova Scotia*, [1980] 2 S.C.R. 774, 807 per Dickson, J. ("Although a court is entitled ... to look to the purpose of the Act ... it must still respect the actual words which express the legislative intention") & *Alexis v. Alberta*, 2020 ABCA 188, ¶ 74; 8 Alta. L.R. 7th 314, 343 leave to appeal ref'd, [2020] S.C.C.A. No. 227 per Wakeling & Greckol, JJ.A. ("A statute's purpose can never justify a court assigning to text a meaning it cannot bear").

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and five children without a breadwinner. As Justice Stratas aptly explained, "[adjudicators] ... are bound by the legislation. They must take it as it is. They may not insert into it the meaning that they want".[77] Purpose never trumps text.[78]

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2. Presumptions

[103] On occasion, consideration of a statutory interpretation presumption assists in resolving a contest as to the meaning of a statutory provision.

[104] This is the case here.

[105] Professor Sullivan states that "[i]t is presumed that the legislature intends to comply with any and all limits on its jurisdiction".[79] Justice Scalia and Professor Garner noted that "[t]he presumption of validity disfavors interpretations that would nullify the provision or the entire instrument – for example, an interpretation that would cause ... a statute to be unconstitutional".[80]

[106] *The Queen v. McKay*[81] illustrates this presumption. A Township of Etobicoke bylaw prohibited a residential property owner from displaying a sign not expressly authorized by the bylaw – a for-sale or no-trespassing sign, for example, were expressly authorized.

[107] During a federal election, the McKays, Etobicoke residential property owners, displayed a small election sign endorsing a federal New Democratic Party candidate. They were charged with and convicted of breaching Etobicoke's no-sign bylaw.

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[77] *Williams v. Canada*, 2017 FCA 252, ¶ 50; 417 D.L.R. 4th 173, 189 per Stratas, J.A. See *Alberta v. McGeady*, 2014 ABQB 104, ¶ 23; [2014] 7 W.W.R. 559, 571, aff'd, 2015 ABCA 54, leave to app. ref'd, [2015] S.C.C.A. No. 91 per Wakeling, J. ("No ... decision maker can ignore substantive statutory provisions because it believes [the statutory provisions produce] ... unfair results and adopt another norm which it is satisfied produces a more satisfactory result").

[78] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd*., 2019 ABCA 49, ¶ 190; 442 D.L.R. 4th 9, 125 per Wakeling, J.A. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 57 (2012) ("purpose … cannot be used to contradict text or to supplement it. Purpose sheds light only on deciding which of various *textually permissible meanings* should be adopted") (emphasis in original).

[79] R. Sullivan, The Construction of Statutes 516 (7th ed. 2022).

[80] Reading Law: The Interpretation of Legal Texts 66 (2012).

[81] [1965] S.C.R. 798. See also *The Queen v. Sharpe*, 2001 SCC 2, ¶ 33; [2001] 1 S.C.R. 45, 75 per McLachlin, C.J. ("If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted"); *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1078 per Lamer, J. ("this Court ... should ... not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed") & *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) per Cardozo, J. ("when a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that preserves to the meaning that destroys").

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[108] The Supreme Court of Canada, satisfied that Etobicoke had no authority to regulate the use of federal election signs,[82] invoked the presumption in favor of validity – "if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted"[83] – and acquitted the McKays. There were two options – a federal election sign is either a sign captured by the bylaw because the text of the bylaw utilizes general terms or it is not, because the municipality has no authority to regulate federal election signs and it is presumed the municipality would not enact an *ultra vires* bylaw.

[109] Had the Etobicoke Bylaw expressly prohibited a residential property owner from displaying a sign during a federal election identifying the property owner as a supporter of a candidate, the property owner, if charged with a contravention of the bylaw, would have been forced to challenge the constitutionality of the bylaw.[84] The presumption in favor of validity would not have assisted the property owner – there was no plausible construction that was constitutional.

B. Section 7(6) of the *Arbitration Act* Prohibits Appeals Against an Order of a Master in Chambers Under Section 7(1) of the *Arbitration Act* to a Judge of the Court of Queen's Bench of Alberta

1. The Purpose of the *Arbitration Act*

[110] A review of the *Arbitration Act*[85] as a whole makes it very clear that the *Act* recognizes the value of arbitration as a desirable dispute resolution option and directs courts to do what is required to make the arbitration process efficacious and do nothing that will impair the efficaciousness of the arbitration process.[86] Doing so furthers the two principles underlying arbitration legislation:

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[82] *The Queen v. McKay*, [1965] S.C.R. 798, 804 per Cartwright, J.

[83] Id.

[84] *The Queen v. Conway*, 2010 SCC 22, ¶ 97; [2010] 1 S.C.R. 765, 810 ("barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent").

[85] R.S.A. 2000, c. A-43.

[86] *ENMAX Energy Corp. v. TransAlta Generation Partnership*, 2022 ABCA 206, ¶ 29 ("The overarching purpose of arbitration legislation is to promote adherence to agreements, efficiency, and fairness and to lend credibility to an important dispute resolution process: ... . Arbitrations are intended to provide a faster and less expensive process to resolve disputes") & B. Casey, Arbitration Law of Canada: Practice and Procedure 319-20 (3d ed. 2017) ("All of the Domestic and International Acts start with the basic proposition that no court is to intervene in matters governed by the respective Act, except as the Act provides. ... The clear mandatory language displaces the concept that the courts have an overriding or inherent supervisory jurisdiction over arbitration tribunals. .... The courts have four general roles in the arbitration process: 1. Requiring parties to honour their obligations under arbitration agreements; 2. Supervising the conduct of the arbitration and the arbitrators to the extent permitted by law, if the place of arbitration is within the jurisdiction of the court; 3. Where requested, providing assistance in the conduct of the arbitration, usually, but not necessarily, when the place of arbitration is within the jurisdiction of the court; and 4. Enforcing arbitral awards regardless of where they were made").

parties should be permitted to determine for themselves the dispute resolution mechanism they wish to use and ought to be held to that agreement, and when they choose arbitration courts should be minimally involved[87] in that process.[88]

[111] Accordingly, the *Arbitration Act* does not bestow a prominent role on the courts. This Court's judgment in *Lamb v. AlanRidge Homes Ltd*.[89] confirms this: "[S]ection 7(6) reflects an important policy consideration, namely that the process of determining whether the parties should proceed with arbitration, or legal proceedings, should not become bogged down by resort to the appeal process".

[112] Section 6 of the *Arbitration Act* confirms the limited role of the courts:

> 6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (a) to assist the arbitration process;

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[87] B. Casey, Arbitration Law of Canada: Practice and Procedure 319 (3d ed. 2017) ("While many in the arbitration field speak of court 'intervention', the courts in Canada, for the most part, have come to recognize that commercial arbitration has evolved to become an important dispute resolution mechanism and today it is more appropriate to speak in terms of court 'involvement' where necessary to facilitate the arbitral process. Courts and arbitral tribunals have both come to recognize the need for and the contribution of the other. Together ... [they] provide a sophisticated regime for the resolution of commercial disputes in Canada").

[88] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, ¶¶ 52 & 55; [2019] 2 S.C.R. 144, 178 & 179 per Moldaver, J. ("The policy that parties to a valid arbitration agreement should abide by their agreement gives effect to the concept of party autonomy — which, in the arbitration context, stands for the principle that parties should generally be allowed to craft their own dispute resolution mechanism through consensual agreement ... . The policy ... goes hand in hand with the principle of limited court intervention in arbitration matters. This latter principle finds expression throughout modern Canadian arbitration legislation ... and has been described as a 'fundamental principle underlying modern arbitration law' ... . This principle is embedded most visibly in ss. 6 and 7 of the *Arbitration Act*") & Alberta Law Reform Institute, Arbitration Act*:* Stay and Appeal Issues Final Report (2013) v ("ALRI reaffirms the two fundamental principles underlying the Alberta Act: the principle of party control and the principle of restricted court intervention"), ¶¶ 10, 12 & 14 ("The law of arbitration rests on the principle of party control. The parties' freedom to contract governs the arbitration process and must be respected. As a general rule, party control means that the parties can make whatever agreement they want concerning what is to be arbitrated, how issues will be identified, how the arbitrator will be chosen and what the rules of the arbitration will be. The parties agree to participate in the arbitration. .... Party control is a fundamental principle underlying the Alberta Act. .... In the Alberta Act and Uniform Act, the principle of party control is balanced against the principle of equal and fair treatment. Party control should be overridden only when needed to ensure equal treatment and fairness between the parties") & 19 ("Another fundamental principle underlying modern arbitration law is that court involvement or intervention in the arbitration process should be strictly limited. In many ways, this principle is a counterpart to the principle of party control. If parties choose to resolve their disputes privately outside the public court system, they should be left to that choice and not be subject to court intervention, except as needed to determine validity of the arbitration agreement or to ensure standards of basic procedural fairness for the arbitral process").

[89] 2009 ABCA 343, ¶ 14; 312 D.L.R. 4th 719, 723, leave to app. ref'd, [2009] S.C.C.A. No. 520.

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> (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
>
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
>
> (d) to enforce awards.

[113] As Justice Moldaver recently observed,[90] "[section] 6 [of Ontario's *Arbitration Act*] signals that courts are generally to take a 'hands off' approach to matters governed by the *Arbitration Act*". This applies equally to Alberta's legislation.[91]

[114] Section 7 also makes it clear that parties that have agreed to submit their disputes to arbitration can expect a court, in the absence of exceptional circumstances catalogued in section 7(2), to order them to honor their commitments.[92] This a court does by staying an action.[93]

[115] Section 7(6) plays an important role in ensuring that courts do no more than is necessary to ensure the integrity of an arbitration agreement. While a party may invoke section 7(1) claiming that it and the nonmoving party have agreed to arbitrate their disputes, the *Act* allows only the original court to determine the merits of a stay application.[94] By denying appeals of section 7

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[90] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, ¶ 56; [2019] 2 S.C.R. 144, 180 per Moldaver, J. Section 6 of Ontario's *Arbitration Act*, S.O. 1991, c. 17, mirrors Alberta's legislation: "No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act: 1. To assist the conducting of arbitrations. 2. To ensure that arbitrations are conducted in accordance with arbitration agreements. 3. To prevent unequal or unfair treatment of parties to arbitration agreements. 4. To enforce awards".

[91] Alberta Law Reform Institute, Arbitration Act*:* Stay and Appeal Issues Final Report ¶ 21 (2013) ("One of the Alberta Act's main features is the statutory enshrinement of the fundamental principle of restricted court intervention. Section 6 prohibits court intervention except for specified purposes as provided by the Act. This principle is further reflected in restricted court authority to refuse a stay of court proceedings under section 7 and to hear appeals under section 44").

[92] Id. ¶ 26 ("If a party to an arbitration agreement commences a court proceeding regarding a dispute covered by that agreement, the Alberta Act is designed to force that party to honour the agreement to arbitrate, except in very limited and specified circumstances [as set out in section 7]").

[93] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, ¶ 51; [2019] 2 S.C.R. 144, 177-78 per Moldaver, J. ("Issuing a stay of court proceedings is one of the ways in which courts may give effect to the policy that the parties to a valid arbitration agreement should abide by their agreement. ... [A] stay of court proceedings is simply 'an indirect method of enforcing an arbitration agreement'").

[94] The Alberta Law Reform Institute confirmed the desirability of its approach. Alberta Law Reform Institute, Arbitration Act*:* Stay and Appeal Issues Final Report ¶¶ 85-88 (2013) ("Section 7(6) of the Alberta Act provides that a Court of Queen's Bench decision under section 7 cannot be appealed to the Court of Appeal. Case law modifies this absolute prohibition, however, by providing that an appeal is not barred where a stay is refused because the arbitration agreement is held to be invalid or otherwise inapplicable. If the appellate court reaches the contrary decision and holds that the arbitration agreement is indeed valid and applicable, the case will then be remitted to the lower court to decide

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decisions made by a master in chambers or a judge of The Provincial Court of Alberta to a judge of the Court of Queen's Bench or a judge of the Court of Queen's Bench of Alberta to the Court of Appeal, the *Act* directs parties to abide by the finding of the original decision maker asked to determine if the nonmoving party must be held to its promise to arbitrate disputes.

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2. Permissible Meanings of Section 7(6) of the *Arbitration Act*

a. The Meaning of Section 7(6) Is Indisputable

[116] Section 7(6) of the *Arbitration Act*[95] – "[t]here is no appeal from a court's decision under this section" – indisputably states that a party to an agreement that contains a mandatory arbitration

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the stay application. That stay decision cannot then be appealed. A respondent proposed that section 7(6) be amended to allow an appeal, with leave, of any stay decision. The respondent submitted that this would allow the Court of Appeal 'to clarify legal differences arising amongst Queen's Bench judges, without the need for legislative reform.' No modern Canadian arbitration statute provides for an appeal of a stay decision. ... The policy in this area uniformly curtails appeals in the interest of finality and preventing delay in the arbitral process. The Supreme Court of Canada would more than likely respect this policy as well. ALRI does not support broadening section 7(6) to provide a general ability to appeal stay decisions"). *Cf.* Uniform Law Conference of Canada, Uniform Arbitration Act (2016), s. 7(7) ("A party may appeal a decision of a court under this section [Stay of court proceedings]") & 6 ("*Commentary*: ... Subsections 7(5) and (6) of the previous *Uniform Arbitration Act* ... suggests that where a court finds that it is not 'reasonable' to separate matters required to be arbitrated from those not required to be arbitrated, the court could refuse a stay, and that the court's finding on that issue is final and binding. The new text deletes subsections 7(5) and (6). This is consistent with the approach recommended by the Alberta Law Reform Institute").

[95] R.S.A. 2000, c. A-43. See also *The Arbitration Act, 1992*, S.S. 1992, c. A-24.1, s. 8(6) ("There is no appeal from the court's decision pursuant to this section"); *The Arbitration Act*, C.C.S.M., c. A120, s. 7(6) ("There is no appeal from the court's decision under this section"); *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7(6) ("There is no appeal from the court's decision"); *Arbitration Act*, R.S.N.B. 2014, c. 100, s. 7(6) ("There is no appeal from the court's decision"); *Arbitration Ordinance*, 2011 H.K.L. No. 38, s. 20(8) ("A decision of the court to refer the parties to arbitration under – (a) article 8 of the UNCITRAL Model Law, given effect to by subsection (1); or (b) subsection (2), is not subject to appeal. (9) The leave of the court making a decision to refuse to refer the parties to arbitration under – (a) article 8 of the UNCITRAL Model Law ... is required for any appeal from that decision") & *Federal Arbitration Act*, 9 U.S.C. § 3 ("Stay of proceedings where issue therein referable to arbitration. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration") & § 16 ("Appeals ... (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order – (1) granting a stay of any action under section 3 of this title"). With the exception of British Columbia and Quebec, those provinces that do not bar appeals of stay decisions appear to have retained the stay application language found in the *Arbitration Act, 1889*, c. 49, s. 4 (U.K.) ("If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and *that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order*

provision and is either the moving or nonmoving party to an application for a stay of a court action under section 7(1) may not appeal an order adverse to its interests made by a judge of The Provincial Court of Alberta, a master in chambers or a judge of the Court of Queen's Bench of Alberta to a court established by an enactment of the Legislative Assembly of Alberta – a judge of the Court of Queen's Bench of Alberta[96] or the Court of Appeal of Alberta.[97]

b. Key Section 7(6) Queries

[117] Three questions must be asked when considering the effect of section 7(6) of the *Arbitration Act*.

i. A Decision of a Master Is a Decision of the Court of Queen's Bench

[118] Is the decision of a master in chambers of the Court of Queen's Bench of Alberta a "decision" of the Court of Queen's Bench of Alberta?

[119] It is.

[120] The *Court of Queen's Bench Act*[98] stipulates that masters in chambers are "officers of the court". The fact that masters in chambers are not judges[99] of the Court of Queen's Bench does not mean that their decisions are not decisions of the Court of Queen's Bench.

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staying the proceedings") (emphasis added). See *Arbitration Act*, R.S.N.S. 1989, c. 19, s. 7; *Arbitration Act*, R.S.P.E.I. 1988, c. A-16, s. 7; *Arbitration Act*, R.S.N.L. 1990, c. A-14, s. 4; *Arbitration Act*, R.S.Y. 2002, c. 8, s. 9; *Arbitration Act*, R.S.N.W.T. 1988, c. A-5, s. 10(2) & *Arbitration Act*, R.S.N.W.T. 1988, c. A-5, s. 10(2). Prince Edward Island enacted the *Arbitration Act*, S.P.E.I. 1996, c. 4, repealing the current act, but this new act has not been proclaimed. Prince Edward Island, Table of Public Acts (updated May 2022) 7. It introduced Bill 50, setting out a new arbitration act, that was first read on February 22, 2022. Section 6(7) of that act provides that "[a] party may appeal a decision of the court under this section".

[96] *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 2(1).

[97] *Court of Appeal Act*, R.S.A. 2000, c. C-30.

[98] R.S.A. 2000, c. C-31, s. 8(1).

[99] The Court of Queen's Bench of Alberta "consists of ... 74 other judges, who shall be called justices of the Court of Queen's Bench of Alberta". *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 3(1)(c). A specific judge of the Court of Queen's Bench of Alberta is properly referred to as "Justice Smith". See S. Bigelow, Legal Etiquette and Court-Room Decorum 9 (1955) ("[A high court judge] should never be addressed or referred to as 'Judge Jones', an unpardonable error, although intimately, he may be called 'Judge'"). "Judge" or "judges" are the proper terms if the reference is not to a specific judge or judges of the Court of Queen's Bench. E.g., *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, ss. 3-7, 7.1, 9, 12, 13, 24, 24.1 & 26 & *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 1.6, 4.13-.18, 4.21, 9.4 & 14.4.

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ii. A Section 7 Decision Has Four Components

[121] What is a "decision under this section"?

[122] This is not a challenging query.

[123] Section 7 of the *Arbitration Act*[100] answers this question.

[124] A "decision under this section" has four components.

[125] First, there must be an application under section 7(1) of the *Arbitration Act*.[101]

[126] Second, the moving and nonmoving parties must have agreed to submit a difference the subject of the court proceeding to arbitration.[102]

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[100] R.S.A. 2000, c. A-43.

[101] *Hnatiuk v. Assured Developments Ltd*., 2012 ABCA 97, ¶ 40; 15 C.L.R. 4th 28, 38 ("The duty in s 7(1) of the *Arbitration Act* to stay the suit in favor of arbitration, applies only if that is sought 'on the application of another party to the arbitration agreement'. Here no party moved for a stay, even at trial"). The fact that the applicant invoked section 7 is not, by itself, determinative. But it is an essential criterion. *Cf. Toronto Standard Condominium Corp. No. 1628 v. Toronto Standard Condominium Corp. No. 1636*, 2020 ONCA 612, ¶ 91; 454 D.L.R. 4th 126, 154 per Jamal, J.A. (" I would ... reject ... [the] proposition, that s. 7(6) bars an appeal from any motion *brought* under s. 7. Section 7(6) refers to a 'decision', not to 'a motion brought', under s. 7. To state the obvious, a motion may be brought on one statutory basis, but the court's decision may be made on a different basis. Citing s. 7 in a notice of motion does not bar an appeal to this court. What matters is the statutory basis of the motion judge's 'decision' – whether the court's decision was *made* under s. 7") (emphasis in original).

[102] *A.G. Clark Holdings Ltd. v. HOOPP Realty Inc*., 2013 ABCA 101, ¶¶ 3 & 13; 361 D.L.R. 4th 101, 105 & 107 ("If the Agreement provides for the mandatory arbitration of disputes, then pursuant to s 7(1) of the *Arbitration Act*, HOOPP's court proceeding must be stayed to allow the arbitration to proceed (subject to the court's discretion to refuse to stay the proceeding in certain circumstances set out elsewhere in s 7). …. [I]f the motion judge holds there is no applicable arbitration agreement upon which the proceedings could be stayed, then s 7(6) cannot be successfully invoked to bar an appeal"); *Lafarge Canada Inc. v. City of Edmonton*, 2013 ABCA 376, ¶ 23; 25 C.L.R. 4th 208, 214 ("Whether an agreement contains a mandatory and relevant arbitration clause is a matter of contractual interpretation and has implications, *inter alia*, for whether the appeal bar in s. 7(6) of the *Arbitration Act* applies to the situation"); *Federal Arbitration Act*, 9 U.S.C. § 16(b)(1) ("Except as otherwise provided in section 1292(b) of title 28, an appeal may *not* be taken from an interlocutory order … granting a stay of any action under section 3 of this title"); *Eggiman v. Martin*, 2019 ONCA 974, ¶ 8, leave to appeal ref'd, [2020] S.C.C.A. No. 44 ("There is no appeal to this court from the order of the motion judge. Section 7(6) is very clear on this point. If it is determined that the arbitration provision applies to the issue that is raised in the proceeding, and thus s. 7 is invoked, then s. 7(6) precludes any appeal from the decision rendered respecting the motion to stay, whether that order grants or refuses the stay"); *Abbey Resources Corp. v. Andjelic Land Inc*., 2020 SKCA 125, ¶ 22 per Richards, C.J. ("The trial judge concluded that the arbitration clauses in the leases between Abbey and Andjelic did *not* apply in the circumstances at hand. As a result, he did not make a 'decision pursuant to this section' as per s. 8(6) of the *Arbitration Act*. Abbey is therefore not barred from pursuing this appeal") (emphasis added); *Brown v. Murphy*, 59 O.R. 3d 404, 408 (C.A. 2002) per Charron, J.A. ("a decision by the motions court that a matter was *not* subject to arbitration under the terms of the arbitration agreement fell outside the scope of s. 7 and a right of appeal lay to this court from that decision") (emphasis added) & *Huras v.*

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[127] If a court in a section 7 application determines that the parties have agreed to submit all the differences the subject of the court proceeding to arbitration and stays the court proceeding, the order staying the court proceeding is not appealable.[103]

[128] Suppose P, a prominent professional athlete, and L, a lawyer, enter into an agency agreement whereby P agrees to retain L to negotiate P's employment contract with X and endorsement agreements for a fee dependent upon a number of complex variables. Both P and L agree to submit any differences relating to fees L earns under the agreement to arbitrator W for final resolution. L successfully negotiates P's employment contract with X and endorsement contracts with an automobile manufacturer, a watchmaker, a clothier, a distiller, a hotelier, and others. P and L cannot agree on the fee P must pay L for the automobile manufacturer and watchmaker endorsement contracts and L sues P. P invokes section 7 of the *Arbitration Act* and applies to a judge of the Court of Queen's Bench for a stay of L's proceeding. The court orders a stay – L's claim is a difference covered by their agency agreement and must be submitted to arbitration. Section 7(6) of the *Arbitration Act* applies. The Court of Appeal has no jurisdiction to hear an appeal by L.

[129] The opposite would be the case – the order is subject to appeal – if the Court of Queen's Bench determined that none of the differences the subject of a court proceeding were a difference under an arbitration agreement and dismissed a stay application.[104]

[130] Suppose L told a newspaper reporter that P abused his wife and used cocaine. The reporter's newspaper published these allegations. They were widely circulated. As a result, the automobile manufacturer and the watchmaker cancelled their endorsement contracts with P. P sues

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Primerica Financial Services Ltd., 137 O.A.C. 79, ¶ 10 (2000) ("Where there is no arbitration clause, the *Arbitration Act, 1991* has no application, or putting it another way, the dispute lies beyond the scope of s. 7. It follows that if the court has decided that the *Act* is not applicable, then the prohibition against an appeal in s. 7(6) is equally not applicable"). *Contra, Tatlow v. Carolina Homes Inc*., 2010 ABQB 412, ¶ 7 (the Court of Queen's Bench held that it had no jurisdiction to hear an appeal against a Provincial Court decision holding that the arbitration term did *not* apply to the dispute the subject of the proceeding).

[103] B. Casey, Arbitration Law of Canada: Practice and Procedure 366-67 (3d ed. 2017) ("Under the Domestic [arbitration] Acts, the court's decision on a motion to stay a proceeding in the face of arbitration is said to not be subject to appeal. However, if the Domestic Act does not apply, there is no prohibition on appealing. For example, if the court at first instance finds that there is no arbitration agreement, ... [or] the matter is not arbitrable, then the Domestic Act is not applicable and there is no prohibition on appealing. ... It is now well established that prohibition respecting appeal does not preclude an appeal from an order refusing to grant a stay on the ground that the matter is not subject to arbitration").

[104] K. McEwen & L. Herbst, Commercial Arbitration in Canada 3-183 (looseleaf rel. 17, 11/2020) ("a decision by the motions court that a matter (or, where applicable, all the claims) is not subject to arbitration under the terms of the arbitration agreement falls outside the scope of the stay provision and a right of appeal lies to the court of appeal from that decision").

L for defamation. L applies for a stay of P's defamation action. P and L never agreed to submit the issue of defamation to arbitrator W. A stay would be inappropriate.

[131] If a court determines that the parties have agreed to submit some of their differences the subject of a court proceeding to arbitration but not all and stays, under section 7(5), the differences the parties have agreed to submit to arbitration and allows the other differences to be litigated or stays all of the differences in the court proceeding, such an order is not appealable.

[132] Suppose under the agency agreement L's entire fee on endorsement contracts is paid from the first of the periodic endorsement payments made to P. P claims that L owes him a portion of the fee P has already paid L. P sues L for defamation and claims that L owes P for a portion of the sums P has already paid L for the endorsement agreements with the automobile manufacturer and the watchmaker. L, relying on section 7 of the *Arbitration Act*, applies to the Court of Queen's Bench for a stay of P's court proceeding. The court, citing section 7(5), grants the stay of P's proceeding satisfied that it would be unreasonable to separate the differences and to have arbitrator W resolve the contest as to the fees owed and the court resolve the defamation action. The two are too closely connected to separate them. The Court of Appeal would have no jurisdiction, on account of section 7(6) of the *Arbitration Act*, to hear an appeal by L.

[133] Had the court come to the opposite conclusion and, on account of section 7(5) of the *Arbitration Act*, stayed the difference relating to the fees owed and allowed the defamation action to proceed, the Court of Appeal would also be without jurisdiction to hear an appeal against a partial stay.

[134] Or there may be a controversy as to the applicability of concepts that deprive the terms of the parties' agreement of their force – such as waiver[105] – or a debate as to the applicability of the criteria under section 7(2) of the *Arbitration Act*. If the court adjudges that the difference the

[105] A. Swan, J. Adamski & A. Na., Canadian Contract Law 132 (4th ed. 2018) ("The party who waives strict compliance with the contract may not – or at least not without giving notice – insist on punctual and exact performance"); J. McCamus, The Law of Contracts 305 (3d ed. 2020) ("The doctrine of waiver is commonly illustrated by reference to the decision of the House of Lords in *Hughes v. Metropolitan Rwy Co*. In this case a landlord had given a notice to the tenant pursuant to the terms of the lease, requiring that certain repairs be made by the tenants within six months. The tenant replied that he was willing to do the repairs but he would like to enter into negotiations for the sale of the leasehold interest to the landlord and further indicated that he would not undertake the repairs during negotiations to that end. The negotiations broke off a few months later and when six months from the initial notice to repair had expired, the landlord purported to treat the lease as forfeited and brought an action to eject the tenant from the premises. The House of Lords dismissed the claim on the basis that the 'course of negotiation ... of the parties' had led the tenant to believe that the time limit for repairs would not be strictly enforced by the landlord and accordingly, that the landlord would not be permitted to enforce it. The landlord had waived his right to insist on strict performance of the agreement and could not now insist on doing so") & E. Farnsworth, Contracts 523 (4th ed. 2004) ("A common ground for excuse of a condition is that, after the contract was made, the obligor promised to perform despite the nonoccurrence of the condition or despite a delay in its occurrence. Such a promise is known as waiver").

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subject of the court proceeding is the subject of an agreement to arbitrate, the dissatisfied party cannot appeal.

[135] It makes no sense to insulate an original court's order from an appeal in order to expedite the arbitration process in the absence of a judicial determination that the parties agreed to submit the difference the subject of a court proceeding to arbitration.[106]

[136] Third, the nonmoving party has commenced an action in the court against the moving party.[107] A party to an arbitration agreement cannot claim that another party has dishonored the arbitration agreement until the other party has actually commenced an action.

[137] Fourth, the adjudicator – a judge or a master in chambers of the Court of Queen's Bench[108] or a judge of The Provincial Court of Alberta – must issue a decision – stay the action commenced

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[106] Courts in Alberta have heard appeals from decisions involving stay applications under section 7 if there was *no* applicable arbitration agreement. *E.g., A.G. Clark Holdings Ltd. v. HOOPP Realty Inc.*, 2013 ABCA 101; 361 D.L.R. 4th 101, rev'ing 2012 ABQB 567 (allowed appeal from decision of chambers judge who dismissed application to strike or stay under section 7 the action because the contract clause did not make arbitration mandatory but rather made it available and required it only for disputes not resolved by other means including mediation, finding that the chambers judge misinterpreted the agreement that did make arbitration mandatory and remitting the matter back for determination on remaining issues, also concluding that section 7(6) did not bar the appeal because it does not apply to a decision that there is no applicable arbitration agreement upon which the proceedings could be stayed, such as that arbitration is not mandatory, but it would bar that court's determination on the remaining issues); *Millennial Construction Ltd. v. 1021120 Alberta Ltd.*, 2005 ABQB 533 (dismissed appeal from unreported decision of master who declined to grant a stay under section 7, on the basis that arbitration was only an option and not mandatory under the contract so that section 7 does not apply and alternatively dismissed the stay application for undue delay, without discussing section 7(6)) & *Young v. Dollar Financial Group Inc.*, 2013 ABCA 264; 364 D.L.R. 4th 341, aff'ing 2012 ABQB 601; 356 D.L.R. 4th 346, leave to appeal ref'd, [2013] S.C.C.A. No. 399 & [2013] S.C.C.A. No. 400 (dismissed appeal from decision of chambers judge who dismissed motion to stay proceedings under section 7(1) because the arbitration clauses in the consumer contracts at issue did not govern).

[107] *Agrium Inc. v. Babcock & Wilcox Canada Ltd.*, 2005 ABCA 82, ¶ 12; 11 C.P.C. 6th 108, 112 per Fruman, J.A. ("In this case the parties used mandatory language and none of the s. 7(2) exceptions apply. Because the underlying arbitration is statute-barred, the statement of claim should be dismissed") & *HOOPP Realty Inc. v. A.G. Clark Holdings Ltd*., 2014 ABCA 20, ¶ 7; 31 C.L.R. 4th 173, 177, leave to appeal ref'd, [2014] S.C.C.A. No. 87 per Paperny, J.A. ("The chambers judge correctly interpreted this Court's decision in *Babcock & Wilcox*, which holds that if the parties have agreed that they must arbitrate a dispute, but one party has issued a statement of claim and has not commenced arbitration within the limitation period for arbitration, then the court must strike out the claim [under rule 3.68 of the *Alberta Rules of Court*]").

[108] See *Wang v. Mattamy Corp*., 2020 ONSC 7012, ¶ 17 per Penny, J. ("Master Muir's decision 'falls squarely' within the provisions of s. 7. Accordingly, it is not appropriate for the court to engage in an analysis of the Master's decision because any review of it is precluded by s. 7(6)"), review ref'd, 2021 ONSC 2635 (Div. Ct.) ¶¶ 6-7 per Favreau, J. ("In his endorsement, the motion judge identified the correct test for deciding whether to extend the time for an appeal, which includes consideration of the merits of the appeal. He ... correctly found that section 7(6) of the Arbitration Act, 1991 is a complete bar to the appeal. Section 7(6) of the Act provides that there is no appeal from a decision of the court staying an action on the basis of an arbitration clause. ... I agree with the motion judge that, based on section 7(6) of the Arbitration Act, 1991, the proposed appeal is devoid of any merit").

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by the nonmoving party or dismiss the stay application allowing the nonmoving party to prosecute the action.[109] A ban against an appeal cannot be effective until there is a decision that might otherwise have been appealed.[110]

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[109] *Lafarge Canada Inc. v. City of Edmonton*, 2013 ABCA 376, ¶ 38; 25 C.L.R. 4th 208, 217 ("Therefore, there has been no decision whether the City by its conduct waived its right to insist on the arbitration clause and attorned to the trial jurisdiction of the Court of Queen's Bench or whether a motion for a stay has been unduly delayed such that the Court of Queen's Bench should exercise its jurisdiction under the *Arbitration Act* to refuse to stay the action"); *Lamb v. AlanRidge Homes Ltd.*, 2009 ABCA 343, ¶ 11; 312 D.L.R. 4th 719, 723, aff'ing 2009 ABQB 170; 309 D.L.R. 4th 214, leave to appeal ref'd, [2009] S.C.C.A. No. 520 ("We have concluded that the decision of the chambers judge was made under section 7 [dismissed a stay application and allowed arbitration to proceed in part], so that subsection (6) applies, and no appeal lies to this Court") & *Brown v. Murphy*, 59 O.R. 3d 404, 407-08 (C.A. 2002) per Charron, J.A. ("the bar under s. 7(6) [of Ontario's *Arbitration Act, 1991*] applied to any decision by the motions court under s. 7 to grant or refuse a stay of 'a proceeding in respect of a matter to be submitted to arbitration under the agreement' within the meaning of s. 7(1)") (emphasis omitted). See B. Casey, Arbitration Law of Canada: Practice and Procedure 366-67 (3d ed. 2017) ("Under the Domestic Acts, the courts' decision to refuse a stay of proceedings or, alternatively, its decision to stay court proceedings and permit the arbitration to continue is said to be not subject to appeal. However, if the Domestic Act does not apply, there is no prohibition on appealing. For example, if the court at first instance finds that there is no arbitration agreement, the matter is not arbitrable, then the Domestic Act is not applicable and there is no prohibition on appealing. ... If the stay is under the court's inherent power to control its own proceedings and not under the Domestic Act then normal appeal rights also flow. ... It is now well-established that prohibition respecting appeal does not preclude an appeal from an order refusing to grant a stay on the ground that the matter is not subject to arbitration").

[110] Courts in Alberta have considered appeals from decisions involving stay applications under section 7 where the decisions related to arbitration but were not made under section 7, sometimes considering the applicability of the section 7(6) bar on appeals. E.g., *Lafarge Canada Inc. v. City of Edmonton*, 2013 ABCA 376; 25 C.L.R. 4th 208, rev'ing 2012 ABQB 634 (allowed appeal from decision of chambers judge who dismissed application to strike under r. 3.68 or stay under section 7 a claim and declare that arbitration is past limitation period on the basis that there was no limitations defence and the statement of claim constituted notice of arbitration, finding that the claim could not be notice of arbitration and remitting matter back to the Court of Queen's Bench to decide stay application, noting that section 7(6) did not prevent the appeal because the chambers judge did not finally decide whether the claim should be stayed) & *International Resource Management (Canada) Ltd. v. Kappa Energy (Yemen) Inc.*, 2000 ABCA 236; 266 A.R. 175 (denied application for summary dismissal of appeal from decision of chambers judge who dismissed appeal from decision of master who granted a stay of proceedings under section 7 on condition that applicant pay into a trust account the invoices in dispute in the action before it can proceed with the arbitration, condition that the respondents had cross-applied for, on the basis that section 7(6) does not bar the appeal because both the master and chambers judge imposed conditions on the arbitration, not on the stay, so it is not a decision under section 7; the Court later allowed the appeal, set aside the chambers judge's order imposing the condition and granted a unconditional stay: 2001 ABCA 146; 281 A.R. 373). *Contra*, *Yaworski v. Gowling Lafleur Henderson LLP*, 2013 ABCA 21, aff'ing 2012 ABQB 424, leave to appeal ref'd, 459 N.R. 395 (note) (dismissed appeal from decision of chambers judge who granted a stay of proceedings against personal plaintiff pending arbitration between plaintiff's professional corporation and the defendant under section 7 and under section 18 of *Judicature Act* insofar as court had no jurisdiction with respect to personal plaintiff under section 7 because he was not a party to the arbitration agreement, agreeing that two sections combined provided the jurisdiction to grant the stay and noting that the arbitration would give the plaintiff, through his personal corporation, effectively everything he sought in the claim, without discussing section 7(6)); *Hnatiuk v. Assured Developments Ltd.*, 2012 ABCA 97; 15 C.L.R. 4th 28, rev'ing 2010 ABQB 258; 92 C.L.R. 3d 216 (allowed appeal from decision of trial judge who dismissed action commenced after an arbitral award was made on the ground

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iii. The Prohibition Against Appeals Applies to Decisions of Both Masters in Chambers and a Judge of the Court of Queen's Bench

[138] Does the prohibition against appeals apply to decisions of both masters in chambers and judges of the Court of Queen's Bench?

[139] It does.

[140] The operative words in section 7(6) are "[t]here is no appeal". This is straightforward.

[141] A party adversely affected by a decision of a judge of The Provincial Court of Alberta or a master in chambers is bound by it unless a judge of the Court of Queen's Bench of Alberta has authority to hear an appeal on account of section 46(1) of the *Provincial Court Act*[111] – "Any party may appeal a decision of the Provincial Court to the Court of Queen's Bench" – or section 12 of the *Court of Queen's Bench Act*[112] – "An appeal lies to a judge in chambers from a decision of a master in chambers" – and allows the appeal.

[142] Because section 7(6) prohibits appeals of a section 7 order, a judge of the Court of Queen's Bench has no jurisdiction to hear an appeal against a section 7 order of a judge of the Provincial Court or a master in chambers.

[143] If a moving party applied for a stay to a judge of the Court of Queen's Bench, a party adversely affected by the subsequent section 7 decision is bound unless the Court of Appeal has authority to hear an appeal on account of section 3(b)(iv)(A) of the *Judicature Act*[113] – "The Court of Appeal ... (b) has jurisdiction and power, subject to the Rules of Court, to hear and determine ... (iv) all appeals ... respecting a judgment, order or decision of (A) a judge of the Court of Queen's Bench" – and allows the appeal.

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of *res judicata* because parties should have raised the issues in the claim during the arbitration, on the basis that no one applied for a stay under section 7 and the defendant waived his right to arbitration and attorned to the court's jurisdiction by participating in the litigation for years, and even if an application under section 7 were made the delay for it would be gross, without mentioning section 7(6)) & *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280; 245 D.L.R. 4th 107, rev'ing in part 2003 ABQB 509 (allowed appeal from part of decision of chambers judge who dismissed application for declaration to stay arbitration (not litigation) in favour of concurrent court proceedings in which the applicant relied on, among others, multiplicity of proceedings and abuse of process, staying the arbitration under the court's "residual jurisdiction to prevent unfairness set out in section 6(c)" on the basis that litigation was necessary as it involved parties not subject to the arbitration agreement and the legislature's amendments to section 7 recognizes that multiple proceedings on the same matter are undesirable, without discussing section 7(6) and where no party sought a stay of the court proceedings under section 7).

[111] R.S.A. 2000, c. P-31.

[112] R.S.A. 2000, c. C-31.

[113] R.S.A. 2000, c. J-2.

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[144] Because section 7(6) prohibits appeals of a section 7 order, the Court of Appeal has no jurisdiction to hear an appeal against a section 7 order of a judge of the Court of Queen's Bench of Alberta.

[145] There is only one plausible or permissible meaning that section 7(6) of the *Arbitration Act* bears. A party that is bound by a mandatory arbitration agreement and adversely affected by a stay application decision under section 7 of the *Arbitration Act* may not appeal a decision of a judge of The Provincial Court of Alberta or a decision of master in chambers to a judge of the Court of Queen's Bench or a decision of a judge of the Court of Queen's Bench to the Court of Appeal.

[146] This means that a judge of the Court of Queen's Bench had no jurisdiction to hear an appeal against the decision of Master Prowse.

[147] In order for the *Arbitration Act*[114] to allow appeals from a master in chambers to a judge of the Court of Queen's Bench, section 7(6) would have to look like this: "There is no appeal from a decision of a judge of The Provincial Court of Alberta to a judge of the Court of Queen's Bench or of a judge of the Court of Queen's Bench to the Court of Appeal under this section". This version – by making no mention of a decision of a master in chambers – does not, in any way, deprive section 12 of the *Court of Queen's Bench Act* – "An appeal lies to a judge in chambers from a decision of a master in chambers" – of its full force.

3. General Provisions in the *Judicature Act*, the *Alberta Rules of Court*, and the *Court of Queen's Bench Act* that Allow Appeals of Queen's Bench Decisions Do Not Assist the Respondents

[148] As already noted, section 3(b)(iv)(A) of the *Judicature Act*[115] expressly states that the Court of Appeal has the general jurisdiction to hear and determine appeals from judgments, orders or decisions of a judge of the Court of Queen's Bench. To similar effect is rule 14.4(1) of the *Alberta Rules of Court*:[116] "Except as otherwise provided, an appeal lies to the Court of Appeal from the whole or any part of a decision of a Court of Queen's Bench judge sitting in court or chambers ... ."

[149] Section 12 of the *Court of Queen's Bench Act* states that "[a]n appeal lies to a judge in chambers from a decision of a master in chambers". So does rule 6.14(1) of the *Alberta Rules of Court*: "If a master makes a judgment or order, the applicant or respondent ... may appeal the judgment or order to a judge".

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[114] R.S.A. 2000, c. A-43.

[115] R.S.A. 2000, c. J-2.

[116] Alta. Reg. 124/2010.

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[150] But these provisions are general grants of authority. Specific statutory provisions may limit a general grant of authority. Professor Sullivan explains this concept:[117] "When two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be resolved applying the specific provision to the exclusion of the more general one". So do Justice Scalia and Professor Garner:[118] "If there is a conflict between a general provision and a specific provision, the specific provision prevails. … Under this canon, the specific provision is treated as an exception to the general rule". Justice Scalia and Professor Garner also explain why:[119] "Jeremy Bentham supplied the rationale: '[T]he particular provision is established upon a nearer and more exact view of the subject than the general, of which it may be regarded as a correction'. Or think of it this way: the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence". I agree. "It makes no sense to apply a general rule as opposed to a specific rule to a fact pattern expressly dealt with by the specific rule".[120]

[151] Suppose parents tell their teenage daughter at the start of her grade-twelve year that her curfew is midnight. But they also tell her and her date to her grade-twelve graduation celebration that she must be home by 2 a.m. the night of the prom. A reasonable observer would understand that the ordinary curfew is still in force for all evenings except the evening of the grade-twelve prom. There is a specific curfew for prom night that supersedes the general curfew.

[152] Section 7(6) of the *Arbitration Act*[121] is a specific rule for appeals of section 7(1) stay application orders. It applies in this case – not the general provisions incorporated in the *Judicature Act*,[122] the *Court of Queen's Bench Act*[123] and the *Alberta Rules of Court*.[124] As a result, the

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[117] The Construction of Statutes 354 (7th ed. 2022). See also *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) per Blackmun, J. ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment") *& The Queen ex rel. Vezina v. Canadian Broadcasting Corp.*, 84 C.C.C. 3d 574 (Ont. C.A. 1993), leave to appeal ref'd, [1993] S.C.C.A. No. 524 (*Canada Elections Act* provisions regulating broadcasters' obligations during a federal election to provide paid and free time to registered political parties, and not the *Broadcasting Act*'s general requirement that broadcasters treat accredited political parties equitably, govern the obligation of broadcasters during federal general elections).

[118] Reading Law: The Interpretation of Legal Texts 183 (2012).

[119] Id.

[120] *Acciona Infrastructure Canada Inc. v. Posco Daewoo Corp.*, 2019 ABCA 241, ¶ 176; 91 Alta. L.R. 6th 59, 105 per Wakeling, J.A.

[121] R.S.A. 2000, c. A-43.

[122] R.S.A. 2000, c. J-2, s. 3(b)(iv)(A).

[123] R.S.A. 2000, c. C-31, s. 12.

[124] Alta. Reg. 124/2010.

Judicature Act, the *Court of Queen's Bench Act* and the *Alberta Rules of Court* do not assist the respondents.

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C. Decisions of a Master in Chambers Under Section 7 of the *Arbitration Act* Are Subject to Appellate or Judicial Review

[153] Mr. Drewry, Q.C., counsel for Orbis Engineering, and Mr. Popowich, counsel for the Elliott companies, argue that section 7(6) of the *Arbitration Act*[125] contravenes section 96 of the *Constitution Act, 1867*[126] if it is interpreted to insulate decisions of a master in chambers under section 7(1) of the *Arbitration Act* from appeals to a judge of the Court of Queen's Bench. They ask us to interpret section 7(6) of the *Arbitration Act* so that it will comply with section 96 of the *Constitution Act, 1867* – allow a judge of the Court of Queen's Bench to hear an appeal from a decision of a master in chambers.

[154] The argument,[127] as I understand it, goes as follows. First, masters in chambers are appointed by the provincial legislature. Second, a legislature cannot assign to a master the authority that a superior court justice appointed under section 96 of the *Constitution Act, 1867* would have. Third, because masters do not have authority "in their own right", a master cannot fetter the discretion of a Court of Queen's Bench judge, and as "final determination of a dispute between the parties must be done by a judge", a master's decision must always be subject to appeal. Fourth, on this basis, section 7(6) of the *Arbitration Act* cannot bar appeals from a master's decision even if they are entirely under section 7 of that act because doing so would grant the master authority that is the "exclusive purview" of a superior court judge.

[155] It is necessary to explore some of these points.

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[125] R.S.A. 2000, c. A-43.

[126] 30 & 31 Vict., c. 3 (U.K.).

[127] Factum of the Respondent Orbis Engineering Field Services Ltd. ¶¶ 83-84, 88 & 89-92. See also Factum of the Respondents Elliott Turbomachinery Canada, Inc. and Elliott Company ¶¶ 63-76.

[156] It is not contentious that section 96 of the *Constitution Act, 1867*[128] places limits on the authority that a provincial legislature may delegate or assign[129] to masters over and beyond the authority vested in this office prior to July 1, 1867.[130]

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[128] 30 & 31 Vict., c. 3 (U.K.).

[129] P. Hogg, Constitutional Law of Canada § 7:15 (5th ed. looseleaf rel. 2021-1) ("The courts have held that the provincial Legislatures may not confer on a body other than a superior, district or county court judicial functions analogous to those performed by a superior, district or county court. This little separation of powers doctrine has been developed to preclude evasion of the stipulations of ss. 96 to 100 of the Constitution Act, 1867. If ss. 96 to 100 of the Constitution Act, 1867 were read literally, they could easily be evaded by a province which wanted to assume control of its judicial appointments. The province could increase the jurisdiction of its inferior courts so that they assumed much of the jurisdiction of the higher courts; or the province could vest higher-court jurisdiction in a newly-established tribunal, and call that tribunal an inferior court or an administrative tribunal. It is therefore not surprising that the courts have added a gloss to s. 96 and the associated constitutional provisions. What they have said is this: if a province invests a tribunal with a jurisdiction of a kind that ought properly to belong to a superior, district or county court, then that tribunal, whatever its official name, is for constitutional purposes a superior, district or county court and must satisfy the requirements of s. 96 and the associated provisions of the Constitution Act, 1867. This means that such a tribunal will be invalidly constituted, unless its members (1) are appointed by the federal government in conformity with s. 96, (2) are drawn from the bar of the province in conformity with ss. 97 and 98, and (3) receive salaries that are fixed and provided by the federal Parliament in conformity with s. 100"); L. Abrams & K. McGuinness, Canadian Civil Procedure Law 155 (2d ed. 2010) ("as provincial appointees, masters cannot be vested with the essential jurisdiction of a section 96 judge under the *Constitution Act, 1867*") & G. Watson & D. McKay, Holmsted and Watson: Ontario Civil Procedure § 7:26 (looseleaf rel. no. 3, July 2022) ("Masters were provincially appointed court officers. By s. 96 of the *Constitution Act, 1867*, the federal government is given the exclusive power to appoint 'the Judges of the Superior, District, and County Courts.' Since masters were not so appointed, there are constitutional limits to the power that can be given to them"). See also *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 737 per Lamer, C.J. (s. 96 of the *Constitution Act, 1867* ... limits both Parliament and the provincial legislatures") & *Ontario v. Victoria Medical Building Ltd.*, [1960] S.C.R. 32, 43 (1959) per Judson, J. ("everything the Master does must be authorized by the *Rules of Practice, The Judicature Act* or some other statute. This does not mean, however, that the Legislature can assign any and all work to him. Section 96 operates as a limiting factor. If this were not so, there would be nothing to prevent the withdrawal of any judicial function from a s. 96 appointee and its assignment to the Master").

[130] G. Watson & D. McKay, Holmsted and Watson: Ontario Civil Procedure § 7:26 (looseleaf rel. no. 3, July 2022) ("Stated generally, subject to the jurisdiction acquired and exercised by masters prior to Confederation, a master could not exercise judicial power which historically could be exercised only by superior and district court judges: ... . This constitutional limitation was well established; less clear was the actual extent of the limitation. Moreover, the issue of what jurisdiction could be given to the master was merely a small part of the larger 's. 96 problem,' *i.e.*, what decision-making powers might the provinces assign to non-s. 96 courts or to provincial tribunals that are not courts at all. ... [T]he accepted general approach was to enquire whether the impugned function was one performed by the master at the time of Confederation. If so, it might be assigned to a master. If not, then the question was whether the jurisdiction was of the type usually exercised by a superior court judge or only 'proper' to be exercised by such a judge: ... . It is at this point that the case law becomes somewhat vague and confusing. It seems that the master might be given jurisdiction over steps designed to ready the case for trial, where one is necessary, and to police and enforce the rules of practice. However, the master could not be given jurisdiction to determine in a final manner the rights of the parties, at least where there was a genuine dispute as to those rights"); P. Hogg, Constitutional Law of Canada § 7:15 (5th ed. looseleaf rel. 2021-1) ("the difficulty lies in the definition of those functions that ought properly to belong to a superior, district or county court. The courts have attempted to fashion a judicially enforceable rule which would separate 's. 96 functions' from other adjudicatory functions. The attempt has not been successful, and it is difficult to predict with

[157] There are two constitutional rules that arise from the "Judicature" part of the *Constitution Act, 1867*.[131]

[158] First, the purpose of the "Judicature" part of the *Constitution Act, 1867* is to preserve the role of superior courts – the judges of which are appointed by the federal government[132] to courts established by a province – as the guardians of the rule of law.[133] Superior courts ensure that there

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confidence how the courts will characterize particular adjudicatory functions") & L. Abrams & K. McGuinness, Canadian Civil Procedure Law §2.120-121 (2d ed. 2010) ("In several of the provinces of Canada, a varying extent of jurisdiction is exercised by judicial officers of the court designated as 'masters' ... . In England, the office of master may be traced back several centuries, at least to the Court of Chancery. The masters were officers of that court, who would hear certain points in relation to Chancery cases assigned to them by the Chancellor. The chief of these offices – that of the Master of the Rolls – subsequently was re-classified into one of the most important of the judicial postings in England: effectively, the Master of the Rolls is the Chief Justice of the Court of Appeal. The offices of the other masters were abolished in 1852. In their place chief clerks were appointed, who exercised a jurisdiction in Chambers. In 1897, the name of the office was changed back to master. In the Courts of Common Law, the office of master was created in 1837. By the statute creating the office, masters were made officers of the court and were to be appointed to conduct the civil business thereof. In 1867, it was provided that the judges might empower the masters to transact all the business transacted by a judge in chambers not affecting the liberty of the subject"). See also *Polson Iron Works v. Munns*, 24 D.L.R. 18, 21-22 (Alta. Sup. Ct. Chambers 1915) per Harvey, C.J. ("in England the office of Master is several centuries old in the Court of Chancery. The Master were officers of the Court, but the chief of them, the Master of the Rolls subsequently developed into one of the most important of the judges and the offices of the others were subsequently abolished in 1852 and in their stead were appointed Chief Clerks who exercised a jurisdiction in Chambers. In 1897 the name was again changed to 'Master.' In the common Law Courts the office of Master was created in 1837. By the statute creating the office they were called officers of the Court, and were to be appointed to conduct the civil business thereof and in 1867 it was provided that the Judges might empower them to transact all the business transacted by a Judge in Chambers not affecting the liberty of the subject. In ... [*Halsbury*] vol. 9, 66 under the head of 'Officers', sec. 5, we find sub.-sec. 3, 'Masters of the Supreme Court.' In para. 142 it is stated that their duties are '(1) The control and superintendence of the central office of the Supreme Court (2) judicial work in Chambers, and (3) issuing directions in points of practice.' From the foregoing it is apparent that at the time of passing of the *B.N.A. Act* judicial work of the character now assigned to the Master in Chambers was being performed in both the English and Canadian Courts by persons designated by the name 'Master' or some other name, who, by the statutes providing for these offices, were termed 'officers' and not 'Judges' of the Court"); *Ontario v. Victoria Medical Building Ltd.*, [1960] S.C.R. 32, 43 (1959) per Judson, J. ("I am content to adopt the judgment of Harvey C.J.A. in *Polson Iron Works v. Munns* for its account of the historical origins of the office [of master] and the broad outlines of the jurisdiction") *& S.B.I. Management Ltd. v. 109014 Holdings Ltd.*, 1981 ABCA 235, ¶ 2; 128 D.L.R. 3d 89, 90, leave to appeal granted, [1981] S.C.C.A. No. 372 per Lieberman, J.A. ("The office of Master in Chambers evolved in England over a period of approximately two centuries until, in 1837 the *Superior Court (Officers) Act*, 1837 (U.K.), c. 30, authorized the appointment of officials to be known as 'Masters of the Court'. That office developed into the present office of 'Queen's Bench master'. The office of Master in Chambers was first established in Alberta in 1913 by the *Statute Law Amendment Act*, 1913 (Alta.), c. 9, which Act amended the *Judicature Ordinance*, C.O.N.W.T. 1898, c. 21. The *Judicature Ordinance* had been inherited from the Northwest Territories by Alberta when it became a province in 1905. The power of the Province to create the office of Master in Chambers emanates from s. 92, para. 14 of the *British North America Act, 1867*").

[131] 30 & 31 Vict., c. 3 (U.K.).

[132] The federal government also compensates superior court judges. *Judges Act*, R.S.C. 1985, c. J-1.

[133] W. Lederman, Continuing Canadian Constitutional Dilemmas 184-85 (1981) ("even though a statute has been enacted by a provincial legislature that is within provincial powers, nevertheless it may raise issues of interpretation

is a concordance between the tasks a legislature assigns to a lower court or a statutory delegate and the decisions made by a lower court or a statutory delegate. A lower court or statutory delegate has no jurisdiction to make a decision not within its assigned responsibilities.

[159] Second, a province cannot assign to an inferior court or an administrative tribunal it has created powers that a superior court must have to serve as the guardian of the rule of law.[134] Superior courts have essential or core powers that a province may not abridge.[135]

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and application that must be entrusted as an original matter to the provincial superior court, as constituted under section 96 of the B.N.A. Act. In other words, there is a guaranteed core of issues arising under valid provincial statutes that the province must assign to its provincial superior court as a matter of original jurisdiction. Title to land is one example, and unlimited jurisdiction to interpret contracts in general is another. ... [Section 96] compels a province to set up the superior courts on the English model ... and it compels the provinces to give them something to do. Our whole history points to this as a safeguard for the rule of law in our country") (emphasis in original). See *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 754 per Lamer, C.J. ("The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law") & *O. Martineau and Sons Ltd. v. City of Montreal*, [1932] A.C. 113, 121 (P.C. 1931) (Que.) per Lord Blanesburgh ("[Section 96 is] ... the means adopted by the framers of the ... [*British North America Act, 1867*] to secure the impartiality and the independence of the Provincial judiciary").

[134] P. Hogg, Constitutional Law of Canada § 7.15 (5th ed. looseleaf rel. 2021-1) ("the provincial Legislatures may not confer on a body other than a superior, district or county court judicial functions analogous to those performed by a superior, district or county court. ... It is ... not surprising that the courts have added a gloss to s. 96 and the associated constitutional provisions. What they have said is this: if a province invests a tribunal with a jurisdiction of a kind that ought properly to belong to a superior, district or country court, then that tribunal whatever its official name, is for constitutional purposes a superior, district or country court and must satisfy the requirements of s. 96 and the associated provisions of the Constitution Act 1867. This means that such a tribunal will be invalidly constituted, unless its members (1) are appointed by the federal government in conformity with s. 96, (2) are drawn from the bar of the province in conformity with ss. 97 and 98, and (3) receive salaries that are fixed and provided by the federal Parliament in conformity with s. 100").

[135] *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 748 per Dickson, J. (the Court upheld an opinion of the Ontario Court of Appeal opining that a provision in *The Residential Tenancies Act* bestowing on the Residential Tenancy Commission to order the eviction of tenants was unconstitutional on the ground that this was within the protected jurisdiction of Ontario's Superior Court: "The Residential Tenancy Commission is charged with the function of interpreting contracts and enforcing contractual rights through the exercise of the impugned powers. The Commission is to be empowered to do what a superior court has always done. It is clearly a Superior Court *quoad* those powers. The statutory provisions conferring those powers are therefore invalid"); *Reference re Section 6 of the Family Relations Act, S.B.C. 1978, c. 20 as amended*, [1982] 1 S.C.R. 62, 112-13 per Estey, J. (the Court upheld in part an opinion of the British Columbia Court of appeal that the *Family Relations Act* constitutionally authorized the Provincial Court to issue guardianship and custody family law orders: "[the] purpose and role [of section 96] ... is in no way jeopardized by the increasing recognition of the implementation of valid provincial programs through provincial administrative and judicial agencies. This will continue to be the case so long as that which is assigned to the provincial body does not have the effect in substance of conferring on that body a judicial function which 'broadly conform[s] to the type of jurisdiction exercised by the superior, district or county courts'"); *Québec v. Farrah*, [1978] 2 S.C.R. 638 (the Court upheld a decision of the Quebec Court of Appeal declaring unconstitutional a provision in Quebec's *Transport Act* that granted the Quebec Transport Tribunal exclusive and final appellate jurisdiction on any question of law from any decision of the Quebec Transport Commission, usurping the supervision role of Quebec's Superior Court); *Crevier v. Québec*, [1981] 2 S.C.R. 220, 238-39 (the Court allowed an appeal against a decision of

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[160] Orbis Engineering[136] does not take issue with the ability of a master to render a decision under section 7 of the *Arbitration Act*.[137] Rather, its contention appears to be that the master's decision cannot be final as only section 96 judges can make final determinations of parties' rights – which rests on the implicit premise that a decision under section 7 is a final determination of the rights of the parties.

[161] There is a difficulty with this. It conflates the "finality" of a decision that provides a resolution which brings the parties' dispute to an end – e.g., summary judgment or a trial decision – with that decision being "final" in the sense of not being subject to appeal – e.g., where the decision is protected by a privative clause or made by a court of last resort.

[162] For its position that a master's decisions must always be subject to review by a superior court judge, Orbis Engineering relies on numerous authorities that discuss the validity of specific grants of authority to a master.[138]

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the Quebec Court of Appeal reversing an order of the Superior Court quashing a decision of the Professions Tribunal that Quebec's *Professional Code* authorized it to decide questions of law arising from decisions of discipline committees and insulating it from judicial or appellate review) & *McEvoy v. New Brunswick*, [1983] 1 S.C.R. 704, 718-19 (the Court reversed the judgment of New Brunswick's Court of Appeal opining that Parliament could bestow exclusive jurisdiction on an inferior court to adjudicate indictable offences: "It has long been the rule that s. 96, although in terms an appointing power, must be addressed in functional terms lest its application be eroded. What then, is the relation between the proposed new statutory Court and s. 96? This is the key constitutional issue in the present case and, as we view the matter, the result is to defeat the new statutory Court because it will effectively be a s. 96 Court").

[136] The Elliott companies seem to generally mirror the position of Orbis Engineering. Factum of the Respondents Elliott Turbomachinery Canada, Inc., and Elliott Company ¶¶ 48-49, 62, 64 & 67-68 ("A decision of a Master is only an interim decision pending a determination by a judge, unless a party accepts it by electing to not appeal. The legislature would not have intended to make such decisions 'unappealable' without expressing that, as Justice Dilts correctly stated. There is long-standing expectation and judicial culture in Alberta that no decision of a Master is final ... . Justice Dilts was correct in that the purpose of section 7 is to limit appeals to the Court of Appeal – and it is not to foreclose appeal to a judge of the Court of Queen's Bench. Statutes are not in conflict, the sound policy that all decisions of first instance need be reviewable is maintained, and the constitutional entitlement to have a case heard by a judge is maintained. ... Section 96 of The Constitution Act, 1867 operates as a limiting factor on Masters' powers: the power of a federally appointed Justice prevails over that of a provincial appointee such as a Master in chambers. .... Elliott submits that barring an appeal from a Master to a Queen's Bench Justice would fetter the jurisdiction of the Justice, offending section 96 ... . The effect of section 96 is that parties are entitled to a hearing before a federally appointed Justice"). They add that Agrium has no right to appeal Justice Dilts' decision to this court. Id. ¶¶ 32 & 110.

[137] Factum of the Respondent Orbis Engineering Field Services Ltd. ¶ 103 ("if this Court determines that s. 7(6) of the *Arbitration Act* may bar an appeal from a master, Orbis submits the bar to appeal would only apply to decisions of a master which clearly fell within the parameters of s. 7").

[138] E.g. *Wright v. Disposal Services Ltd.*, 80 D.L.R. 3d 671, 674 (Alta. Sup. Ct. Trial Div. 1977) per Laycraft, J. ("It was urged upon me during argument that as the master had exercised his discretion, I should follow the practice of appellate courts and not interfere with that discretion even if I disagreed with the result, unless it was plainly based on wrong principle. In my opinion, however, the rule followed by the Appellate Division in an appeal from a trial judge involving an exercise of discretion does not apply to an appeal from the decision of a master in chambers. While that

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decision is entitled to the greatest respect, the discretionary jurisdiction possessed by a superior court trial judge cannot be fettered in any way by the previous decision of the master. The superior court judge possesses that jurisdiction by virtue of his federal appointment under the powers given the federal Crown by the *British North ... [America] Act*. His status resulting from that appointment cannot be diminished by the decision of the master appointed by the provincial Crown"); *Menduk v. Gore Mutual Ins. Co.*, 67 W.W.R. 573, 574 & 577 (Alta. Sup. Ct. 1969) per Sinclair, J. ("Counsel for the appellant says, in effect, that the appeal should be heard as though the application were being made *de novo*. On the other hand, counsel for the respondent urges that the appeal be treated as though it were from a discretionary order of a judge. .... [I]t is clear that an appeal to a judge of the supreme court from a discretionary decision of a master is to be treated as a review and a rehearing. The judge is in no way fettered by the previous exercise of the master's discretion, and is entitled to exercise his own discretion as though the matter came before him for the first time"); *Ontario v. Victoria Medical Building Ltd.*, [1960] S.C.R. 32, 38 (1959) per Kerwin, C.J. ("Notwithstanding the fact that mechanics' liens were unknown at the time of Confederation, my view is that Pomeroy [in Equity Jurisprudence ss. 1268-9] correctly stated the nature of the action given by *The Mechanics' Lien Act* [as 'ordinary equitable actions resulting in a decree for sale and distribution of the proceeds identical in all their features with suits for the foreclosure of mortgages by judicial action'] and that ... the jurisdiction conferred upon the Master by subs. (1) of s. 31 of *The Mechanics' Lien Act* broadly conforms to the type of jurisdiction exercised by the Superior, District or County Courts at Confederation"), 41-42 per Judson, J. ("This is not a case where the Province has appointed a new judicial officer to preside over a newly created court or tribunal but one where the Province has increased the jurisdiction of a judicial officer already appointed by the Province. There is no question here of the use of a device to create a new s. 96 court with a new s. 96 judge under another name. What is happening is that work is being redistributed within the s. 96 court itself and new work assigned to a provincially appointed judicial officer. In a sense it is not even an exclusive assignment when a judge of the court, on motion by one of the parties, has the power of removal under s. 31(2). Nevertheless, it is my opinion that the judgment under appeal is well founded and that this legislation is in conflict with the appointing power under s. 96 of the *British North America Act*, and I reach this conclusion for two reasons — the nature of the jurisdiction which is conferred upon the Master and the fact that he is given the power of final adjudication in these matters, subject to the usual right of appeal to the Court of Appeal as from a single judge"); *Polson Iron Works v. Munns*, 24 D.L.R. 18, 22 (Alta. Sup. Ct. Chambers 1915) per Harvey, C.J. ("It is perfectly clear, of course, that the legislature could not provide for the office [of master] either specifically or generally and leave the executive or the Judges to give him a jurisdiction which would make him practically a Judge, but, in my opinion, that has not been done here. The Judge's chief duty is to determine the rights of parties in the first instance by trial, and subsequently on appeal. The practice and procedure is for the purpose of accomplishing these results, advantageously and expeditiously. The work in Chambers is practically all leading up to trial and appeal. It is to this subsidiary work that the Master's jurisdiction is confined. The order under consideration is perhaps the nearest approach to determining the rights of parties by trial that the rules authorize the Master to make. But in reality, he is not trying the rights of the parties. He is determining that there is no real issue to be tried. It is only when such a situation is found to exist that the Master is authorized to give a judgment in favor of the plaintiff. When he gives a judgment in favor of the defendant apparently all he does is to give effect to and enforce some rule of practice e.g. for failure to prosecute the action as required by the rules. The Master has no jurisdiction in trials or in appeals and all of his acts are subject to review by a judge. His office is essentially that of an officer preparing litigation for its legitimate purpose, *viz.* a trial of the rights of the parties which is exclusively reserved for the judges to whom it essentially belongs. His duties, therefore, while largely judicial in their character, do not constitute him a judge since from them are reserved the essential duties of a judge"); *Colonial Investment & Loan Co. v. Grady*, 24 D.L.R. 176, 176, 178 & 179 (Alta. Sup. Ct. App. Div. 1915) per Stuart, J. ("the Legislative Assembly of Alberta provided a special method of procedure for the enforcement of rights under mortgages, encumbrances and agreements of sale. Section 3 of that Act reads as follows: – 'All proceedings to secure or enforce any right, remedy or obligation under a mortgage, encumbrance or agreement of sale, or in respect of the lands, moneys, covenants, conditions, stipulations or agreements described or contained therein, *shall be brought before a Master in Chambers in the Supreme Court of Alberta under the provisions of this Act and as nearly as may be in accordance with the practice and procedure of the said Court*.' .... [T]he Master was 'to have jurisdiction to hear all evidence, adjourn all hearings, grant all orders, pronounce all judgments, and to do all other

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[163] It is not clear how these cases support Orbis Engineering's position. Given its concession that a master may render a decision under section 7, the only issue arising from the argument as framed is whether the absence of a right to appeal to a Court of Queen's Bench judge renders Alberta's assignment of jurisdiction to the master *ultra vires* the Alberta legislature.

[164] It would seem that the argument comes down to whether a provincial legislature can assign to a master decision-making authority that can properly rest in that office but that is insulated from appeal to a section 96 judge.

[165] The argument assumes that a decision of a master in chambers is not subject to appeal or judicial review.

[166] As I will explain, this is not the case.

[167] A determination that section 7(6) of the *Arbitration Act*[139] prohibits appeals from orders of a master in chambers under section 7(1) of the *Arbitration Act* to a judge of the Court of Queen's Bench does not mean that a decision of a master in chambers is immune from appellate or judicial review.

[168] First, an order of a master in chambers under section 7(1) of the *Arbitration Act* is, for the purpose of section 40(1) of the *Supreme Court Act*,[140] a "final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province ... in which judgment can be

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acts or things that may be necessary in *finally* disposing of such proceedings,' and this subject only to certain conditions of procedure and certain enactments by way of substantive law which in no way limited his final and complete jurisdiction. It is obvious that it was left entirely in the discretion of the Master to decide whether or not he should exercise powers which were undoubtedly as full and complete as those held by a Judge of the Supreme Court. He could, indeed, if he thought best, direct an action to be brought or an issue to be tried, but it was still open to him to hear oral evidence as at a trial and to give as full and as final a judgment as a Judge of the Court could give, no matter what issue of fact, *e.g.*, fraud or other ground of defence, might have been raised. He was to do all this 'in the Supreme Court.' It seems to me that it is impossible to avoid the conclusion that by such legislation the Master was constituted in effect a Judge of the Supreme Court with a jurisdiction limited indeed to its *extent* but not in its *content*, that is, limited to a certain very important branch of litigation, but practically unlimited within that sphere, and subject only with respect to his final judgment to an appeal to the Appellate Division in the same way as a final judgment of any ordinary Judge of the Supreme Court. For this reason I think the legislation was *ultra vires* of a Provincial Legislature, inasmuch as it was inconsistent with the appointing power expressly given to the Dominion in the B.N.A. Act") (emphasis in original) *& S.B.I. Management Ltd. v. 109014 Holdings Ltd.*, 1981 ABCA 235, ¶¶ 41, 42 & 60; 128 D.L.R. 3d. 89, 100 & 105 per Lieberman, J.A., leave to appeal granted, [1981] S.C.C.A. No. 372 ("That a Master, in the proper case, can grant summary judgment is beyond dispute. ... In the present case, the Master held that there was no triable issue. He was on the facts entitled and, I might say, compelled to so find. The question becomes whether granting an order for possession in these circumstances can be regarded as analogous to granting summary judgment. In my view, it can. .... Applying the threefold test to the situation faced by the Master in this case, I have no hesitation in coming to the conclusion that he did have jurisdiction to grant the order for possession").

[139] R.S.A. 2000, c. A-43.

[140] R.S.C. 1985, c. S-26.

had in the particular case" and, with leave of the Supreme Court of Canada, may be appealed to the Supreme Court of Canada.[141] The Supreme Court of Canada is a superior court.[142] It follows that an order of a master in chambers under section 7(1) of the *Arbitration Act* is not immune from appellate review. This, in my opinion, is a complete answer to Orbis Engineering's constitutional argument.

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[141] *Uber Technologies Inc. v. Heller*, 2020 SCC 16, n. 5 per Abella & Rowe, JJ. ("if the motion judge had issued a stay under the ... [*Arbitration Act*], no appeal to the Court of Appeal would have been available (... [*Arbitration Act*] s. 7(6)). A direct appeal to this Court with leave would still have been permissible"); *Argentina v. Mellino*, [1987] 1 S.C.R. 536, 545 per La Forest, J. ("This appeal is brought under s. 41 [now section 40(1)] of the *Supreme Court Act* ... which in broad terms empowers this Court to grant leave to appeal from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in a particular case. The Act again underscores the breadth of the provision in s. 2(1) by defining 'the court appealed from' as 'the court from which the appeal is brought directly to the Supreme Court, whether such court is one of original jurisdiction or a court of appeal', and 'final judgment' as 'any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding'. On a plain reading of these provisions ... it [is] obvious that s. 41 applied to the present case. The decision of Waite J., from which this appeal is taken, finally dismissed the application for extradition") & *Le Syndicat des employés de bureau de l'Hydro-Québec v. Québec*, [1973] S.C.R. 790, 791 ("The Court, being of the opinion that the judgment of the Honourable Jean Saint-Germain of the Superior Court, granting ... the petition presented by the Attorney General of the Province of Quebec under s. 99 of the *Labour Code of Quebec*, is, in law, a judgment from which an appeal lies to the Court of Appeal of the Province of Quebec, it follows that no appeal lies from that judgment to this Court under s. 41 [now section 40(1)] of the *Supreme Court Act*").

[142] Lederman, "The Independence of the Judiciary" 34 Can. B. Rev. 769, 1175 (1956) ("Section 101 of the B.N.A. Act contemplates the establishment of federal superior courts. This arises from the use of the word 'court' in the section, and indeed the 'General Court of Appeal for Canada' would necessarily and preeminently be a superior court on the English model. To consider that section 101 could mean anything else would be so incongruous as to be absurd"). See *Addy v. Canada*, 22 D.L.R. 4th 52, 60 (Fed. Ct. Tr. Div. 1985) per Grant, J. ("the Supreme Court of Canada and the Federal Court of Canada are superior courts within the meaning of s. 99(2) of the *Constitution Act, 1867*, and that the judges of both ... courts are ... superior court judges"). A court is presumably either superior or inferior. There is no third option. But the terms may take on different meanings depending on context. See P. Hogg, Constitutional Law of Canada § 7:14 (5th ed. looseleaf rel. 2021-1) ("Do the provisions of ss. 96 to 100 of the Constitution Act, 1867, dealing with appointment, payment and tenure of higher court judges, apply to the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the higher territorial courts? There is no doubt that those courts are 'superior courts'). See also *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35(1) ("*In every enactment … 'superior court'* means (a) in the Province of Newfoundland and Labrador, the Supreme Court, (a.1) in the Province of Ontario, the Court of Appeal for Ontario and the Superior Court of Justice, (b) in the Province of Quebec, the Court of Appeal and the Superior Court in and for the Province, (c) in the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, the Court of Appeal for the Province and the Court of Queen's Bench for the Province, (d) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Court of Appeal and the Supreme Court of the Province, and (e) the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice, and *includes the Supreme Court of Canada*, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada") (emphasis added).

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[169] Second, given that a master in chambers is not a section 96 superior court judge, it is arguable that a party may apply to a judge of the Court of Queen's Bench for judicial review[143] of a master in chambers' decision under section 7 of the *Arbitration Act*.[144] While it is true that the availability of an appeal to the Supreme Court of Canada under section 40(1) of the *Supreme Court Act* would cause a reviewing court to consider whether this is a sufficient reason to decline to hear a judicial review application,[145] it is not obvious to me what the outcome of that issue would be.

[170] If the judicial review court concluded that section 40(1) of the *Supreme Court Act*[146] provided an adequate alternative remedy, it may decline to grant any relief. If the court came to the opposite conclusion, it may decide to grant a judicial review remedy.

[171] Section 7(6) of the *Arbitration Act*[147] does not deprive section 40(1) of the *Supreme Court Act* of its force.

[172] First, Alberta does not have the constitutional authority to regulate the jurisdiction of the Supreme Court.[148] Only Parliament has the authority to do so.[149] As a result, the presumption of

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[143] D. Jones, Q.C. & A. de Villars, Q.C., Principles of Administrative Law 7 (7th ed. 2020) ("Superior courts have the inherent power to review the legality of administrative actions performed by statutory delegates; in other words, they have the inherent power to judicially review the actions or decisions of statutory delegates. This inherent power of judicial review is the natural consequence of the courts' role to interpret the meaning of statutes, including determining the ambit of statutes which grant powers to statutory delegates. Courts decide whether administrative actions are *ultra vires*. Superior courts have historically used the prerogative remedies of *certiorari, mandamus*, prohibition, *quo warranto* and *habeas corpus* to exercise supervisory jurisdiction over *inferior courts* and statutory delegates") (emphasis added).

[144] R.S.A. 2000, c. A-43.

[145] *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 592 per Beetz, J. ("I have reached the conclusion that appellant's right of appeal to the senate committee provided him with an adequate alternative remedy [to judicial review]. In addition, this remedy was in my opinion a more convenient remedy for appellant as well as for the university in terms of costs and expeditiousness") & *Chad Investments Ltd. v. Longson, Tammets & Denton Real Estate Ltd*., 20 D.L.R. 3d 627, 631 (Alta. Sup. Ct. App. Div. 1971) per McDermid, J.A. ("It is a wrongful exercise of judicial discretion, unless there are special circumstances, to grant an order of certiorari where the party aggrieved has been given an effective right of appeal which the party has not taken advantage of and which has expired"). See D. Jones, Q.C. & A. de Villars, Q.C., Principles of Administrative Law 602 (7th ed. 2020) ("the existence of a statutory right of appeal may result in a court exercising its discretion to refuse to grant judicial review of a statutory delegate's decision, and, as a result, deny the remedies available on judicial review").

[146] R.S.C. 1985, c. S-26.

[147] R.S.A. 2000, c. A-43.

[148] L. Watt, G. Ragan, G. Régimbald, J. Beedell & M. Estabrooks, Supreme Court of Canada Practice (2022) 1.1 ("Where a provincial statute has removed the right of appeal to a provincial court of appeal, a direct appeal will lie to the [Supreme] Court with leave. In other words, a province cannot constitutionally deprive litigants of an appeal to the Court by legislating that there shall be no further appeal from a judgment of a provincial appellate court").

[149] *Crown Grain Co. v. Day*, [1908] A.C. 504, 507 (P.C.) (Can.) per Lord Robertson ("It is to be observed that the subject in conflict [the jurisdiction of the Supreme Court of Canada] belongs primarily to the subject-matter committed

validity means that section 7(6) of the *Arbitration Act* only limits the jurisdiction of judges of the Court of Queen's Bench and the Court of Appeal – courts established by provincial legislation[150] – to hear appeals against orders of masters in chambers and judges of the Court of Queen's Bench respectively.

[173] Second, if Alberta does have the constitutional authority to preclude appeals from a master in chambers or a judge of the Court of Queen's Bench to the Supreme Court of Canada, which I am satisfied it does not, the doctrine of dominion paramountcy[151] resolves the conflict between section 7(6) of the *Arbitration Act* and section 40(1) of the *Supreme Court Act* in favor of the *Supreme Court Act*. As Professor Lederman opines, if the dominion paramountcy doctrine is engaged, "provincial legislation is suspended or inoperative".[152]

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to the Dominion Parliament, namely, the establishment of the Court of Appeal for Canada. But, further, let it be assumed that the subject-matter is open to both legislative bodies [Manitoba and Parliament]; if the powers thus overlap, the enactment of the Dominion Parliament must prevail") & *Re Sutherland*, 134 D.L.R. 3d 177, 181 (Man. C.A. chambers 1982) per Huband, J.A. ("The *Payment of Wages Act* purports to make the decision of the County Court Judge 'final'. But the *Supreme Court Act* recognizes the possibility of an appeal to the Supreme Court of Canada from any 'final or other judgment of the highest court of final resort in a province'. For the purposes of the *Payment of Wages Act*, there can be no doubt but that the provincial legislature has endeavoured to constitute the County Court as the Court of final resort in a Province. But in doing so, the provincial legislature has not attempted to foreclose an appeal to the Supreme Court of Canada"). See P. Hogg, Constitutional Law of Canada § 8:5 (5th ed. looseleaf rel. 2021-1) ("If a province would prefer that litigation in a field within provincial jurisdiction be finally disposed of at the level of the provincial court of appeal, it cannot constitutionally give effect to that preference").

[150] *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31 & *Court of Appeal Act*, R.S.A. 2000, c. C-30.

[151] Lederman, "Classification of Laws and the British North America Act" in Legal Essays in Honour of Arthur Moxon 202 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 244-45 (1981) ("it is a principle of our constitution that in the event of a collision between a federal law and a provincial law each valid under the double-aspect theory, the federal features of the former law are considered in the last analysis more important than the provincial features of the latter") & *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶ 32; [2007] 2 S.C.R. 3, 30 per Binnie & LeBel, JJ. ("the doctrine of federal paramountcy ... recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse. Under our system, the federal law prevails").

[152] Lederman, "Some Forms and Limitations of Co-Operative Federalism", 45 Can. B. Rev. 409, 417 (1967) ("In the event of conflict, the judicial doctrine of dominion paramountcy is to the effect that federal legislation prevails and provincial legislation is suspended or inoperative").

VII. Conclusion

[174] I would allow the appeal – the order under appeal is of no effect with the result that the order of Master Prowse remains in force.

[175] I acknowledge the very high quality of counsel's written and oral arguments.

Appeal heard on June 15, 2022

Memorandum filed at Calgary, Alberta
this 8th day of August, 2022

Wakeling J.A.

2022 ABCA 266 (CanLII)

Appearances:

D.J. McDonald, Q.C./M. Deyholos
for the Appellant

R.B. Drewry, Q.C./A.F. Jeffs
for the Respondent, Orbis Engineering Field Services Ltd.

C.J. Popowich/K.L. Reiffenstein
for the Respondents, Elliott Turbomachinery Canada Inc. and Elliott Company

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Corrigendum of the Memorandum of Judgment
of the Honourable Justice Crighton and the Honourable Justice Ho

Dissenting Memorandum of Judgment of the Honourable Justice Wakeling

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Page 51 - Counsel has been changed from L.K. Feehan to **A.F. Jeffs** for the Respondent, Orbis Engineering Field Services Ltd.

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CED Guarantee, Indemnity and Standby Letters of Credit § 134

Canadian Encyclopedic Digest

Guarantee, Indemnity and Standby Letters of Credit

Prepared by Kevin McGuinness, LL.B., LL.M., S.J.D., Steele Raymond Professor of Business Law, Bournemouth University, England; Member of the Law Society of Upper Canada and the Law Society of England and Wales: October 1996, Updated by the legal editorial staff of Thomson Reuters Canada: January 2025

XIII. Indemnities

D. Miscellaneous

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§ 134. Indemnification Against Own Negligence

Topic Summary

The law presumes that any indemnity given to a person is not intended to extend to loss or cost arising by reason of that person's own negligence or the negligence of his or her employees or agents. [1] However, as noted above, there is no absolute prohibition against the provision of an indemnity to a person against his or her own negligence—indeed, public liability insurance would scarcely exist if there was such a prohibition—and therefore the question whether a particular contractual or other indemnity affords such protection is one of construction. [2] Nevertheless, in construing contractual indemnities other than insurance contracts, there is a strong bias in the courts against interpreting the indemnity as affording protection against the indemnified person's own negligence. [3] By and large, the courts' attitude in construing indemnity provisions is stricter than that which they adopt in construing the scope of exclusion clauses. [4]

Absent an express provision dealing with negligence, [5] a right to indemnity will be inferred only where it arises by necessary implication, that is, where no interpretation of the indemnity agreement is possible other than that it must extend to negligence in order for the provision to be given meaning. Specifically, if the words used in the agreement are wide enough to encompass negligence, the court will consider whether there is some non-negligent base of liability that is neither remote nor fanciful which the parties might have had in mind when drafting the contract. If such an alternative liability exists, then the court will construe the indemnity not to apply to the indemnified person's own negligence. [6]

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Footnotes

1 Walters v. Whessoe Ltd. (1968), 6 Build. L.R. 23 (C.A.); E.E. Caledonia Ltd. v. Orbit Valve Co. Europe, [1993] 4 All E.R. 165 (Eng. Q.B.).

2 Smith v. South Wales Switchgear Ltd. (1977), [1978] 1 All E.R. 18 (U.K. H.L.).

3 E.E. Caledonia Ltd. v. Orbit Valve Co. Europe, [1993] 4 All E.R. 165 (Eng. Q.B.).

4 Livingstone v. Roskilly, [1992] 3 N.Z.L.R. 230; Smith v. South Wales Switchgear Ltd. (1977), [1978] 1 All E.R. 18 (U.K. H.L.).

5 Hancock Shipping Co. v. Deacon & Trysail (Private) Ltd., [1991] 2 Lloyds Rep. 550 (Q.B.).

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6 Alderslade v. Hendon Laundry Ltd., [1945] 1 All E.R. 244 (Eng. C.A.); Canada Steamship Lines Ltd. v. R., [1952] A.C. 192 (Canada P.C.); E.E. Caledonia Ltd. v. Orbit Valve Co. Europe, [1993] 4 All E.R. 165 (Eng. Q.B.); Kocherkewych v. Greyhound Canada Transportation Corp. (2006), 2006 CarswellBC 808 (B.C. S.C.) (indemnity clause not containing express language exempting corporation from negligence of its own employees; words not wide enough in their ordinary meaning to cover such consequence; such liability being remarkable obligation and requiring very clear words; corporation's interpretation contradicted by other clause in agreement; clause directed to other non-fanciful heads of damage).

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HMF-28 Requisite elements of the tort of fraudulent misrepresentation.

Halsbury's Laws of Canada - Misrepresentation and Fraud (2023 Reissue), 2023 Reissue

Margaret Isabel Hall, Shirley Margolis (Main Title Contributors)

(Updates prepared by LexisNexis Canada Inc.)

***HMF*-28**

Halsbury's Laws of Canada - Misrepresentation and Fraud (2023 Reissue) (Jovellano, Margolis) > IV. Fraudulent Misrepresentation Founded in Tort > 1. The Tort of Fraudulent Misrepresentation > (2) Requisite Elements of the Tort

IV. Fraudulent Misrepresentation Founded in Tort

1. The Tort of Fraudulent Misrepresentation

(2) Requisite Elements of the Tort

Requisite elements of the tort of fraudulent misrepresentation.

Cumulative Supplement - Current to December 15, 2023

Note 2

Chaba v. Khan, *[2020] O.J. No. 4465*, *2020 ONCA 643* (Ont. C.A.), leave to appeal refused (*sub nom. Swat Emeraldmine and Marketing Inc. v. Chaba*) *[2020] S.C.C.A. No. 442* (S.C.C.). See also *Rana v. Ramzan*, *[2023] O.J. No. 4668*, *2023 ONSC 5792* (Ont. S.C.J.); *Kramer v. Collins*, *[2023] O.J. No. 4723*, *2023 ONSC 6011* (Ont. S.C.J.).

HMF-28 **Requisite elements of the tort of fraudulent misrepresentation.**

The requisite elements to establish the tort of fraudulent misrepresentation may be summarized as follows:

1. A false representation of fact made by the defendant to the plaintiff;
2. Some level of knowledge of the falsehood of the representation on the part of the defendant (including recklessness);
3. That the false representation caused the plaintiff to act (the plaintiff's actions were caused by their reliance on the defendant's representation); and
4. That the plaintiff's actions resulted in a loss to the plaintiff.[1]

Requirement of intention uncertain. Historically, a fifth element has been applied: a requirement of intention, on the part of the defendant, that the false representation be acted upon by the plaintiff, in addition to the plaintiff relying and thereby acting on the false statement.[2] Various courts have characterized this element as the defendant's intention to "induce" the plaintiff to act on the misrepresentation, an element separate and apart from the plaintiff's actually being induced to act by their belief in, and subsequent reliance on, the veracity of the false statement. However, there is some uncertainty as to whether a defendant's intention that the false representation

be acted on remains a necessary element of a fraudulent misrepresentation claim.[3] Should it constitute a necessary element for such a claim, an intention may be proven directly with evidence, or inferred from the lack of evidence of a credible explanation for the actor's concealment or false representation.[4]

Misrepresentation must have been made to the plaintiff. A plaintiff must not merely show that they relied on the representations of the defendant that the latter knew were false or made recklessly without care for their truth or falsity.[5] The plaintiff must also demonstrate that the defendant made the false statement of fact directly to the plaintiff or, in the alternative, made the misrepresentation with the intent that the plaintiff would rely and act upon it.[6]

Reliance is a subjective test. The element of reliance is essential to proving a claim of fraudulent misrepresentation.[7] In determining whether a plaintiff has proven the element of reliance when making a claim for the tort of deceit, courts apply a subjective test[8] and ask whether the defendant's misrepresentation was material to the plaintiff and thereby induced them to act.[9]

Implied existence of a legal duty. While the requisite elements for fraudulent misrepresentation do not require there to be a legal duty owed by the defendant to the plaintiff, an implied duty will be found.[10] The implied duty relates to a representor's responsibility to avoid making a statement of fact to a representee that they know to be false, or recklessly without care for its truth or falsity, with the intention that the representee would rely and act upon it.[11] Where the representor knowingly makes a false statement of fact that the representee relies upon to their detriment, the representor breaches the implied legal duty, and the representee has a case for fraudulent misrepresentation.[12]

Footnote(s)

1 *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] S.C.J. No. 8 at paras. 18-21, [2014] 1 S.C.R. 126 (S.C.C.). See also *Bank of Montreal v. 1870769 Ontario Inc.*, [2022] O.J. No. 4237, 2022 ONSC 5100 (Ont. S.C.J.).

2 *Midland Resources Holding Limited v. Shtaif*, [2017] O.J. No. 1978 at para. 162, 2017 ONCA 320 (Ont. C.A.), citing *Amertek Inc. v. Canadian Commercial Corp.*, [2005] O.J. No. 2789 at para. 63, 76 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused [2005] S.C.C.A. No. 439 (S.C.C.); *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 at para. 21, 172 O.A.C. 59 (Ont. S.C.J.), citing *Parna v. G. & S. Properties Ltd.*, [1970] S.C.J. No. 81, 15 D.L.R. (3d) 336 at 344 (S.C.C.); *Chaba v. Khan*, [2020] O.J. No. 4465 at para. 15, 2020 ONCA 643 (Ont. C.A.), referring with approval to *Mariani v. Lemstra*, [2004] O.J. No. 4283 at para. 12, 246 D.L.R. (4th) 489 (Ont. C.A.), leave to appeal refused [2004] S.C.C.A. No. 355 (S.C.C.). See also *Silver v. Imax Corp.*, [2009] O.J. No. 5585 at para. 76, 86 C.P.C. (6th) 273 (Ont. S.C.J.), leave to appeal refused [2011] O.J. No. 656, 2011 ONSC 1035 (Ont. Div. Ct.), citing *Carom v. Bre-X Minerals Ltd.*, [1998] O.J. No. 1428 at paras. 24-25, 20 C.P.C. (4th) 163 (Ont. Gen. Div.), where the Court held that this element of the action is met where a plaintiff demonstrates that the defendant intended that a class of persons including the plaintiff, and not merely the plaintiff, would rely upon the misrepresentation.

3 *Trump v. Singh*, [2016] O.J. No. 5285 at para. 141, 2016 ONCA 747 (Ont. C.A.), leave to appeal refused [2016] S.C.C.A. No. 548 (S.C.C.). In that case, the Court held that "… it is not clear from the case law that an intention that the false representation be acted on is a necessary element of a fraudulent misrepresentation claim", citing *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] S.C.J. No. 8 at para. 21, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), and *Bhasin v. Hrynew*, [2014] S.C.J. No. 71 at para. 88, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.). See also *Nguyen v. Adas*, [2022] O.J. No. 1930 at para. 55, 2022 ONSC 2541 (Ont. S.C.J.).

4 *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, [2017] A.J. No. 1194 at para. 32, 2017 ABCA 378 (Alta. C.A.). See also *Caroti v. Vuletic*, [2022] O.J. No. 3955 at para. 547, 2022 ONSC 4695 (Ont. S.C.J.).

5 *997219 Ontario Inc. (c.o.b. Lightning Capital) v. Mantella*, [2002] O.J. No. 372 at para. 24 (Ont. S.C.J.) citing Lewis N. Klar, *Tort Law*, 2d ed. (Toronto: Carswell, 1996), at 495.

6 *997219 Ontario Inc. (c.o.b. Lightning Capital) v. Mantella*, [2002] O.J. No. 372 at para. 24 (Ont. S.C.J.) citing Lewis N. Klar, *Tort Law*, 2d ed. (Toronto: Carswell, 1996), at 495.

7 *Kelemen v. El-Homeira*, *[1999] A.J. No. 1279* at para. 7, *73 Alta. L.R. (3d) 399* (Alta. C.A.), leave to appeal refused *[2000] S.C.C.A. No. 140* (S.C.C.) citing *Clerk & Lindsell on Torts*, 17th ed. (London: Sweet & Maxwell, 1995) at 732.

8 *Kelemen v. El-Homeira*, *[1999] A.J. No. 1279* at para. 10, *73 Alta. L.R. (3d) 399* (Alta. C.A.), leave to appeal refused *[2000] S.C.C.A. No. 140* (S.C.C.).

9 *Kelemen v. El-Homeira*, *[1999] A.J. No. 1279* at para. 7, *73 Alta. L.R. (3d) 399* (Alta. C.A.), leave to appeal refused *[2000] S.C.C.A. No. 140* (S.C.C.) citing *Clerk & Lindsell on Torts*, 17th ed. (London: Sweet & Maxwell, 1995) at 732.

10 *Re Bozzo*, *[2005] O.J. No. 2037* at para. 25, *10 C.B.R. (5th) 1* (Ont. S.C.J.).

11 *Re Bozzo*, *[2005] O.J. No. 2037* at para. 25, *10 C.B.R. (5th) 1* (Ont. S.C.J.).

12 *Re Bozzo*, *[2005] O.J. No. 2037* at para. 25, *10 C.B.R. (5th) 1* (Ont. S.C.J.).

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HGI-113 Meaning and scope of contractual indemnities.

Halsbury's Laws of Canada - Guarantee and Indemnity (2022 Reissue)

Alison Manzer, Charles Newman, Marc Mercier, Jennifer Wasylyk, Corina Capmare (Main Title Contributors)

HGI-113

Halsbury's Laws of Canada - Guarantee and Indemnity (2022 Reissue) (Manzer, Newman, Mercier, Wasylyk, Capmare) > III. Assessing the Liability of the Surety > 3. Non-Guarantee Indemnities > (1) Contractual Indemnities Distinguished from Similar Obligations

III. Assessing the Liability of the Surety

3. Non-Guarantee Indemnities

(1) Contractual Indemnities Distinguished from Similar Obligations

HGI-113 *Meaning and scope* of contractual indemnities.

A contract of indemnity is one in which the promisor undertakes to indemnify the promisee against a liability or loss, independent of whether there is default by some other person.[1] As obligations which require one party to make good the loss of another, contracts of indemnity may be said in broad terms to include such agreements as guarantees[2] and insurance contracts,[3] but contracts of indemnity are not limited to agreements of these types. Indeed, the term “indemnity” is most often used to describe original (primary) obligations to indemnify, rather than collateral agreements in the nature of a guarantee. Accordingly, an indemnity agreement may be a stand-alone as an obligation, and unlike a guarantee is not necessarily dependent for its survival either upon the existence or continuation of some other primary obligation.[4]

Indemnities distinguished from insurance contracts. It is customary to distinguish insurance contracts from indemnities generally[5] (such non-insurance indemnities being termed “simple indemnities”). At common law, the right of an insured party arose as soon as the event specified in the insurance contract occurred. Thus where a person was covered by a policy of liability insurance, that person might claim under their policy in respect of any liability which that person incurred as soon as the liability arose, and it was immaterial that the insured had not first discharged that liability.[6] In contrast, at common law, a right to obtain indemnification in respect of a potential liability did not become enforceable at law until such time as the liability has been discharged[7] (as the right to claim at law was founded in debt), although the contrary was in general the case in equity.[8] With the fusion of the courts of law and equity in the mid-19th century, this particular distinction between insurance and indemnities has in large measure ceased to be of significance. However, there remain distinctions between insurance contracts and indemnity agreements, which continue to have practical ramifications. For instance, unlike insurance contracts, a simple contract of indemnity is not one in which the protected party must act with the utmost good faith. Moreover, a simple contract of indemnity may secure the party entitled to the indemnity against a loss that is known to have already been suffered.[9]

Footnote(s)

1 *Canadian General Insurance Co v. Dube Ready-Mix Ltd.*, [*[1984] N.B.J. No. 50*](), [*52 N.B.R. (2d) 66*]() (N.B.C.A.), and see generally: *Pontifex v. Foord* (1884), 12 Q.B.D. 152 (Q.B.); *Tritton v. Bankart* (1887), 56 L.J. Ch. 629 (Ch.); *Speller v. Bristol Steam Nav. Co.* (1884), 13 Q.B.D. 96 (C.A.); *Credit Foncier Trust Co. v. Zatala Holdings Inc.*, [*[1986] B.C.J. No. 516*](), 48 B.C.L.R. (2d) 25 (B.C.C.A.).

2 In *Harburg India Rubber Comb. Co. v. Martin*, [1902] 1 K.B. 778 at 784 (C.A.), Vaughan William L.J. describes guarantees as the class of indemnity that is required by the *Statute of Frauds* to be in writing.

3 *Castellain v. Preston* (1883), 11 Q.B.D. 380 at 386 (C.A.).

4 *British Columbia v. Clearwater (Canada) Hatcheries Ltd.*, [*[1994] B.C.J. No. 1787*](), [*95 B.C.L.R. (2d) 396*]() (B.C.S.C.).

5 *Goulston Discount Co. v. Clark*, [1967] 2 Q.B. 493 (C.A.).

6 *Re Law Guarantee Trust and Accident Society Ltd., Liverpool Mortgage Ins. Co. Case*, [1914] 2 Ch. 617 (C.A.); *Re Eddystone Marine Insurance Co.*, [1892] 2 Ch. 423 (Ch. D.).

7 See, for instance, *Goddard v. Vanderheyden* (1771), 3 Wils. 262, 2 Black. W. 795, 96 E.R. 467 (K.B.); *Reynolds v. Doyle* (1840), 1 Man. & G. 753, 133 E.R. 536 (C.P.).

8 *Law Guarantee Trust and Accident Society Ltd. v. Munich Reinsurance Co.* (1915), 31 T.L.R. 572 (Ch. D.).

9 *In the Marriage of Langford* (1992), 110 F.L.R. 396 at 400 (Aust. Fam. Ct.), *per* Nygh J.

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HBC-306 Specific exclusions.

Halsbury's Laws of Canada - Business Corporations (2022 Reissue)

Ruth I. Wahl, Maurice Coombs (Main Title Contributors)

(Updates prepared by LexisNexis Canada Inc.)

HBC-306

Halsbury's Laws of Canada - Business Corporations (2022 Reissue) (Wahl, Coombs) > XIV. Shareholder Remedies > 2. The Oppression Remedy > (8) Procedural Considerations > (d) Bars to Action

XIV. Shareholder Remedies

2. The Oppression Remedy

(8) Procedural Considerations

(d) Bars to Action

Specific exclusions.

Cumulative Supplement - Current to June 1, 2024

Note 1

(MB) *Limitation of Actions Act*, *C.C.S.M. c. L150* should read *Limitations Act*, *C.C.S.M. c. L150*.

HBC-306 Specific exclusions.

There are a number of cases that deal with bars to oppression relief.[1] For instance, it has been held that the oppression and derivative action remedies will not be permitted to be used by minority shareholders to extort benefits from the majority shareholders or other controlling group in the corporation.[2] Relief is available to a claimant under s. 241 of the *Canada Business Corporations Act* and its equivalents if, and only if, the applicant can establish that the applicant has suffered detriment in their capacity as a complainant.[3] In the ordinary case, where the corporation abandons the course of action on which the complainant's application is based, no order will be made, for in such a case the abandonment constitutes the remedy.[4] More generally, the oppression remedy is not intended to require (nor to empower) the courts to review every decision made within a corporation. It does not offer a general right of appeal from the internal decision-making process of the corporation.[5] The court may refuse a remedy where there has been prolonged delay in bringing an application in regard to oppressive conduct.[6] However, this principle should not be too far extended. Ordinarily, in the case of equitable relief, delay will bar action only where the potential claimant was aware of the facts giving rise to the cause of action and failed to proceed. Since potential claimants will often possess only limited knowledge about what is transpiring in relation to the corporation, its business or affairs, as a practical matter it may be difficult for them to determine whether they have a realistic chance of a claim, even though they may be dissatisfied in some general way with the manner in

which the business or affairs of the corporation are being conducted. Moreover, the voluntary withdrawal of a shareholder from active participation in a corporation does not prevent that shareholder from seeking relief under the oppression remedy, nor does the fact that the shareholders allowed the directors to run the business for a prolonged period of time without demanding that annual meetings be held or financial statements provided. The obligation is upon the directors of a corporation to call annual meetings of shareholders, to carry out their other corporate governance duties and to account for their administration of the corporation, not upon the shareholders to superintend the directors.[7]

Footnote(s)

1 As to the application of the (MB) *Limitation of Actions Act*, R.S.M. 1987, c. L150 (now (MB) *Limitation of Actions Act*, C.C.S.M. c. L150), to oppression proceedings, see *Jaska v. Jaska*, [1996] M.J. No. 579, 30 B.L.R. (2d) 104 (Man. C.A.). As for whether a complainant may reject a reasonable compromise and insist upon taking the dispute to court, see *Re A Company (No. 00836 of 1995)*, [1996] 2 B.C.L.C. 192 (Ch. D.).

2 *Mason v. Intercity Properties Ltd.*, [1987] O.J. No. 448, 59 O.R. (2d) 631 (Ont. C.A.), leave to appeal refused [1987] S.C.C.A. No. 402, 62 O.R. (2d) ix (S.C.C.).

3 (CAN) *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 241. See *Diligenti v. RWMD Operations Kelowna Ltd.*, [1976] B.C.J. No. 38, 1 B.C.L.R. 36 (B.C.S.C.).

4 *V.F. Erickson Consultants Ltd. v. Ventures West Minerals Ltd.*, [1990] B.C.J. No. 1111 (B.C.C.A.).

5 *Zephyr Holdings Pty Ltd. v. Jack Chia (Australia) Ltd.* (1989), 7 A.C.L.C. 239, *per* Brooking J. (S.C. Vic.); see also *Thomas v. H.W. Thomas Ltd.*, [1984] 1 N.Z.L.R. 686, 2 A.C.L.C. 610 (C.A.).

6 *Jaska v. Jaska*, [1996] M.J. No. 579, 141 D.L.R. (4th) 385 (Man. C.A.). In *Zhao v. Li*, [2020] O.J. No. 671, 2020 ONCA 121 (Ont. C.A.), the Court addressed aspects of how limitation periods apply to oppression remedy claims under the (ON) *Business Corporations Act*, R.S.O. 1990, c. B.16. Following the sale of a business, claims arose for: failure to share the proceeds of sale and profits for the preceding year; and dissolution of the business without the complainant's knowledge. These were singular discrete oppressive acts rather than ongoing oppression. The failure to share proceeds and profits claims were statute-barred, since they were discoverable before the expiry of the limitation period, while the claim based on the dissolution of the corporation was not statute-barred, since the dissolution occurred later.

7 See, generally, *Bernhardt v. Main Outboard Centre Ltd.*, [1994] M.J. No. 521, 17 B.L.R. (2d) 219 (Man. Q.B.).

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HGI-114 Circumstances under which the right to indemnity may exist.

Halsbury's Laws of Canada - Guarantee and Indemnity (2022 Reissue)

Alison Manzer, Charles Newman, Marc Mercier, Jennifer Wasylyk, Corina Capmare (Main Title Contributors)

HGI-114

Halsbury's Laws of Canada - Guarantee and Indemnity (2022 Reissue) (Manzer, Newman, Mercier, Wasylyk, Capmare) > III. Assessing the Liability of the Surety > 3. Non-Guarantee Indemnities > (1) Contractual Indemnities Distinguished from Similar Obligations > (a) Distinguished from Right to Damages

III. Assessing the Liability of the Surety

3. Non-Guarantee Indemnities

(1) Contractual Indemnities Distinguished from Similar Obligations

(a) Distinguished from Right to Damages

HGI-114 Circumstances under which the right to indemnity may exist.

Although there is a similarity in their respective practical consequence, a right to be indemnified is not the same as a right to recover damages.[1] A right to recover damages is a legal right in favour of a plaintiff to be compensated by a defendant for injuries recognized at law, which were suffered by the plaintiff as a result of the wrongful conduct of the defendant. A right of indemnity may exist where the plaintiff has suffered no injury[2] at the hands of the person who is obliged to indemnify, and even where the wrong giving rise to the claim for indemnity was committed by some third party,[3] or where no wrong has been committed by any person but the indemnifier is nonetheless obliged to make good a loss which has been suffered by the claimant.

As compared to right to recover damages for breach of contract. A right to recover the damages occasioned by a breach of contract is the converse of a contractual right to an indemnity. Where a contractual right of indemnity exists, the right to an indemnity constitutes a term of the contract and forms part of the contract between the parties.[4] A right to damages for breach of contract, on the other hand, arises as a consequence of the breach of the original bargain which the parties made. A right to recover damages for breach of contract is not part of a contract; it is an incident that the law attaches to a breach of the contract, rather than a provision of the contract itself.[5]

As compared to right of damages for tortious injury. A similar distinction exists in the case of a right of damages for tortious injury. Every person has a right at common law to recover the amount of the damages occasioned to them as a result of the tortious conduct of another person.[6] That right is not founded upon any principle of implied contract, but is a legal right in favour of a plaintiff to be compensated for the injuries suffered at the hands of a wrongdoer. Nevertheless, when it comes to ascertaining the measure of damages that the plaintiff has suffered, it may be that indemnity will properly express the measure of damages.[7]

Footnote(s)

HGI-114 Circumstances under which the right to indemnity may exist.

1 *McFee v. Young* (1905), 1 W.L.R. 383 at 385 (N.W.T.S.C.), *per* Wetmore J.; *Birmingham & District Land Co. v. London & North Western Rlwy.* (1886), 34 Ch. D. 261 at 274 (C.A.), *per* Bowen L.J. and at 276, *per* Fry L.J.

2 While a claim for damages may be made only in respect of injuries that are recognized at law, a claim based upon a right of indemnity is not so limited. Thus the parties to a contract may provide for a right of indemnity to compensate the protected party against forms of loss that do not generally represent types of injury which the law will recognize (legal costs on a solicitor-and-client basis, being just one common example). However, in order to claim the benefit of an indemnity it is necessary to prove that the event to which the indemnity relates has occurred, otherwise a plea of *non damnificatus* may be raised in defence of a claim under the indemnity: *Leeming v. Smith*, *[1877] O.J. No. 232*, *25 Gr. 256* (Ont. Ct. Ch.); *Sutherland v. Webster*, *[1894] O.J. No. 17*, *21 O.A.R. 228* (Ont. C.A.).

3 Compare the definition found in s. 124 of the *Indian Contract Code Act*, 1872, c. 9: “A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity.”

4 *McLean v. Dinning*, *[1922] S.J. No. 50*, *63 D.L.R. 507* (Sask. C.A.).

5 *Birmingham & District Land Co. v. London & North Western Ry.* (1886), 34 Ch. D. 261 at 274-75 (C.A.), *per* Bowen L.J., and at 276, *per* Fry L.J.

6 As to the difference between a right of indemnity and a right to relief over in third party proceedings, see *Australian Newsprint Mills Ltd. v. Canadian Union Line Ltd.*, *[1953] B.C.J. No. 118*, *[1953] 2 D.L.R. 828* (B.C.C.A.), affd *[1954] S.C.J. No. 21*, *[1954] S.C.R. 307* (S.C.C.).

7 *Birmingham & District Land Co. v. London & North Western Ry.* (1886), 34 Ch. D. 261 (C.A.). See also *McLean v. Tinsley*, *[1849] O.J. No. 179*, *7 U.C.R. 40* (U.C. Ct. Q.B.).

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CED Contracts § 189

Canadian Encyclopedic Digest

Contracts

Prepared by Warren H.O. Mueller, B.A., LL.B., LL.M., Q.C., and D. Morgan, B.A., LL.B, LL.M.: September 2008, Updated by the legal editorial staff of Thomson Reuters Canada: January 2025

XII. Express Terms; Performance of Contract

B. Performance

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§ 189. Duty of Good Faith in Performing Contracts

Topic Summary

The legal characterization of the relationship between contracting parties largely determines their obligations to each other. [1] The graduated obligations arising between commercial contracting parties have been ordered in a three-tiered theoretical framework which is often cited in recent Canadian judgments: [2] "the unconscionability standard", "the good faith standard" and the "fiduciary standard". [3] Although all three standards are concerned with the extent to which one contracting party is obliged to acknowledge and to respect the interests of the other, each standard, in setting its own limits, proceeds from a different premise. Thus, "unconscionability" accepts that one party is entitled as of course to act self-interestedly in his or her actions toward the other; however, it protects those who are vulnerable in the contracting process from loss or improvidence to that party in the bargain. [4] "Good faith", while permitting a party to act self-interestedly, also positively requires that such party, in his or her decisions and actions, have regard to the legitimate interests of the other party. [5] The "fiduciary" standard enjoins one party to act in the interests of the other—that is, to act selflessly and with undivided loyalty. [6] The demarcation where one standard of behaviour ends and another begins is not always clear. [7] The duty of good faith is not a fiduciary duty, and it does not extend to create new, unbargained rights. [8]

The courts recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. [9]

Not every contract imposes actionable good faith obligations on contracting parties. While good faith is an organizing principle of Canadian contract law, it manifests itself in specific circumstances. In particular, its application is generally confined to existing categories of contracts and obligations. [10]

Canadian courts have traditionally proceeded quite cautiously in recognizing duties of good faith in the performance and enforcement of contracts. [11] References in judicial decisions to good faith obligations have usually been made where the result of the case has been determined by the application of other, more established, legal principles, such as that regarding implied terms. [12] Thus, unlike the situation in Quebec [13] and the United States, [14] where a duty of good faith in the performance of commercial contracts was broadly recognized, Canadian courts took more time in developing a comprehensive and principled approach to good faith obligations in commercial contracts. In particular, they have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from its provisions, [15] although the law in this regard is currently unsettled. [16] Lastly, the Supreme Court of Canada recently held that it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just with

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regard to contracts. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations. [17] As for the concept of bad faith, it is flexible, and its content will vary from one area of law to another. [18]

Canadian courts have recently expanded the range of "special" relationships giving rise to a duty of good faith beyond those traditionally giving rise to fiduciary obligations, such as trusts, [19] partnerships, [20] joint ventures, [21] and agency, [22] and the relationship of utmost good faith created by an insurance contract, [23] as well as such situations as tendering contracts, [24] mortgagees in possession, [25] grantors exercising rights of first refusal, [26] and termination of long-standing contractual arrangements. [27] For example, the courts have regarded employment contracts as having unique characteristics setting them apart from ordinary commercial contracts, giving rise to an obligation to act in good faith in the termination of an employee. [28] And franchise arrangements have been characterized as contracts of adhesion, giving rise to good faith obligations. [29] However, parties to ordinary commercial contracts, which are usually not characterized by vulnerability and trust, are generally not subject to a general and overriding good faith obligation. [30] Where a duty of good faith exists, not every breach of contract will be a breach of the duty of good faith. [31] Canada's law of conflicts as administered by the courts is based on precedents rooted in English jurisprudence. [32] Lastly, the Supreme Court of Canada recently held that it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just with regard to contracts. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations. [33]

Canadian courts have generally accepted that once a contract has been entered into, [34] the parties must perform their respective obligations in good faith, even if there is no express contractual provision to this effect in the contract itself. This duty of good faith performance either arises by operation of law, within the parameters of what the court considers to be fair dealing between the parties [35] or, alternatively, is an implied term of the contract, [36] particularly where required to give the agreement business efficacy. [37] Cases in which a duty of good faith has been implied have been viewed as falling into three broad categories: [38] (i) those imposing a duty to co-operate in achieving the objectives of the agreement; [39] (ii) those imposing limits on the exercise of discretionary powers provided for in the contract; [40] and (iii) those precluding parties from evading contractual duties, such as by engaging in conduct not strictly prohibited by the letter of their agreement, but that effectively defeats the other party's contractual rights. [41] A duty of good faith may also arise from one party's representations or undertakings to the other party. [42] Whether or not a party under a duty of good faith has breached that duty will depend on all the circumstances of the case, including whether the party subject to a duty of good faith conducted itself fairly throughout the process. [43] Lastly, whether or not there is good faith is dependent on the facts, circumstances and contractual terms. [44]

The Supreme Court of Canada has expanded the duty of honest performance. Parties to a contract can breach the duty of honest performance by knowingly misleading the other party, even if the misleading action is silence. To "knowingly mislead" can include half-truths, misleading actions, or failing to correct a misrepresentation that the representing party believed was true at the time of the representation, but later learned was false. Whether a party has knowingly mislead the other party is largely fact-specific, and deference must be shown to the trial judge who weighs the evidence. Outright lies are not requisite to a finding of a contractual breach. [45]

The remedy for breach of the duty of honest performance is expectation damages, putting the party in the position it would have been had the duty not been breached. [46]

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Footnotes

1 Machias v. Mr. Submarine Ltd. (2002), 2002 CarswellOnt 1176 (Ont. S.C.J.) (citing Finn, "The Fiduciary Principle", in Youdan, ed., *Equity, Fiduciaries and Trusts* (Carswell, 1989)); Leopold v. Leopold (2000), 2000 CarswellOnt 4707 (Ont. S.C.J.).

2 Hodgkinson v. Simms (1994), 1994 CarswellBC 438 (S.C.C.); Lac Minerals Ltd. v. International Corona Resources Ltd. (1989), 1989 CarswellOnt 126 (S.C.C.); Babcock v. Canada (Attorney General) (2005), 2005 CarswellBC 937 (B.C. S.C.); Trophy Foods Inc. v. Scott (1995), 1995 CarswellNS 218 (N.S. C.A.); Shelanu Inc. v. Print Three Franchising Corp. (2003), 2003 CarswellOnt 2038 (Ont. C.A.); 978011 Ontario Ltd. v. Cornell Engineering Co. (2001), 2001 CarswellOnt 1290 (Ont. C.A.); leave to appeal refused (2001), 2001 CarswellOnt 3809 (S.C.C.); Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd. (2001), 2001 CarswellOnt 579 (Ont. C.A.); Rogers & Rogers Inc. v. Pinehurst Woodworking Co. (2005), 2005 CarswellOnt 7190 (Ont. S.C.J.); Engels v. Richard Killen & Associates Ltd. (2002), 2002 CarswellOnt 2435 (Ont. S.C.J.); affirmed (2004), 2004 CarswellOnt 62 (Ont. C.A.); Machias v. Mr. Submarine Ltd. (2002), 2002 CarswellOnt 1176 (Ont. S.C.J.); Leopold v. Leopold (2000), 2000 CarswellOnt 4707 (Ont. S.C.J.); Canadian Imperial Bank of Commerce v. Graat (1992), 1992 CarswellOnt 136 (Ont. Gen. Div.); affirmed (1997), 1997 CarswellOnt 340 (Ont. C.A.); Gregoric v. Gregoric (1991), 1991 CarswellOnt 3151 (Ont. Gen. Div.); Bank of Montreal v. McIntosh (1995), 1995 CarswellSask 281 (Sask. Q.B.).

3 Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp. (2020), 2020 SCC 29 (S.C.C.) (notion of unconscionability discussed); Finn, "The Fiduciary Principle", in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Carswell, 1989).

4 Uber Technologies Inc. v. Heller (2020), 2020 SCC 16 (S.C.C.) (allows courts to set aside unfair agreements that stray far from ideals of free, equal and fair contracting); **see also** Canadian Imperial Bank of Commerce v. Ohlson (1997), 1997 CarswellAlta 1050 (Alta. C.A.) (unconscionability, like undue influence and duress, aiming to temper ideal of freedom to contract with need to prevent abuse and protect the weak; doctrine permitting application of judicial discretion to excuse obligant from performing contract); Deforest v. Deforest (1982), 1982 CarswellSask 175 (Sask. C.A.) ("constructive fraud" in equity including two related but distinct notions: agreement subject to rescission if obtained by "undue influence" or constituting "unconscionable bargain"); *Zhao v. Chandi* 2022 BCSC 1574 (B.C. S.C.) (facts showing there was no inequality in bargaining power between parties court also adding that agreement was not improvident).

5 Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District (2021), 2021 SCC 7 (S.C.C.) (party must exercise its discretion reasonably, that is, in manner connected to underlying purposes of discretion granted by contract; no breach of duty to exercise contractual discretion in good faith in exercising contractual discretion to allocate waste volumes without also compensating for financial consequences of allocation); *Massey v. Massey* (2022), 2022 ONSC 5150 (Ont. S.C.J.) (while "appropriate regard" for other party's interests will vary depending on context of contractual relationship, it does not require acting to serve those interests in all cases; court adding that it merely requires that party not seek to undermine those interests in bad faith); Finn, "The Fiduciary Principle", in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Carswell, 1989).

6 1698496 Ontario Ltd. v. Zoberi (2015), 2015 CarswellOnt 16178 (Ont. S.C.J.) (fiduciary obligation requiring very "high obligation" of loyalty); Finn, "The Fiduciary Principle", in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Carswell, 1989); **see also** Hodgkinson v. Simms (1994), 1994 CarswellBC 438 (S.C.C.) (concept of "vulnerability" being golden thread uniting such related causes of action as breach of fiduciary duty, undue influence, unconscionability, and negligent misrepresentation).

7 Machias v. Mr. Submarine Ltd. (2002), 2002 CarswellOnt 1176 (Ont. S.C.J.).

8 Rio Algom Ltd. v. Canada (Attorney General) (2012), 2012 CarswellOnt 1200 (Ont. S.C.J.).

9 Sheik v. Lebovic Enterprises Limited (2021), 2021 ONSC 8512 (Ont. S.C.J.); *Martens v. The Manitoba Public Insurance Corporation* (2021), 2021 MBCA 102 (Man. C.A.); leave to appeal refused (2022), 2022 CarswellMan 292 (S.C.C.) (duty of good faith with regard to insurance discussed); 100 Bloor Street West Corp. v. Barry's BootCamp et al. (2022), 2022 ONSC 5054 (Ont. S.C.J.); affirmed, 2023 ONCA 247 (Ont. C.A.) (duty to exercise discretion in good faith will be breached where exercise of discretion is unreasonable in that it is unconnected to purposes for which discretion was granted); *2264052 Ontario Inc. (Louch & Louch) v. Brockville Centre*

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Development Corp. (2022), 2022 ONCA 610 (Ont. C.A.) (court explaining that underlying principle does not impose duty of loyalty or of disclosure, or require party to forego advantages flowing from contract; instead, it is merely requirement not to lie or mislead other party about one's contractual performance).

10 Atlantic Lottery Corp. Inc. v. Babstock (2020), 2020 SCC 19 (S.C.C.) (alleged contract not fitting within any of established good faith categories, nor did plaintiffs advance any argument for expanding those recognized categories); C.M. Callow Inc. v. Zollinger (2020), 2020 SCC 45 (S.C.C.) (organizing principle of good faith not treated as free-standing rule, but instead, manifests itself through existing good faith doctrines).

11 Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd. (1994), 1994 CarswellAlta 89 (Alta. C.A.); leave to appeal refused (1994), 1994 CarswellAlta 1092 (S.C.C.) (general obligation expressed in terms of good faith not obvious part of contract law in England and Canada); Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (Canadian courts not recognizing independent stand-alone duty of good faith, creating new, unbargained-for rights and obligations or permitting alteration of contract's express terms; rather, courts implying duty of good faith with view to securing performance and enforcement of contract made by parties); Ascent Financial Services Ltd. v. Blythman (2006), 2006 CarswellSask 83 (Sask. Q.B.); affirmed (2007), 2007 CarswellSask 390 (Sask. C.A.) (court declining to decide whether independent duty of good faith existing, as finding defendants breaching good faith requirement in performance of agreement transferring business); Newswest Corp. v. Glendar Holdings Ltd. (2001), 2001 CarswellSask 457 (Sask. Q.B.) (trial courts more willing to apply concept of good faith than appellate courts, which largely uphold trial decisions without specific reference to good faith obligation; too soon to conclude Canadian courts having recognized as general principle that contracts to be performed in good faith); **but see** Bhasin v. Hrynew (2014), 2014 CarswellAlta 2046 (S.C.C.) (Supreme Court of Canada creating new common law duty under broad umbrella of good faith performance of contracts and holding that there is general duty of honesty in contractual performance).

12 Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (motions judge erring by striking plea of purchaser of shares regarding seller's duty to disclose facts coming to its attention during due diligence potentially prejudicing purchaser's position); Newswest Corp. v. Glendar Holdings Ltd. (2001), 2001 CarswellSask 457 (Sask. Q.B.) (trial courts more willing to apply concept of good faith than appellate courts, which largely uphold trial decisions without specific reference to good faith obligation; too soon to conclude Canadian courts have recognized as general principle that contracts must be performed in good faith); **see also** Belobaba, "Good Faith in Canadian Contract Law", *Special Lectures of the Law Society of Upper Canada* (Richard De Boo Publishers, 1985), p. 73; Bridge, "Does Anglo-Canadian Law Need a Doctrine of Good Faith?" (1984), 9 Can. Bus. L.J. 385, 413; McCamus, "The Duty of Good Faith Contractual Performance at Common Law" (paper presented to the N.J.I.: Civil Law Seminar, Contract Law: From Form to Remedies, Osgoode Hall Law School, May 17, 2000 (unpublished)); Tetley, "Good Faith in Contract, Particularly in the Contracts of Arbitration and Chartering" (2004), 35 JMLC 561.

13 Banque canadienne nationale c. Soucisse (1981), 1981 CarswellQue 110 (S.C.C.); Hôtel de l'Aéroport de Mirabel inc. c. Aéroports de Montréal (2002), 2002 CarswellQue 1372 (C.S. Que.); affirmed (2003), 2003 CarswellQue 1768 (C.A. Que.) (duty to negotiate in good faith recognized in Quebec law); Churchill Falls (Labrador) Corp. v. Hydro-Québec (2018), 2018 SCC 46 (S.C.C.) (good faith conferring broad, flexible power to create law and served as basis for court to intervene and to impose on contracting parties obligations that are based on notion of contractual fairness); C.M. Callow Inc. v. Zollinger (2020), 2020 SCC 45 (S.C.C.) (duty to act honestly in performance of contract precluded active deception; court reasoning that by exercising termination clause dishonestly, group breached duty of honesty on matter directly linked to performance of contract, even if ten-day notice period was satisfied and irrespective of motive for termination).

14 *United States Uniform Commercial Code*, art. 1, s. 1-304; Kang v. Sun Life Assurance Co. of Canada (2013), 2013 CarswellOnt 1909 (Ont. C.A.); Corbin, Perillo, Murray, *Corbin on Contracts*, Vol. 3 (Matthew Bender), s. 541, p. 95; *Restatement of the Law (2d) of Contracts* (American Law Institute Publishers, 1981), s. 205.

15 Aldo Group Inc. v. Moneris Solutions Corp. (2015), 2015 CarswellOnt 4734 (Ont. S.C.J.) (Canadian courts not recognizing stand-alone duty of good faith that is independent from terms of contract or objectives that emerge from those provisions); Martel Building Ltd. v. R. (2000), 2000 CarswellNat 2678 (S.C.C.) (tenant not owing duty of care to landlord in renewal negotiations such that negligence claim could be made for economic loss arising out of conduct of negotiations); Princeton Light & Power Co. v. MacDonald (2005), 2005 CarswellBC 1254 (B.C. C.A.) (while Canadian courts not recognizing independent duty, standard electricity supply contract including duties of good faith and fair dealing; bad faith conduct evident); 1193430 Ontario Inc. v. Boa-Franc (1983) Ltée (2005), 2005 CarswellOnt 5661 (Ont. C.A.); leave to appeal refused (2006), 2006 CarswellOnt 2317 (S.C.C.) (both parties believing

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contract obliging them to act in good faith; questionable whether general duty of good faith could require party to disclose change in ownership to other party, since creating new, unbargained-for obligation independent from contract's terms and parties' objectives); Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (Canadian courts not recognizing independent stand-alone duty of good faith, creating new, unbargained-for rights and obligations or permitting alteration of contract's express terms; rather, courts implying duty of good faith with view to securing performance and enforcement of contract made by parties); Rogers & Rogers Inc. v. Pinehurst Woodworking Co. (2005), 2005 CarswellOnt 7190 (Ont. S.C.J.); Amaren Corp. v. Cara Operations Ltd. (1999), 1999 CarswellOnt 350 (Ont. Gen. Div.) (while no independent duty of good faith and fair dealing in Ontario, duty existing to fulfill obligations of contract in good faith); Ascent Financial Services Ltd. v. Blythman (2006), 2006 CarswellSask 83 (Sask. Q.B.); affirmed (2007), 2007 CarswellSask 390 (Sask. C.A.) (court declining to decide whether independent duty of good faith existing, as party breaching good faith requirement in performing agreement transferring business); **but see** Bhasin v. Hrynew (2014), 2014 CarswellAlta 2046 (S.C.C.) (Supreme Court of Canada creating new common law duty under broad umbrella of good faith performance of contracts and holding that there is general duty of honesty in contractual performance); Gateway Realty Ltd. v. Arton Holdings Ltd. (1991), 1991 CarswellNS 320 (N.S. T.D.); affirmed on other grounds (1992), 1992 CarswellNS 518 (N.S. C.A.) (law requiring contracting parties to exercise rights honestly, fairly and in good faith; duty breached when party acting in "bad faith", defined as conduct contrary to community standards of honesty, reasonableness or fairness); LeMesurier v. Andrus (1986), 1986 CarswellOnt 670 (Ont. C.A.); leave to appeal refused (1986), 74 N.R. 239 (note) (S.C.C.) (vendors and purchasers owing duty to each other to perform contract honestly and in good faith; "approach may be merely an example of the development of an independent doctrine of good faith in contract law at least in the performance of contracts"); TSP-Intl Ltd. v. Mills (2006), 2006 CarswellOnt 4037 (Ont. C.A.) (contractor, exercising discretionary contractual power, making unilateral contractual decisions defeating contractual objectives; trial judge finding conduct not according with objective community standards of reasonableness and fairness; however, appellate court finding that duty of good faith, not pleaded by parties, should not be ruled on); Ascent Financial Services Ltd. v. Blythman (2006), 2006 CarswellSask 83 (Sask. Q.B.); affirmed (2007), 2007 CarswellSask 390 (Sask. C.A.) (plaintiffs purchasing goodwill of defendants' business and parties forming new business; after parties falling out, plaintiffs purchasing defendants' shares, and defendants later breaching non-competition and non-solicitation agreements; defendants, owing obligation to use best efforts to transfer their clients to new business, breaching duty of good faith in performance of contract; defendants owing plaintiffs fiduciary duty independent of contract based on power to affect plaintiffs' interests); **see also** McCamus, *The Law of Contracts* (Irwin Law, 2005), p. 806; McCamus, "The Duty of Good Faith Contractual Performance at Common Law", Civil Law Seminar, Contract Law: From Form to Remedies (Osgoode Hall Law School, Toronto: May 17, 2000); Belobaba, "Good Faith in Canadian Contract Law", *Special Lectures of the Law Society of Upper Canada* (Richard De Boo Publishers, 1985), p. 73; Swan, "Whither Contracts: A Retrospective and Prospective Overview", *Special Lectures of the Law Society of Upper Canada 1984-Law in Transition: Contracts* (Richard De Boo Publishers, 1984), p. 125.

16 Martel Building Ltd. v. R. (2000), 2000 CarswellNat 2679 (S.C.C.) (although tenant not owing duty of care to landlord in renewal negotiations such that negligence claim could be made for economic loss arising out of conduct of negotiations, whether contractual negotiations to be governed by duty of good faith described as "question for another time"); Princeton Light & Power Co. v. MacDonald (2005), 2005 CarswellBC 1254 (B.C. C.A.); Stelco Inc., Re (2006), 2006 CarswellOnt 335 (Ont. C.A.) (specific wording in memorandum of understanding calling on parties to negotiate and pursue opportunities in good faith; existence of stand-alone duty of good faith, independent from terms expressed in contract, not settled; not plain and obvious that statement of claim should be struck); Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (motions judge erring by striking plea of purchaser of shares regarding seller's duty to disclose facts coming to its attention during due diligence potentially prejudicing purchaser's position); 530888 Ontario Ltd. v. Sobeys Inc. (2001), 2001 CarswellOnt 240 (Ont. S.C.J. [Commercial List]) (conflicting authority and academic debate about independent good faith duty in contract law; erroneous to conclude such claim could not possibly succeed); McColl-Frontenac Inc. v. Petro-Canada Inc. (1998), 1998 CarswellOnt 6224 (Ont. Gen. Div.) (court holding, without deciding, that assuming independent common law obligation of good faith was developing in Canadian contract law, no such duty in light of bargain made by parties).

17 Bhasin v. Hrynew (2014), 2014 CarswellAlta 2046 (S.C.C.); Canaccord Genuity Corp. v. Pilot (2015), 2015 CarswellOnt 16345 (Ont. C.A.) ("two incremental steps" doctrine applied); Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd. (2016), 2016 ONCA 324 (Ont. C.A.); leave to appeal refused (2017), 2017 CarswellOnt 1201 (S.C.C.) (duty of good faith in performance of contractual obligations discussed; Court of Appeal reversing decision to strike claim that duty of good faith owed by franchisor to franchisee, despite lack of direct contractual relationship, based on vulnerability of franchisee, level of control and special obligations; not plain and obvious that claim could not succeed; novel claim requiring decision based on full record); Mayotte v. Ontario (2016), 2016 CarswellOnt 2647 (Ont. S.C.J.) (court rejecting claim from private issuers of vehicle licences under contract with province that

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remuneration unreasonable and in bad faith as a matter of substance; no precedent for commercial reasonableness being tethered to outcome as opposed to process or performance; no indication that discretion of province used in bad faith during process of determining remuneration); Northrock Resources v. ExxonMobil Canada Energy (2017), 2017 CarswellSask 393 (Sask. C.A.) (duty of good faith must not be used to circumvent plain language of contract; defendant in context of right of first refusal did not lie or mislead); Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District (2021), 2021 SCC 7 (S.C.C.) (discussion of breach of good faith; court found that arbitrator erred in concluding that breach of duty of good faith occurred whenever party failed to give "appropriate regard" to other's interests in absence of finding that contract had been "eviscerated" or "nullified" and in finding "dishonesty" and thus breach of duty of good faith without any element of dishonesty, improper motive, of bad faith as understood in existing law); Mohamed v. Information Systems Architects Inc. (2018), 2018 ONCA 428 (Ont. C.A.) (defendant employer breached agreement by failing to terminate in good faith, and triggered right to damages that was not contemplated by agreement).

18 Cramer v. Focus Group Holding Inc. (2013), 2013 CarswellAlta 215 (Alta. Prov. Ct.); Gateway Realty Ltd. v. Arton Holdings Ltd. (1991), 1991 CarswellNS 320 (N.S. T.D.); affirmed on other grounds (1992), 1992 CarswellNS 518 (N.S. C.A.) (law requiring contracting parties to exercise rights honestly, fairly and in good faith; duty breached when party acting in "bad faith"); Health Care Developers Inc. v. Newfoundland (1996), 1996 CarswellNfld 352 (Nfld. C.A.).

19 **See** §§ 51, 52, 74; Trusts.

20 Prothroe v. Adams (1997), 1997 CarswellAlta 681 (Alta. Q.B.) (defendants, as partners appointed to negotiate proposed terms of potential merger, standing in fiduciary relationship to other partners); Brew v. Rozano Holdings Ltd. (2006), 2006 CarswellBC 1813 (B.C. C.A.) (partners owing each other equitable duty of good faith); Merklinger v. Jantree No. 3 Ltd. Partnership (2004), 2004 CarswellOnt 6659 (Ont. S.C.J.) (general partner breaching fiduciary duty toward limited partner); Moffat v. Wetstein (1996), 1996 CarswellOnt 2148 (Ont. Gen. Div.); leave to appeal refused (1997), 1997 CarswellOnt 633 (Ont. Gen. Div.) (individual partner owing fiduciary duty to partnership generally as well as fellow partners); **see also** 337965 B.C. Ltd. v. Tackama Forest Products Ltd. (1992), 1992 CarswellBC 119 (B.C. C.A.); leave to appeal refused (1993), 161 N.R. 159 (note) (S.C.C.) (defendant's duty as managing partner not that of trustee, but more like duty owed by governing director to corporation); Zawadzki v. Matthews Group Ltd. (1999), 1999 CarswellOnt 1681 (Ont. S.C.J. [Commercial List]); affirmed (2001), 2001 CarswellOnt 5023 (Ont. C.A.) (since assignee of partnership interest not becoming "partner" in partnership venture, absent agreement to that effect, assignee not inheriting obligations of utmost good faith and honesty flowing from being partner).

21 Awad v. Dover Investments Ltd. (2004), 2004 CarswellOnt 3805 (Ont. S.C.J.); additional reasons at (2005), 2005 CarswellOnt 369 (Ont. S.C.J.) (parties negotiating joint venture, involving special duty of utmost good faith); Wonsch Construction Co. v. National Bank of Canada (1990), 1990 CarswellOnt 135 (Ont. C.A.) (joint venturer unable to make secret profit by dealing directly with another joint venturer's bankers to secure direct benefits in liquidation of joint venture's assets and payments of its debts); **see also** WHA 820 Holdings Ltd. v. Daymax Management Inc. (2003), 2003 CarswellBC 3103 (B.C. S.C.) (agreement requiring each party to bear proportionate responsibility for any liabilities incurred by defendants respecting development project, giving rise to good faith obligation on part of defendants, including duty to plaintiffs to disclose activities affecting project).

22 **See** §§ 43 to 46, 47; Agency; **see also** Trophy Foods Inc. v. Scott (1995), 1995 CarswellNS 218 (N.S. C.A.) (while principal and agency relationship giving rise to fiduciary duties, extent of such duties vary; equitable duties imposed should reflect nature of relationship and, particularly, terms of contract between commercial parties).

23 Shea v. Manitoba Public Insurance Corp. (1991), 1991 CarswellBC 60 (B.C. S.C.) (insurer's exclusive discretionary power to settle claims placing insured at insurer's mercy; insured's vulnerability imposing on insurer duties of good faith and fair dealing, requiring at least as much consideration to insured's interests as to own interests, and disclosure of all material information touching on insured's position in litigation and settlement negotiations); Ernst & Young Inc. v. Chartis Insurance Co. of Canada (2014), 2014 CarswellOnt 891 (Ont. C.A.) (duty to act in good faith separate from duty to compensate for loss covered by policy and thus giving rise to separate and independent cause of action); **see also** Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co. (1994), 1994 CarswellOnt 661 (Ont. C.A.) (excess insurer's duty to act in good faith not giving rise to general fiduciary duty); Manifest Shipping Co. v. Uni-Polaris Shipping Co. (2001), [2001] 2 W.L.R. 170 (U.K. H.L.); **see also** § 6 (regarding good faith during negotiations), §§ 117, 259; Insurance.

24 Martel Building Ltd. v. R. (2000), 2000 CarswellNat 2678 (S.C.C.) (full extent of obligation of fair and equal treatment to be determined from tender documents); M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd. (1999), 1999 CarswellAlta 301

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(S.C.C.) (implied obligation that only compliant bid would be accepted); Double N Earthmovers Ltd. v. Edmonton (City) (2005), 2005 CarswellAlta 276 (Alta. C.A.); affirmed (2007), 2007 CarswellAlta 36 (S.C.C.) (duty of fairness to bidder not including obligation to investigate allegations concerning capacity of another bidder to comply with own bid prior to acceptance); J. Oviatt Contracting Ltd. v. Kitimat General Hospital Society (2002), 2002 CarswellBC 1506 (B.C. C.A.) (hospital able to rely on privilege clause, as no bad faith found); Chinook Aggregates Ltd. v. Abbotsford (Municipal District) (1989), 1989 CarswellBC 203 (B.C. C.A.) (implied term of fairness inherent aspect of tendering process; unannounced local preference policy breaching duty to treat all bidders fairly); Rockwood v. Eastern Newfoundland & Labrador Regional Health & Community Services Board (2004), 2004 CarswellNfld 178 (N.L. T.D.) (privilege clause clearly reserving right not to proceed with tender; board, required to act fairly and in good faith, not obliged to any bidder to pay more than it felt it could afford, investigate other financing sources, or rework objectives to award contract to particular bidder); Health Care Developers Inc. v. Newfoundland (1996), 1996 CarswellNfld 352 (Nfld. C.A.) (doctrine of good faith part of law of tendering for government contracts; bad faith to award something other than contract B, to fail to reject non-compliant tenders, or to award contract B on basis of undisclosed preference); Provincial Fence Products Ltd. v. Conception Bay South (Town) (2013), 2013 CarswellNfld 233 (N.L. T.D.) (town acting in good faith in call for tenders; evidence supported town's reasons for cancelling tender as being budgetary in nature); **but see** McNamara Construction Co. v. Newfoundland Transshipment Ltd. (2002), 2002 CarswellNfld 124 (Nfld. T.D.) (good faith not implied in construction contract on basis of either intention of parties or implication by law; unlike public tendering cases, circumstances not engaging broad issues of public policy and interest); **see also** § 6 (regarding good faith in negotiations), § 10; Building Contracts.

25 Canadian Bank of Commerce v. Munro (1925), 1925 CarswellAlta 130 (S.C.C.); Business Development Bank of Canada v. Parkview Holdings Ltd. (2000), 2000 CarswellNfld 125 (Nfld. T.D.) (common theme running through "deficiency" applications being requirement that mortgagee always to act in good faith); Federal Business Development Bank v. Ralph (1988), 1988 CarswellNfld 82 (Nfld. C.A.) (mortgagee breaching duty to act in good faith to take reasonable precautions to obtain best available price); Frost Ltd. v. Ralph (1982), 1982 CarswellNfld 66 (Nfld. C.A.) (mortgagee not acting in good faith when price realized significantly short of true value of property sold, when acting wilfully and recklessly in conduct of sale, or when failing to take reasonable precautions or act in prudent manner to obtain proper price).

26 GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 1996 CarswellOnt 1434 (Ont. Gen. Div. [Commercial List]) (grantor of right of first refusal must act reasonably and in good faith; duty not discharged where essential purpose of sale to third party being to frustrate right of first refusal); Landymore v. Hardy (1991), 1991 CarswellNS 102 (N.S. T.D.) (grantor of right of first refusal required to offer property at lowest fair market price that prepared to accept; relations to be characterized by good faith and reasonableness); **but see** 1376273 Ontario Inc. v. Knob Hill Farms Ltd. (2003), 2003 CarswellOnt 2239 (Ont. S.C.J.); affirmed (2003), 2003 CarswellOnt 4936 (Ont. C.A.) (in case of exercise of simple option to purchase, no duty of good faith on vendor to remind purchaser of expiry date of option or to tell purchaser that request for extension will be denied); Morningstar Homes Ltd. v. 545918 B.C. Ltd. (2005), 2005 CarswellBC 96 (B.C. S.C.) (option to purchase; term requiring reasonable efforts to register subdivision plan not required as matter of business efficacy).

27 Valley Equipment Ltd. v. John Deere Ltd. (2000), 2000 CarswellNB 13 (N.B. Q.B.) (dealer awarded damages against manufacturer for breach of duty of good faith; "reasonableness" read into cancellation clause in dealer agreement; termination of long-term relationship based on resignation of dishonest and disloyal general manager not reasonable); **see also** Klewchuk v. Switzer (2003), 2003 CarswellAlta 867 (Alta. C.A.); leave to appeal refused (2004), 2004 CarswellAlta 426 (S.C.C.) (parties having long-standing business arrangements to provide charities with locations and services for operating casinos; defendant meeting duty of good faith by negotiating with plaintiff after concluding that agreement frustrated by change in gaming laws; agreement to negotiate not carrying obligation to lease casino facility at any price); Sultani v. Blenz The Canadian Coffee Co. (2005), 2005 CarswellBC 877 (B.C. S.C.); affirmed (2005), 2005 CarswellBC 2862 (B.C. C.A.) (franchise agreement containing entire agreement clause but no provision for renewal; while relationship between parties imposing duty of good faith upon franchisor short of fiduciary duty, duty of fair dealing not compelling party to renew expiring relationship when not commercially reasonable to do so); 530888 Ontario Ltd. v. Sobeys Inc. (2001), 2001 CarswellOnt 600 (Ont. S.C.J. [Commercial List]) (no inherent right to force franchisor to enter into new sublease with franchisee where sublease agreement expiring and containing no option to renew); **see also** § 6 (regarding duty of good faith in negotiating in context of long-term relationship).

28 Wallace v. United Grain Growers Ltd. (1997), 1997 CarswellMan 455 (S.C.C.) (unlike ordinary commercial contract, power inequality informing all aspects of employment relationship and requiring courts to hold employers to duty of good faith and fair dealing in manner of dismissal; breach of obligation compensable by adding to length of notice period; however, dismissed employee having no right to sue in contract or tort for bad faith conduct in manner of dismissal); **see also** McKinley v. BC Tel (2001), 2001 CarswellBC

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1335 (S.C.C.) ("… obligations [of good faith and fair dealing] subsist throughout the employment relationship until, and including its termination" (*in obiter*)); Babcock v. Canada (Attorney General) (2005), 2005 CarswellBC 937 (B.C. S.C.) (implied obligation of good faith not extending beyond dismissal; applying only to manner of dismissal); Gismondi v. Toronto (City) (2003), 2003 CarswellOnt 1498 (Ont. C.A.); leave to appeal refused (2004), 2004 CarswellOnt 718 (S.C.C.) ("Wallace damages" not limited to employer's acts at very moment of dismissal; in appropriate circumstances may include employer's conduct both pre- and post-termination, but only as component of manner of dismissal); Barnard v. Testori Americas Corp. (2001), 2001 CarswellPEI 29 (P.E.I. C.A.) (employment contracts not carrying implied term of good faith and fair dealing); Bower v. J.M. Schneider Inc. (1986), 1986 CarswellBC 397 (B.C. C.A.) (trial judge erroneously implying term to ensure employee's mortgage subsidy payment continuing to end of reasonable notice of termination; court unable to rewrite business contracts to impose own notion of fairness or to imply term contradicting contractual express term).

29 Joo v. Shin (2005), 2005 CarswellBC 1460 (B.C. S.C.) (franchisor terminating relationship by bad faith conduct, substantially nullifying benefits for which franchisee contracted); Ismail v. Treats Inc. (2004), 2004 CarswellNS 24 (N.S. S.C.) (applicable duty of care in franchise relationship one of good faith, including requirement to prepare accurate *pro forma* statements and generally to disclose accurate financial information); Shelanu Inc. v. Print Three Franchising Corp. (2003), 2003 CarswellOnt 2038 (Ont. C.A.) (franchisors owing duty of good faith to franchisees even apart from *Arthur Wishart Act (Franchise Disclosure), 2000*); Triple 3 Holdings Inc. v. Jan (2004), 2004 CarswellOnt 2649 (Ont. S.C.J.) (franchisor, abusing power and acting dishonestly, liable for $350,000 in punitive damages); Pizza Pizza Ltd. v. 805837 Ontario Inc. (1997), 1997 CarswellOnt 5494 (Ont. Gen. Div.) (no evidence of lack of good faith on part of franchisor in calculating payments to be made under agreements, and no evidence that calculations inaccurate); Perfect Portions Holding Co. v. New Futures Ltd. (1995), 1995 CarswellOnt 3126 (Ont. Gen. Div.); Courtesy Chrysler (1987) Ltd. v. Chrysler Canada Inc. (2012), 2012 CarswellAlta 1843 (Alta. Q.B.); **see also** McKinlay Motors Ltd. v. Honda Canada Inc. (1989), 1989 CarswellNfld 9 (Nfld. T.D.) (franchisor allocating limited resources or products among various distributors required to act in good faith and not rely on pretexts for action outside scope of circumstances contemplated by contract); Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada Ltd. (2005), 2005 CarswellOnt 1954 (Ont. S.C.J.) (duty imposed on car manufacturer to act fairly to dealership, as relationship akin to franchise; decision to terminate dealership agreement exercised unfairly and in bad faith); **but see** Sultani v. Blenz The Canadian Coffee Co. (2005), 2005 CarswellBC 877 (B.C. S.C.); affirmed (2005), 2005 CarswellBC 2862 (B.C. C.A.) (franchise agreement containing entire agreement clause but no provision for renewal; while relationship between parties imposing duty of good faith upon franchisor short of fiduciary duty, duty of fair dealing not compelling party to renew expiring relationship when not considered commercially reasonable to do so); 530888 Ontario Ltd. v. Sobeys Inc. (2001), 2001 CarswellOnt 600 (Ont. S.C.J. [Commercial List]) (no inherent right existing to force franchisor to enter into new sublease with franchisee where sublease agreement expiring and no option to renew); **see also** § 6 (regarding good faith during negotiations).

30 Lac Minerals Ltd. v. International Corona Resources Ltd. (1989), 1989 CarswellOnt 126 (S.C.C.) (fiduciary relationships not to be presumed in commercial contracts, as equity's drastic remedies reserved for special circumstances; instead, parties should protect themselves by contract); Weiss v. Schad (2002), 2002 CarswellOnt 1498 (Ont. C.A.) (share purchase agreements not falling into special class of contracts of utmost good faith imposing obligation to disclose); 962789 Ontario Ltd. v. Newmarket Plaza Ltd. (2006), 2006 CarswellOnt 5086 (Ont. S.C.J.) (landlord and tenant relationship not analogous to franchise relationship; landlord having no control over day-to-day operation of tenant's business, and lease being typical commercial bargain between parties of equal bargaining power; landlord not owing tenant duty of good faith regarding type of business it leased vacant premises to); Rogers & Rogers Inc. v. Pinehurst Woodworking Co. (2005), 2005 CarswellOnt 7190 (Ont. S.C.J.) (supplier and installer of store fixtures claiming manufacturer breached good faith in misappropriating business opportunity; as relationship between parties not fiduciary, no duty of good faith on manufacturer in fiduciary capacity and no operative good faith standard breached; provided manufacturer not breaching restrictive covenant, entitled to act in own self-interest without regard to supplier's interests); **see also** Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd. (1999), 1999 CarswellAlta 141 (Alta. C.A.); reconsideration / rehearing refused (1999), 1999 CarswellAlta 348 (Alta. C.A.); leave to appeal refused (2000), 253 N.R. 193 (note) (S.C.C.) (duties of loyalty and avoidance of conflict of interest inherent in fiduciary relationship unlikely to be implied in absence of such relationship; while code of professional ethics cannot create fiduciary relationship, may be considered in determining scope of fiduciary relationship); 978011 Ontario Ltd. v. Cornell Engineering Co. (2001), 2001 CarswellOnt 1290 (Ont. C.A.); leave to appeal refused (2001), 2001 CarswellOnt 3809 (S.C.C.) (no duty of good faith in negotiations where no special relationship between parties; mentor relationship not displacing normal contractual principle of self-reliance, since defendant in ascendant position; plaintiff not having good faith obligation to disclose clear and visible termination provision to defendant who signed agreement without reading it; defendant's trust in plaintiff insufficient to create good faith obligation); Courtesy Chev Olds Ltd. v. Hadfield (2006), 2006 CarswellOnt 1937 (Ont. S.C.J.) (defendant owing implied contractual duty of good faith to car lessee to notify of proposed repairs and allow inspection prior to repairs; also breaching duty by

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not showing labour rates and hours spent in billing to customer); **but see** Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd. (2001), 2001 CarswellOnt 579 (Ont. C.A.) (developer marketing condominium project designed around recreation area to be conveyed to condominium corporations, but then deciding to develop it; duty of good faith to condominium owners owing due to manner in which developer marketed property, unequal bargaining power, and owners' lack of access to information concerning future development of recreation area lands); Canadian Imperial Bank of Commerce v. Brown (1999), 1999 CarswellOnt 4107 (Ont. S.C.J.) (bank, making loan to debtors under conflict of interest, having duty to act in good faith, regardless of lack of prior or fiduciary relationships between bank and debtors); Computer Workshops Ltd. v. Banner Capital Market Brokers Ltd. (1988), 1988 CarswellOnt 107 (Ont. H.C.); affirmed (1990), 1990 CarswellOnt 1445 (Ont. C.A.) (implied term in contract for supply of computer hardware that vendor not to sell similar system to competitor; customer's trust and confidence in supplier creating fiduciary duties); Ascent Financial Services Ltd. v. Blythman (2006), 2006 CarswellSask 83 (Sask. Q.B.); affirmed (2007), 2007 CarswellSask 390 (Sask. C.A.) (plaintiffs purchasing goodwill of defendants' business and parties forming new business; after parties falling out, plaintiffs purchasing defendants' shares, and defendants later breaching non-competition and non-solicitation agreements; defendants, owing obligation to use best efforts to transfer their clients to new business, breaching duty of good faith in performance of contract; defendants owing plaintiffs fiduciary duty independent of contract based on power to affect plaintiffs' interests).

31 Shelanu Inc. v. Print Three Franchising Corp. (2003), 2003 CarswellOnt 2038 (Ont. C.A.).

32 Wallace v. Canadian Pacific Railway (2013), 2013 CarswellSask 432 (S.C.C.).

33 Bhasin v. Hrynew (2014), 2014 CarswellAlta 2046 (S.C.C.).

34 Bhasin v. Hrynew (2014), 2014 CarswellAlta 2046 (S.C.C.); **see** § 6 (existence of a duty of good faith in the negotiation of contracts).

35 O'Neill v. General Motors of Canada Ltd. (2013), 2013 CarswellOnt 9803 (Ont. S.C.J.) (duty of good faith inherent in employment relationship; court thus concluding that duty of good faith favouring plaintiff's claim that benefits could not be reduced after employee had retired); Ward v. Manufacturers Life Insurance Co. (2007), 2007 CarswellOnt 8048 (Ont. C.A.); Gateway Realty Ltd. v. Arton Holdings Ltd. (1991), 1991 CarswellNS 320 (N.S. T.D.); affirmed on other grounds (1992), 1992 CarswellNS 518 (N.S. C.A.) (good faith standard breached when party acting in bad faith manner in performing contract, contrary to community standards of honesty, reasonableness or fairness; insistence on good faith requirement in discretionary conduct in contractual formation, performance and enforcement fulfilling courts' obligations to justly resolve disputes between contracting parties); LeMesurier v. Andrus (1986), 1986 CarswellOnt 670 (Ont. C.A.); leave to appeal refused (1986), 74 N.R. 239 (note) (S.C.C.) (purchaser refusing to close purchase and sale agreement because fence and curb of driveway placed over lot line by less than one foot; reliance on rescission clause not justified; vendors and purchasers owing duty to each other to perform contract honestly and in good faith; “approach may be merely an example of the development of an independent doctrine of good faith in contract law at least in the performance of contracts”); Elite Specialty Nursing Services Inc. v. Ontario (2002), 2002 CarswellOnt 2575 (Ont. S.C.J.) (exercise of discretion in allocation of nursing care cases among several facilities; explicit recognition of doctrine of good faith making law more certain, understandable and fair, and avoiding judicial interpretive contortions to obtain desired result); **but see** Wallace v. United Grain Growers Ltd. (1997), 1997 CarswellMan 455 (S.C.C.) (dismissed employee having no right to sue in contract or tort for bad faith conduct in manner of dismissal; however, unlike ordinary commercial contract, power inequality informing all aspects of employment relationship, requiring courts to hold employers to duty of good faith and fair dealing in manner of dismissal; breach of obligation compensable by adding to length of notice period); Slate Ventures Inc. v. Hurley (1996), 1996 CarswellNfld 64 (Nfld. T.D.); affirmed (1997), 1997 CarswellNfld 203 (Nfld. C.A.) (vendor of shares in slate quarry owing duty not to nullify reasonably expected benefits by personally exploiting another quarry project; contract creating reasonable expectations of parties by implication and not based on any good faith doctrine); Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (implied duty of good faith not having gone so far as to create new, unbargained-for rights and obligations, nor used to alter contract's express terms); **see also** Waters, “Corporate Behaviour and Equity's Standards of Conduct” (2004), C.L.R. (3d) 248 (arguing that good faith doctrine of equity going beyond literal and implied terms of contract, and emphasizing spirit of agreement and fairness prevailing between parties); Stack, “The Two Standards Of Good Faith In Canadian Contract Law” (1999), 62 Sask. L. Rev. 201 (one standard of good faith relying on concepts like commercial standards, fair play, fairness, and reasonableness; second standard relying on expectations and intentions of contracting parties as manifested in their contract; court applying first standard looking to a tort-like norm outside parties' agreement to decide if bad faith has occurred, while court employing latter arriving at appropriate standard of conduct by interpreting parties' agreement).

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36 Slate Ventures Inc. v. Hurley (1996), 1996 CarswellNfld 64 (Nfld. T.D.); affirmed (1997), 1997 CarswellNfld 203 (Nfld. C.A.) (vendor of shares in slate quarry owing duty not to nullify reasonably expected benefits by personally exploiting another quarry project; contract creating reasonable expectations of parties by implication and not based on any good faith doctrine); Cherubini Metal Works Ltd. v. New Brunswick Power Corp. (2007), 2007 CarswellNB 183 (N.B. Q.B.); affirmed (2008), 2008 CarswellNB 628 (N.B. C.A.) (implied contractual duty of good faith and fairness in tendering process not applicable when owner does not award tender to lowest bidder, as long as all criteria to be applied are considered); **see also** Manifest Shipping Co. v. Uni-Polaris Shipping Co. (2001), [2001] 2 W.L.R. 170 (U.K. H.L.) (good faith duty in performing contract being contractual obligation arising from contract and subject to remedies provided by contract); Waddams, *The Law of Contracts*, 7th ed. (Thomson Reuters Canada Limited, 2017), § 514 (test of good faith is objective, empowering the court to grant relief from agreements, or clauses that are highly unreasonable or unfair).

37 Dynamic Transport Ltd. v. O.K. Detailing Ltd. (1978), 1978 CarswellAlta 62 (S.C.C.) (implied obligation on vendor in purchase and sale situation to act in good faith and take all reasonable steps to complete sale, including steps to subdivide if condition for carrying out sale; only way to give agreement business efficacy); **see also** § 162.

38 CivicLife.com Inc. v. Canada (Attorney General) (2005), 2005 CarswellOnt 4228 (Ont. S.C.J.); reversed in part on other grounds (2006), 2006 CarswellOnt 3769 (Ont. C.A.) (implied term of contract to build internet portal that government would act in good faith so as not to nullify software developers' reasonable expectations); **see also** McCamus, *The Law of Contracts* (Irwin Law, 2005); McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith in Contractual Performance" (2005), 29 Advocates' Q. 72.

39 CivicLife.com Inc. v. Canada (Attorney General) (2005), 2005 CarswellOnt 4228 (Ont. S.C.J.); reversed in part on other grounds (2006), 2006 CarswellOnt 3769 (Ont. C.A.) (implied term of contract to build internet portal that government would act in good faith so as not to nullify software developers' reasonable expectations; parties' intention that government would facilitate co-operation); **see also** McCamus, *The Law of Contracts* (Irwin Law, 2005); McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith in Contractual Performance" (2005) 29 Advocates' Q. 72; Waddams, *The Law of Contracts*, 7th ed. (Thomson Reuters Canada Limited, 2017), § 505; **see also** cases cited in § 191.

40 Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd. (1994), 1994 CarswellAlta 89 (Alta. C.A.); leave to appeal refused (1994), 179 N.R. 80 (note) (S.C.C.) (party unable to exercise contractual power in way substantially nullifying contractual objectives or causing significant harm to other party contrary to parties' original purposes; defendant failing to consider both main methods of pooling under royalty agreement, contrary to industry practice and parties' expectations); Shelanu Inc. v. Print Three Franchising Corp. (2003), 2003 CarswellOnt 2038 (Ont. C.A.) (discretion under contract must be exercised reasonably, fairly and with regard to how other party's interests affected); EdperBrascan Corp. v. 177373 Canada Ltd. (2000), 2000 CarswellOnt 4084 (Ont. S.C.J.); affirmed on other grounds (2002), 2002 CarswellOnt 698 (Ont. C.A.) (contracting parties obliged to act in good faith in some circumstances, such as duty to use best efforts, and in exercise of discretion (*in obiter*)); Greenberg v. Meffert (1985), 1985 CarswellOnt 727 (Ont. C.A.); leave to appeal refused (1985), 64 N.R. 156 (note) (S.C.C.) (contract providing that payment of commission to real estate agent after termination of agreement being at agency's sole discretion; agency required to act reasonably, fairly, and with regard to how other party's interests affected); Elmdale Investments Ltd. v. Myers (2001), 2001 CarswellOnt 4499 (Ont. S.C.J.) (purchaser obliged to act in good faith in dealing with conditions set out in agreement of purchase and sale; not entitled to exercise discretion capriciously); **see also** P. & G. Cleaners Ltd. v. Johnson (1995), 1995 CarswellMan 187 (Man. Q.B.) (vendor of shares having absolute right to withhold consent to purchaser acquiring shares in related company, unless business efficacy necessitating limitation of reasonableness; however, minimal duty to act in good faith existing); Muhammad v. Mental Health Program Services of Metropolitan Toronto (2006), 2006 CarswellOnt 5013 (Ont. S.C.J.); affirmed (2008), 2008 CarswellOnt 2370 (Ont. C.A.) (contract stipulating that transfer of contract could be unreasonably withheld; implied duty of good faith would contradict terms of contract); Degelder Construction Co. v. Dancorp Developments Ltd. (2000), 2000 CarswellBC 1484 (B.C. S.C. [In Chambers]); affirmed on other grounds (2002), 2002 CarswellBC 2218 (B.C. C.A.) (mortgagee held to subjective duty of acting in good faith; no implied term placing objective duty upon mortgagee to reasonably exercise powers under mortgage); McCamus, *The Law of Contracts* (Irwin Law, 2005); McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith in Contractual Performance", (2005) 29 Advocates' Q. 72; **see also** § 192.

41 Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1998), 1998 CarswellAlta 1088 (Alta. Q.B.) (debt restructuring agreement creating reasonable expectation that company would sell designated assets and give proceeds to bank when unable to pay dividends or redemptions; company breaching duty of good faith by refusing to sell designated assets); Princeton Light

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& Power Co. v. MacDonald (2005), 2005 CarswellBC 1254 (B.C. C.A.) (duties of good faith and fair dealing implied elements of standard electrical utility supply contract; utility acting in bad faith in unreasonably back-billing customer, justifying punitive damages); Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (duty of good faith may be implied to secure performance and enforcement of contract made by parties, or to ensure that parties not acting in manner eviscerating or defeating agreement's objectives); Optimal Space Inc. v. Margana Holdings Inc. (2005), 2005 CarswellOnt 1687 (Ont. S.C.J.) (commercial leases subject to implied duty of good faith in performance; party's attempts to destroy integrity of contract amounting to bad faith, and presence of bad faith excluding existence of good faith); **see also** Kubota Canada Ltd. v. Merchant Private Ltd. (1997), 1997 CarswellOnt 1685 (Ont. Gen. Div.) (good faith equally applicable to all contracts, including leasing and financing agreements; allowing lessor to retain payment resulting from lessee's mistake in failing to give notice under technical provisions of lease inconsistent with good faith and fair dealing); McCamus, *The Law of Contracts* (Irwin Law, 2005); McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith in Contractual Performance" (2005), 29 Advocates' Q. 72; **but see** M.A. Hanna Co. v. Sydney Steel Corp. (1995), 1995 CarswellNS 45 (N.S. S.C.); Potter, Q.C., annotation); **see also** §§ 191 to 192.

42 Markakis v. Yuck (2003), 2003 CarswellAlta 208 (Alta. Q.B.) (defendant's representations when soliciting investment in business ventures from plaintiffs carrying undertaking that defendant would act reasonably and in good faith, arising both as matter of contractual interpretation and by operation of law); **see also** No. 151 Cathedral Ventures Ltd. v. Gartrell (2003), 2003 CarswellBC 2974 (B.C. S.C.) (since land owners extracting undertaking from developer to advise them of any disadvantage resulting from contract's implementation, reasonable for developer to expect owners not to take advantage of it; owners, contrary to such known expectation, deliberately delaying advising developer until expiry of deadline for condition removal, that developer's draft new offer considered repudiation of contract; breach of implied term of good faith); **but see** Galaxy Sports Inc. v. Umbro Holdings Ltd. (2005), 2005 CarswellBC 481 (B.C. S.C.) (relationship between parties nothing other than licensor/licensee in commercial enterprise; merely negotiating toward acquisition agreement not creating fiduciary relationship; representations not made with intention of promoting sale of licences).

43 Shelanu Inc. v. Print Three Franchising Corp. (2003), 2003 CarswellOnt 2038 (Ont. C.A.).

44 Strategy Summit Ltd. v. Remington Development Corp. (2011), 2011 CarswellAlta 1616 (Alta. Q.B.).

45 C.M. Callow Inc. v. Zollinger (2020), 2020 SCC 45 (S.C.C.) (counterparty's actions and statements led party to mistakenly believe that winter contract would be renewed; breach of duty of honest performance).

46 C.M. Callow Inc. v. Zollinger (2020), 2020 SCC 45 (S.C.C.) (court rejected reliance damages that measured damages according to loss party suffered from relying on other party's dishonesty).

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In the Court of Appeal of Alberta

Citation: Paterson v. Hamilton, 1996 ABCA 143

Date: 19960404
Docket: 16415
Registry: Calgary

1996 ABCA 143 (CanLII)

Between:

George G. Paterson,
The Estate of R.J. Ritchie Paterson

Appellants
(Plaintiffs)

- and -

Frederic C. Hamilton, Hamilton Brothers Exploration Company, Hamilton Brothers Petroleum Corporation, Hamilton Brothers Oil & Gas Corporation and Hamilton Brothers Oil Company

Respondents
(Defendants)

And Between:

Southern Hills Investments Ltd., John Souther, Nancy L. Souther, C.W. Roenisch III, Ronald D. Lepan, The Estate of Isaac Hashman, and The Estate of Dr. Francis M. Christie

Appellants
(Plaintiffs)

- and -

Frederic C. Hamilton, Hamilton Brothers Exploration Company, Hamilton Brothers Petroleum Corporation, Hamilton Brothers Oil & Gas Corporation and Hamilton Brothers Oil Company

Respondents
(Defendants)

The Court:

The Honourable Madam Justice Conrad
The Honourable Madam Justice McFadyen
The Honourable Mr. Justice O'Leary

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

W.E. Code, Q.C. and T.N. Cotter, for the Appellant (Plaintiffs)

D.J. McDonald, Q.C. and R.F. Smith, for the Respondent (Defendants)

W.E. Code, Q.C. and T.N. Cotter, for the Appellant (Plaintiffs)

D.J. McDonald, Q.C. and R.F. Smith, for the Respondent (Defendants)

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MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

CONARD, J.A.:

[1] You ought to know that old habits die hard. At the last minute, we are still finishing our judgment. In any event, we are prepared to give judgment this morning. The decision of this Court is divided. Mr. Justice O'Leary will give the majority decision and I will give the dissenting decision.

O'LEARY, J.A.: (for the majority):

[2] The Plaintiffs have appealed two rulings made by Kent, J. during the course of trial. The Defendants have applied to stay the Notice of Appeal on the ground that it is premature, that it is a disruption of the trial process, and an abuse of process.

[3] The trial commenced in May, 1995. There have been approximately 75 days of trial. The Plaintiffs have closed their case except for completion of the evidence of a rebuttal witness and the Defendants have closed their case. The issue which has precipitated the rulings which are now under appeal first arose during the evidence of the last, or close to the last, witness of the Defendants, one Huddleston. The Plaintiffs first made this application following completion of his evidence and during the course of the evidence of the rebuttal witness.

[4] The trial is essentially over. It can be completed within, perhaps, two weeks including completion of the evidence and argument. The trial is scheduled to resume on April 22.

[5] During the examination of the witness Huddleston, it came to light that the witness had sworn a deposition in the United States proceedings and that the deposition had not been disclosed in the Defendants' production. The document was obtained and the examination of the witness was completed with the benefit of the deposition transcript.

No objection has been made with respect to the late production of that document. Any potential prejudice which existed has apparently been remedied.

[6] The existence of the unproduced Huddleston deposition transcript led counsel for the Defendants to make further enquiries with his clients and it was discovered that there are several other similar deposition transcripts which had not been produced. Counsel made this fact known to counsel for the Plaintiffs as well as to the Court. As a result of this, Plaintiffs' counsel made an application to the Trial Judge in December of last year seeking various forms of relief, including a mis-trial or, alternatively, a stay of proceedings or an adjournment *sine die.*

[7] The Trial Judge looked at selected parts of the documents which had then been produced and made a ruling on December 15, 1995. That ruling is the first subject of the appeal.

[8] Later, in early January of this year, further documentation was produced. That resulted from issues raised by the Plaintiffs when they were permitted to re-open their case and call evidence from another witness. Those new documents consisted largely of micro-fiche records of journal entries in respect of inter-company financial transactions or movements of assets among the various Hamilton companies. These matters were not considered relevant by the Defendants in the first instance and were not made the subject of production.

[9] The Plaintiffs made a further application, similar to the first, and the Trial Judge again reviewed those parts of the documents which counsel selected as relevant and made a ruling on February 28, 1996 dismissing the Plaintiffs' application. That ruling is the second subject-matter of the appeal before this Court.

[10] In her December ruling, the learned Trial Judge formulated a test for determining whether or not a remedy should be made available where there has been late production of relevant documents. The test is set out in her Reasons for Judgment. She formulated this test after first taking into account a number of criteria, including the duty of a party to litigation to make continuous production during the litigation including the trial. After a review of the material produced in the light of the evidence introduced at the trial to that point, the Trial Judge applied the test she had formulated and ruled that the Plaintiffs were not entitled to any of the remedies sought and that the trial should proceed.

[11] The February ruling was to the same effect.

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[12] It has long been accepted that this Court will not entertain appeals from rulings or orders made in the course of a trial unless there are exceptional or unusual circumstances. To entertain such appeals would seriously compromise the trial process. The question is whether these circumstances justify the Court in examining the rulings made by the learned Trial Judge to determine if they were right or wrong and to either grant a remedy or order the trial to continue to completion.

[13] Exceptional or unusual circumstances justifying interference in the trial process must be such as to demonstrate that it would be manifestly unjust to one or both of the parties to let the trial proceed on the basis of the ruling appealed and that such injustice cannot be adequately redressed if the trial is allowed to continue without the correctness of the ruling being tested in this Court.

[14] The Plaintiffs say that the rulings are not rulings made in the course of trial but are, rather, rulings on an application in the nature of an interlocutory motion, in respect of which the Plaintiffs are given the right to appeal under **Rule 505.** We do not agree. The applications here were made to the Trial Judge in the course of the trial. Rules and policy considerations applicable to rulings made in the course of the trial apply equally here.

[15] It is clear from reviewing the material filed and from the submissions of counsel that if this Court hears the appeal, the appeal can only be resolved in one of two ways: by directing a mis-trial or by ordering the trial to continue (in effect dismissing the appeal).

[16] It is evident that there can be no “half-way house” here; that this is not a case which can be “patched-up” by directing further discoveries or other similar remedies. That could only be done, in any event, if this Court were to decide that the Trial Judge’s rulings were wrong and that brings us back to the fundamental question of whether this Court should interfere in these circumstances or not.

[17] The foregoing considerations militate in favour of staying the Notice of Appeal, and letting the trial process proceed to completion. The correctness of the rulings made by the Trial Judge will be subject to scrutiny on appeal if an appeal is taken.

[18] This is not a case where the trial can be “saved” by making orders of various kinds, such as for additional examinations for discovery, re-opening of the parties respective cases and things of that nature. As we have already said, there are only two realistic options available to this Court should the appeal proceed.

[19] We see no additional prejudice to the Plaintiffs if the Notice of Appeal is stayed and the trial allowed to proceed to completion. The Plaintiffs argue that they will be

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prejudiced if they are forced to complete the trial and then appeal the judgment, because findings of fact will have been made on an inadequate discovery. The Court of Appeal would be reluctant to overturn findings of fact, even if made on the basis of inadequate discovery and possibly a consequent inadequate examination of witnesses.

[20] We do not agree with that argument. The position here is similar to any error which occurs in the course of a trial. If an appellant convinces this Court that evidence was improperly admitted or rejected, or if a procedural matter results in unfairness to one of the parties, this Court has never had difficulty in providing an appropriate remedy, despite findings of fact made by the trial judge.

[21] There is also the question of the prejudice of having to mount a full appeal in order to have the issues resolved. If the Plaintiffs are unsuccessful at trial, they are likely to appeal in any event, regardless of what remedial action this Court might take should the appeal be permitted to proceed.

[22] If the Plaintiffs are successful at the trial, then the issues raised become largely academic. They would still be bound of course by the evidence at trial and this might result in prejudice on an appeal by the other side. On balance, however, the potential prejudice to the Plaintiffs arising from refusal to let this appeal proceed is greatly outweighed by the prejudice which will result to both parties from the declaration of a mis-trial, and we believe that that remedy or the dismissal of the appeal are the only practical potential results should the appeal proceed.

[23] The position of the Defendants should also be kept in mind. We should not decide this application on the basis of any presumption of wrong-doing on the part of the Defendants or their counsel. The Trial Judge made it very clear that her decision was not based on any such presumption and we should proceed on the same basis. We are not in a position to make any findings in this regard.

[24] We fail to see how this appeal can be allowed to proceed without it being characterized as “second guessing” the Trial Judge. In our view it would be a serious compromise of the principle, long recognized in this Court, that we will not interfere with the trial process except in exceptional circumstances. This principle is particularly applicable here where the trial is virtually completed and the only reasonable remedy, as we have said on several occasions, which could be open to this Court on the appeal would be to either dismiss the appeal or to direct a mis-trial with the result that the trial would have to be commenced again from the start.

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[25] Counsel for the Defendants accepted that staying the Notice of Appeal would not bar the Plaintiffs from raising the matters now complained of on appeal, should they be unsuccessful at the trial and eventually appeal to this Court.

[26] For the reasons which I have stated, the application to stay the Notice of Appeal is allowed.

McFADYEN, J.A.:

[27] I agree with the decision and the Reasons of Mr. Justice O'Leary.

CONRAD, J.A. (dissenting):

[28] As stated by Mr. Justice O'Leary, the issue before this Court is whether this appeal should be dismissed or stayed as being premature or an abuse of process.

[29] I am of the view that this application for dismissal should be denied and the appeal proceed. Any panel that hears this appeal would, of course, have the opportunity to revisit this issue on its own motion should they feel after a review of fuller evidence than is currently available to us that the issue of a mistrial should be reserved until after the conclusion of the trial.

[30] My brother O'Leary has outlined briefly some of the background leading up to this application and I would simply add a few comments and observations in that regard.

[31] The late disclosure of documents in this case is vast. There were, according to the Plaintiffs, in excess of 1,900 documents produced by the Respondents since the trial commenced. Approximately 208 of those documents were not produced until after the Appellant had closed its case. Those documents alone consisted of thousands of pages of documents. As Mr. Justice O'Leary described, some of the depositions first came to light during the cross-examination of the expert, Mr. Huddleston.

[32] Prior to trial, the Respondents' counsel had sent a letter to the Appellant saying that all of the trial transcript and depositions from a related U.S. trial had been disclosed. Without suggesting that counsel has done anything intentionally wrong, that statement was inaccurate and the depositions of many witnesses came to light following the cross-examination of Mr. Huddleston. Huddleston's deposition alone was some 656 pages long.

[33] One of the depositions that was not disclosed was that of Mr. Betts, who was apparently involved with Mr. Huddleston in the collection of facts underlying the Huddleston opinion evidence. That deposition has not been disclosed to the date of this appeal.

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[34] O'Leary, J.A. referred to the late disclosure of journal entries, indicating transfers between various of the Respondent companies and Ex Co. These entries were contained on a microfiche of accounting and journal entries. The existence of the microfiche was not disclosed. The Appellants argue that there is a very significant entry of that microfiche supporting the allegations in the Statement of Claim. The Respondent says he did not recognize that they were relevant until after the re-opening of the Plaintiffs' case. In any event, it is not disputed that the microfiche is relevant to the issues in dispute, and that it was not produced.

DISCUSSION

[35] In arriving at my decision, I agree with the general principle that this Court does not entertain appeals from rulings made mid-trial except in exceptional circumstances, for fear of compromising the trial process. However, as Chief Justice Laycraft made clear in the ***Alberta Tank Ltd.*** decision (1987), 53 Alt a. L.R. (2d) 190, this Court should not refuse to exercise its jurisdiction to hear an appeal and wait for final verdict where a later review will not produce a just result. Thus, the practical point in this appeal is whether a miscarriage of justice will occur if the trial proceeds. I am of the view it will.

[36] In applying the above principle to the facts of the case under appeal, it is important to identify the reason the problem in this case exists. It arises totally from the failure of the Respondents to produce not just a few documents, but many documents, on a timely basis.

[37] Thus, there is a second fundamental principle which is at stake in this case. There is a fundamental obligation of a party to an action to provide all of the documents relating to the matters in issue. There is a danger that if we allow cases to proceed to trial where there has been a massive failure of production of documents, it will diminish the obligation to produce in a timely fashion, as it may be seen as an advantage to withhold production. Conversely, halting proceedings raid-trial may prompt such appeals. It is with these two fundamental requirements of our judicial system in mind that I approach this appeal.

[38] In my view, this case is quite different from the ***Cascade Development Corporation Limited*** case (1988), 63 Alta L.R. (2d) 394 where the trial judge ruled the document was irrelevant. In the case at bar the documents are all admitted to be relevant. It is admitted that they should have been produced. They simply were not produced. Nor is there any evidence to say why they were not produced. It is true that counsel has said it was an oversight -and I am not suggesting otherwise - but there is no evidence to explain

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how the oversight occurred. Were the documents thought to be lost? Where were they? Were they in the solicitor's possession and he just simply overlooked producing them? Were they docuraents that everybody forgot about? All of that is unknown. What is know is that they were not produced, without explanation.

[39] Again, I do not suggest by these comments that any sinister intent was involved; but, with respect, I take a somewhat different view of this than my colleagues. Where he says we should not presume wrongdoing by the Defendants, I say there is wrongdoing - not in the sense of intentional wrongdoing because I cannot make that decision on this evidence, but in the sense of an extensive failure of production.

[40] The principle of production is vital to the civil litigation process. In commercial litigation such as the type involved in this case, the plaintiffs rely absolutely on full and complete production and discovery. The obligation rests on the party to produce, not on the party requesting production. I accept that frequently there is a casualness about production in our courts, where counsel agree between themselves that documents will continue to be produced throughout the course of the trial. That does happen from time to time, but when that happens there is also generally an accommodation between parties as to the need to remedy any prejudice that may exist as a result of that late production. When they cannot agree, of course rulings will have to be made; but the responsibility for that production does not shift.

[41] The problems that have arisen in this case are created not by the Trial Judge's ruling, for she was forced to make rulings, but by the extensiveness of the failure to disclose what are conceded to be relevant and producible documents. Not only did they fail to provide, but in the case of the depositions there was representation - albeit innocent - that all deposition evidence had been produced. The Plaintiffs were entitled to rely on that. They did not need to go looking for those depositions. That statement was not correct.

[42] Thus, when I view the issues of injustice, I am not as concerned here with the position of the Defendants/Respondents as my colleagues. I do so not because I conclude that the Defendants intentionally set out to do something wrong, but because the problems that have been created are their doing, whether inadvertent or not.

[43] I also, with respect, do not share the same view as my colleagues with respect to the issue of this being an all-or-nothing situation. In my view, the findings that it must be either a mistrial, or nothing, cannot be made until after the appeal of the rulings. If the Trial Judge is right in all of her conclusions, except perhaps the failure to produce one

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document, then perhaps the trial could be saved by allowing the Appellants to cross-examine and reopen the case with respect to that evidence. If, on the other hand, the production is so disastrous that it cannot be saved, should the Plaintiffs be forced to proceed to try to salvage what they can in rebuttal evidence with what they accurately describe as having one arm tied behind their back?

[44] Taking everything into consideration, I conclude on the facts of this case that justice cannot be done if this application is granted. In summary, I arrive at that decision for the following reasons:

[45] Firstly, this case is not the normal case necessitated by a, ruling during the course of trial relating to admissibility of evidence or rulings made to deal with a few documents produced in an untimely fashion, or other such rulings as may arise from time to time throughout a trial; rather, this is a case necessitated by an extensive failure to produce of admittedly relevant documents. While counsel continued on, once they knew of some of the documents, I do not think they should be penalized when at some point in the trial they realize that they cannot continue on properly without prejudice.

[46] Secondly, the Trial Judge was in a difficult spot. She looked at the late production and concluded that there were no issues raised by the new production. It will be remembered that she did not have all of the new production in front of her but made her decision on the basis of the examples put forward which she described as being examples most prejudicial to the Plaintiffs. She felt that the evidence in those examples was already available, and thus refused any adjournment for re-examination with respect to much of the production. In my view, if she were wrong on any of those issues and there is any possibility that an adjournment could resolve the issue in time to save the trial, that opportunity will be lost if this motion is granted. Injustice will occur. For instance, the Trial Judge concluded that Mr. Jenny's deposition, where he said he knew that the expert had not concurred with the $18.00-$20.00 price being suggested for the Ex Co shares was no different than an earlier letter from Hamilton which suggested that they could not have concurrence from the expert without further investigation. The Appellant, on the other hand, argues that the Hamilton document can be understood to mean that the expert couldn't concur without further research, whereas the statement of Jenny is the first statement indicating that one of the directors knew that the appraiser did not actually concur with the $18.00-$20.00 price. If the appeal court thought the trial judge erred in regard to that one witness only, they could allow examinations for discovery with hopes of

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saving the trial, as opposed to having to order a new trial later. That will not be an option open at the end of the day.

[47] I recognize that that similar problems frequently arise with respect to mid-trial rulings. However, in most cases the problem is not created by such an extensive failure of production. Moreover, in this case there has already been an extensive adjournment from December until April 22. It is not a case of interrupting a trial that is in full flow.

[48] Thirdly, if, on the other hand, the appeal court is of the view that the failure of production is so vast the trial cannot be saved, they can direct a new trial immediately if it is obvious that one is needed, if, on the other hand, the trial proceeds, the appellant will never have the advantage of arguing the full prejudice of the non-production because they will have been prevented from obtaining the derivative evidence that might appear should cross-examination be felt proper.

[49] Fourthly, while the trial is at rebuttal stage, we are not talking about a couple of days of trial remaining. There are still two weeks anticipated. That is a significant time and, indeed, is longer than many trials in total. Moreover, if the Trial Judge is wrong that this evidence is not significant, the Plaintiffs are being forced to continue with rebuttal without the benefit of cross-examination on the new documentary evidence and the derivative evidence that may come to light as a result of such cross-examination. They have the prejudice, not just the ones referred to by them as enumerated by Mr. Justice O'Leary, but the prejudice of expense, time, money, and completion of a trial after disclosure.

[50] Finally, and perhaps most importantly, it is the wrong message to send to persons who fail to produce on the same scale that production failed in this case. The benefit of the continued trial should not operate in the favour of the person who created the serious problem. Morever, at the appeal, this Court will have the benefit of full transcripts and no doubt the documents that were not produced. They are in a much better position to evaluate the deferring of the decision with respect to the mistrial than this panel and, in my view, this motion for dismissal at this time should be dismissed.

[Discussion]

CONRAD, J.A.: The Court is of the view in this situation that it should be costs in the cause.

1996 ABCA 143 (CanLII)

Opron Construction Co. Ltd.
(plaintiff) v. Her Majesty The
Queen in Right of Alberta
(defendant)
(Action No. 8403-37500)

Indexed As: Opron Construction Co. v. Alberta

Alberta Court of Queen's Bench
Judicial District of Edmonton
Feehan, J.
March 17, 1994.

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1994 CanLII 18362 (AB KB)

Counsel:

W.J. Kenny, Q.C., A.J. Beames and G.G. Ortt, for the plaintiff;

A.P. Hnatiuk, Q.C., D.H. Lewis and C.A. Graham, for the defendant.

This action was heard before Feehan, J., of the Alberta Court of Queen's Bench, Judicial District of Edmonton, who delivered the following judgment on March 17, 1994.

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Introduction

[1] Feehan, J.: The plaintiff, Opron Construction Co. Ltd. ("Opron"), claims damages against the defendant arising out of the Stage II contract for construction of the Paddle River Dam ("PRD"). Opron, in response to an invitation to tender issued by the Department of Environment of the Government of Alberta, bid to perform work called for on a unit price basis. Opron's claim arises primarily from three main areas of the work:

(a) the pervious borrow;

(b) the downstream foundation;

(c) the north abutment.

[2] Opron claims against the defendant:

(a) for breach of contract, including

(i) breach of express terms;

(ii) breach of implied terms requiring full disclosure and good faith;

(b) concurrently, or alternatively, for liability in tort on the basis of deceit and negligent misrepresentation.

[3] The issues in this case include:

(a) Was there actionable misrepresentation and actionable nondisclosure? I will find that there was.

(b) Is the defendant liable for breach of contract? I will find that it is.

(c) Is the defendant liable concurrently or alternatively in tort for such misrepresentations and nondisclosure, either in deceit or negligence, or both? I will find that it is, for both.

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(d) Does the contract limit or negative the liability of the defendant? I will find that it does not.

(e) What is the proper measure of Opron's damages? $875,000 plus interest.

[4] The Paddle River Valley (PRV) in the area of the dam is up to approximately one-half kilometre wide. The Paddle River itself during normal flow, which is most of the year, occupies only a small portion of this wide valley. The valley bottom in the vicinity of the PRD is flanked on either side by steep walls approximately 30 metres in height.

[5] The Paddle River is subject to severe periodic flooding and was known by the defendant to flood since the earliest settlement of this area. The flooding occurred most frequently in the spring, during runoff, and in the summer following heavy rainfall. The river was usually lowest in the fall and winter.

[6] The PRD is an earthfill dam designed to serve as a flood control structure. Water is stored during the high river flows and released when the river flows are low. In this way, flooding of agricultural land downstream and adjacent to the Paddle River was expected to be controlled.

[7] Alberta Environment undertook numerous investigations, both before and after the government's public announcement. These investigations were to determine the location of the dam, the nature, availability and suitability of materials for construction and for the design of the dam itself.

[8] After investigating several potential sites, the location of the dam was finalized in December of 1980. The design of the dam embankment was finalized in the spring of 1981. Numerous changes were made to the embankment design through the course of construction. Some of these changes will be referred to later.

[9] Alberta Environment and Thurber Construction Limited (TCL) (Thurber) working under its direction designed the dam and conducted investigations which led to the design.

[10] The PRD was to be constructed in phases or stages over a period of years. It was actually constructed between mid-1981 and 1985.

[11] The main stages of construction were:

(a) Embankment Stage I - This contract's main purpose was to divert the river from the middle of the valley to the south abutment, prepare the foundation for the low level outlet works, excavate a portion of the foundation for the embankment, construct a portion of the embankment, and excavate a portion of the north abutment.

This work was carried out by Thompson Bros. (Constr.) Ltd. ("Thompson Bros.") between August and December of 1981.

(b) Outlet Works Stage I - This contract's main purpose was to construct the intake structure, conduit, gate chamber and the stilling basin of the low level outlet works.

This work was carried out by Stuart Olson Construction between January and August of 1982.

(c) Embankment Stage II - This contract's main purpose was to complete the foundation excavation for the embankment, complete the excavation of the north abutment, excavate the south abutment, conduct rough excavation of the spillway chute, construct the remainder of the embankment to its final cross section, construct the gate

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access shaft and supply and place the riprap on the upstream slope of the embankment.

This work was primarily carried out by the plaintiff between August 1982 and December 1983.

(d) Spillway - This contract's main purpose was to construct the spillway inlet chute, and stilling basin.

This work was carried out by Ellis-Don Construction between May and December of 1983.

(e) Gates and gate house - The main purpose of these contracts were to supply and install the gates in the low level outlet gate chamber and construct the gate house and install the operating controls.

[12] The defendant had determined that there was not enough clay available to build a homogeneous embankment out of clay with the required flattened slopes. The only design option which remained available was a zoned embankment.

[13] The defendant then embarked on the construction of Stage I of the embankment for the dam. This phase of construction called for work in three separate areas which were to have significant impact on the Stage II work; the pervious borrow, the north abutment and the downstream foundation. We pause here to note that the terms "pervious borrow", "gravel" and "coarse alluvium" are synonymous, and have been used interchangeably throughout.

[14] Under the Stage I contract the contractor was to excavate and place 181,000m^3 of gravel, leaving approximately 1,200,000m^3 of gravel to be placed during Stage II. The gravel for Stage I was to come from specified pervious borrow areas. Calculations had determined that these specified areas would yield all of the volume required for the Stage I work. During the Stage I construction successive re-designs were made which reduced the gravel requirements by over 20%. Despite the reduction, the Stage I contractor was unable to recover all of the necessary gravel from the specified pervious borrow areas. The defendant was forced to make an additional pervious borrow area available to the Stage I contractor.

[15] During the course of the Stage I contract, the Stage I contractor excavated more overburden than had been expected and predicted, despite having recovered less gravel. These events had a substantial cost impact to Alberta Environment but had no cost impact on the Stage I contractor. He had been paid for every cubic metre of excavation performed without regard to volumes actually placed. He was then paid a second unit rate for volumes placed. He was, therefore, paid for excavating all the overburden necessary to locate and recover the gravel.

[16] The second area of the Stage I work of import to the Stage II contractor was the north abutment.

[17] Under the terms of the Stage I construction, the contractor was to excavate the north abutment foundation area to the surface of clay till and backfill the area to the level to which the rest of the embankment was constructed. After completion of the North Abutment foundation excavation, the defendant directed the contractor to excavate further into the toe or base of the slope. When the contractor complied with this direction, a slide, covering half of the distance of the upstream side of the north abutment, occurred. The defendant directed that only temporary repairs be made. The

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slide was stabilized with a berm built at the base and all of the cracks of the slide were filled in. The material for filling in the cracks and building the berm was dozed down the slope from above the slide and contained organics. The work was done under freezing conditions and without compaction. The effect of the repair work performed was to obliterate the slide from view.

[18] The third area of the Stage I work of import to the Stage II contractor was the downstream foundation area.

[19] The Stage I contractor was directed by the defendant to place waste material into the old channels and oxbows and other low lying areas in that area immediately downstream of the embankment as it was then designed. The Stage I contractor complied with this direction and placed waste in that area until December. This waste was saturated. It was not compacted. It spread out beyond the old channels and oxbows. The area was then levelled and landscaped over. It was capped off with dry clay-type material. The effect of the work in this area was two-fold. Firstly, the natural ground conditions in the area were hidden from view. Secondly, the waste that had been buried in the area was also hidden from view.

[20] All three of the foregoing items of work became the subject of design and other changes between Stage I and Stage II. The experiences of the Stage I contractor in all three areas were not conveyed to the Stage II bidders. All three areas have become the subject of this claim brought by the Stage II contractor.

Findings Of Fact

[21] This trial lasted some 14 months. As a result, this judgment will be very long. In order to help the reader I intend, here and now, to set out certain findings of fact. The rest of this portion of the judgment will be in support of those findings. I will then deal with the law and then with quantum.

[22] Concerning the upstream pervious borrow: I will find that the defendant was in possession of a great deal of relevant information that they did not disclose to the bidders. Some of that information could have been had by the bidders by asking for it. However, other important essential information, information that would have helped the bidders prepare their bids, was concealed from the bidders. I will find the defendant to have been deceitful. I will find that the deceit caused the plaintiff to suffer substantial losses. I will also find breach of contract by the defendant.

[23] Concerning the north abutment: I will find that the defendant had information concerning a slide and its manner of repair, which information would have been of great help to the bidders, and that the defendant negligently misrepresented the situation to the bidders thus causing the plaintiff substantial losses. I will also find breach of contract by the defendant.

[24] Concerning the downstream foundation: I will find that the defendant had information concerning certain channel deposits that would have greatly aided the plaintiff in preparing its bid, and that that information was deceitfully withheld from the bidders. I will find that as a result the plaintiff suffered substantial losses. I will also find breach of contract by the defendant.

[25] I will find the defendant to be in breach of express terms of the contract.

[26] However, I will find that the plaintiff's bidding estimates and their execution of the works were done in a negligent manner and

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that the plaintiff is therefore the author of a substantial portion of its losses.

[27] Concerning quantum: I will find that, although the plaintiff suffered many losses, it did not suffer anything like the amount claimed, and that of the losses suffered, a great many were the plaintiff's own fault.

The Landowner Reports

[28] In May 1981, the defendant requested EBA Consultants (EBA) to update their 1979 Arnold Landowner Report (the Gust property having already been purchased) and to also prepare similar reports in respect of a number of properties further upstream from Gust which would, in part, now fall within the influence of the reservoir as it is envisaged with the dam located at site Maa. The defendant advised EBA that ...

> "the purpose of the report is to provide a dollar value of the granular resources. The report will be used in negotiations for purchase of the land. The owners of the land will be contacted by your representatives and advised of the investigation. They may suggest appropriate places to put pits or boreholes and these should be recognized as legitimate requests in order to satisfy the owners of our best intentions."

[29] As a result of these investigations, both EBA and TCL prepared geotechnical reports estimating gravel reserves in which comment was made on the geology of the area and on prior gravel mining operations. These engineering firms were selected and instructed by the engineers employed by the Design and Construction Branch headed up by J.W. Thiessen, project manager for Alberta Environment. Both consultants had contact with the landowners and obtained details as to prior mining operations, which information was provided to the defendant.

[30] During the course of the investigation leading to the acquisition of these lands, the Land Acquisition Branch of Alberta Environment came into possession of information concerning gravel excavated and sold in the past from these lands both to the County of Lac Ste. Anne and to Alberta Transportation. This information was made known to others in Alberta Environment. All of the geotechnical reports commissioned for the purposes of the land acquisition proceedings were available and the contents known to the Design and Construction Branch and its engineers.

[31] The first consultant to report to Alberta Environment on the issue of the geology of the PRV was EBA in 1979. Between 1979 and 1981, the defendant received numerous reports from EBA, TCL and Dr. Mollard, an expert in photographic interpretation, which provided a geological history of the valley. Invariably, these consultants reported that based on geologic history, the gravel deposit in the valley was segmented or often absent in some areas as a result of the actions of the Paddle River. The reports also provided details of the prior mining, referred to above.

[32] Subsurface investigations, by their nature, consist of making reasoned and supportable inferences of the conditions which will be encountered based on relatively few direct observations of those conditions. The direct observations are taken from test pits and boreholes. It is the geology and the geologic history of an area which allows, or possibly disallows, the observations from test pits to be extended to those unseen areas between the test pits. If the geologic history of an area is consistent with a uniform or continuous deposit, then it can be reasonably inferred that the strata of material in test pits extends between the test

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pits. If the geologic history of an area indicates the deposit to be of an erratic, pocketed and segmented nature, then, unless the test pitting is performed at a spacing commensurate with the scale of variation in the deposit, the information in those test pits cannot be relied upon as being representative of the subsurface conditions which exist between the pits. The geology of an area will serve to determine the parameters required for a representative program of test pit exploration. The geology will also provide the framework for an appropriate understanding of the information obtained from a test pitting program.

[33] Alberta Environment's own investigations began in the mid-1970's. Until January of 1981, all of the design work was performed internally by Alberta Environment. Alberta Environment also carried out all of the investigations, either directly itself or by utilizing the services of consultants hired to carry out specific tasks. Following the announcement of the dam construction, Alberta Environment created an Implementation Committee. It was through this committee as well as through meetings of smaller groups (such as the Geotechnical group) that the information gained through the investigation process was disseminated throughout Alberta Environment.

[34] Alberta Environment first received detailed information regarding the gravel deposits from Alberta Transportation and the County of Lac Ste. Anne in 1977. From this time on, it was known to Alberta Environment, generally, and in time by each of Thiessen, Ruttan, Nicolson and Campbell, all of Alberta Environment, that the gravel deposits in the PRV had been mined extensively, dating back to at least 1958. Alberta Transportation and the County of Lac Ste. Anne had mined gravel, in substantial quantities, at different times and from different locations throughout that part of the PRV which was to become the Stage II upstream pervious borrow area. Both the County of Lac Ste. Anne and Alberta Transportation information and records which came into the possession of Alberta Environment described the nature of the gravel deposit they encountered, in nearly identical terms, as patchy, occurring in pockets, poor in quality and having much overburden.

[35] R. Brittain, an employee of the Geotechnical Branch of Alberta Environment, prepared a memorandum in which he recorded that Alberta Transportation and the County of Lac Ste. Anne had removed a volume in excess of approximately 200,000m^3 from the Gust and Smith properties, both in the valley. Brittain described the nature of the gravel deposit left behind on the Smith property after the prior mining activities as "gopher-holed" and in "small isolated pockets". A copy of this memorandum was provided to Campbell.

[36] EBA, a consultant retained by Alberta Environment to perform granular evaluations, and TCL, initially hired for a similar purpose (TCL was initially retained in November of 1980 to prepare a granular evaluation for the Smith property and TCL was subsequently retained in January of 1981 to design the embankment), both prepared numerous reports which identified the areas of the valley from which gravel had been previously extracted. Alberta Environment itself prepared a drawing which clearly and explicitly showed some of the areas of the Stage II pervious borrow which had been mined for gravel previously.

[37] TCL recognized and reported that the prior mining activities would have a significant and detrimental effect on the volumes of available gravel which had been calculated based upon test pits. TCL recommended that detailed investigations be carried out with respect to the effect that the

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prior mining had had on the volumes of gravel apparently available in the PRV and to improve the accuracy of those calculations.

[38] Neither the reports of EBA and TCL nor Alberta Environment's own drawing showing the prior mining, nor the information from the County of Lac Ste. Anne and Alberta Transportation, nor any of the other internal documents created by Alberta Environment concerning prior mining were provided to Stage II bidders. Bidders were not advised, in the contract documents, of the existence of these documents.

[39] A total of 12 reports were prepared by EBA and TCL. These reports, prepared between March of 1979 and September of 1981, were provided to Alberta Environment for use in their negotiations with the former landowners in the area of the PRV that was to become the reservoir of the dam. These reports also fully covered the area that was subsequently designated in the Stage II contract documents as the upstream pervious borrow area.

[40] The consultants were requested by Alberta Environment to determine the volumes of gravel which existed on the properties and to assign a market value to that gravel. Both consultants approached their commission in essentially the same fashion. Based on various investigations, including field trips, test pitting and air photo evaluations, both consultants provided, as an overview, a geological description of all the materials in the river valley. The gravel identified was categorized as marketable or not marketable. Estimates of the value of the marketable gravels were provided. It is the overview geological descriptions provided in these reports which are of the most interest to this case. EBA described the gravel as being "buried channel deposits". EBA further reported that the erosive action of the river had "often segmented" that deposit. TCL describes, in the landowner reports they prepared, that the erosive effects of the river made the gravel "often absent in some areas".

[41] The descriptions of the gravel deposit contained in the landowner reports was corroborated by a report prepared at the request of Alberta Environment by Dr. Jack Mollard and provided to Alberta Environment in December 1979. Dr. Mollard was hired as an expert in air photo interpretation. Dr. Mollard, in a letter to Alberta Environment, which predated his report, expressed amazement at the complexity of the geology in the site area. Dr. Mollard also commented that the borrow situation appeared to be tough. He later stated in his report that the material in the PRV was complexly layered and variable in composition. Dr. Mollard described the valley as having "patches of thin gravel". He reported expecting small quantities only which would be available from "seemingly small and scattered patches" but that this should be checked. Dr. Mollard reported there was a scarcity of good-looking granular prospects in the PRV. As a consequence of that observation Dr. Mollard went to the effort and expense of obtaining information additional to that supplied to him by Alberta Environment to extend his search for granular material farther afield from the PRV.

[42] Dr. Mollard provided a second report which was received by Alberta Environment in March of 1980. In that report, Dr. Mollard provided a geological history which confirmed a deposit entirely consistent with what EBA had described as a "buried channel deposit". That report was received by, and its contents were known to, Alberta Environment.

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[43] Alberta Environment carried out its own internal air photo analysis of the PRV. This analysis was reported in June of 1980 and the report concluded that sources of gravel in the PRV were rare.

[44] The first report prepared by TCL, after it was retained in January of 1981, was a preliminary appraisal of the geology of the dam site area. This report was received by Alberta Environment in early March of 1981. The various materials which made up the alluvium, including the gravel, were described by this report as being "distributed in an erratic pattern as a consequence of the complex shifting of the Paddle River channel".

[45] The Stage I Embankment contract was completed in December of 1981. The final quantity measurements for that contract were completed by Alberta Environment by March of 1982. The Stage II tender documents were published in late May of 1982. Initially the Stage I contract called for the placement of 181,000m^3 of pervious borrow material from the PRV by the Stage I contractor. The Stage I contract incorporated a two-item payment structure for the pervious borrow work. One payment unit measured and paid for all excavation from the pervious borrow area regardless whether the excavated material was overburden or gravel. A second payment unit measured and paid for the volume of gravel that was actually recovered and placed in the embankment. As such, the contractor was reimbursed for all of the overburden which he excavated, regardless of the volume of gravel (if any) that existed below that overburden. The risk of the nature of the distribution of the gravel in the pervious borrow area was therefore retained by the owner.

[46] The Stage I contract afforded Alberta Environment the opportunity to physically observe on a large scale the actual nature of the gravel deposit and to satisfy themselves of the conditions that would be encountered subsequently during the Stage II contract. TCL had recommended in its report dated August 20, 1981 that Alberta Environment take advantage of this opportunity and use the Stage I contract as a large scale model for the Stage II work. Alberta Environment was aware of this recommendation by TCL.

[47] Alberta Environment did not disclose to the bidders for the Stage II contract its knowledge of the conditions which would be encountered in the pervious borrow areas.

[48] There was nothing in the Stage II tender package which disclosed the extent or location of prior mining which had taken place. There was nothing in the Stage II tender documents which disclosed the nature of the gravel deposit which had been encountered by either Alberta Transportation or the County of Lac Ste. Anne during those prior mining activities. There was nothing in the Stage II tender package which disclosed the effects of those prior mining activities on the gravel deposit which remained behind.

[49] Some of these reports are listed on a single sheet of paper which Ruttan testified he had prepared prior to Alberta Environment publishing the Stage II tender package. Alberta Environment had not included this single page list anywhere in the four volumes and hundreds of pages of tender information that was provided. This single page list was not attached to a multi-page information document prepared by Ruttan which was handed out to contractors who attended the site visit. This single page list was not incorporated into an addendum which was issued to bidders by Alberta Environment during the tender period. This single page list was never given to Opron and came to light only during this litigation.

[50] Alberta Environment did, however,

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change the payment terms for the pervious items for the Stage II contract such that there was only a single payment unit in the Stage II contract based upon the volume of gravel actually placed in the dam. The effect of this change was to force the Stage II bidders to include, within their submitted prices, all costs associated with the anticipated volume of overburden. This change, which Alberta Environment instructed TCL to make, shifted the risk and the cost of an increase in the overburden to gravel ratio, as had occurred during the Stage I contract, away from Alberta Environment and squarely onto the shoulders of the contractor.

Evolution And Chronology Of The Dam Design

[51] In January of 1981, Geo-Physi-Con was commissioned to perform a resistivity survey. This was the same method of subsurface exploration that had been attempted unsuccessfully by EBA in 1979. Geo-Physi-Con's report was received by Alberta Environment at the end of February 1981. Alberta Environment knew that the resistivity survey carried out by Geo-Physi-Con was of little or no value in the evaluation of the granular deposits that was under way at the time. Alberta Environment knew that the resistivity survey could not distinguish between overburden and granular materials. As a result, the survey did not provide any information of use in determining whether the gravel was continuous or not. Ken Tedder of the Geotechnical Branch prepared a memorandum which was extremely critical of the Geo-Physi-Con report and called into question the reliability and usefulness of the results. Alberta Environment, however, then provided, without caution or caveat, a copy of the Geo-Physi-Con report to TCL for their use in evaluating the gravel deposit in the contract documents.

[52] TCL prepared a borrow pit investigation report in March of 1981. In this exhibit, TCL reported sand and gravel volumes present in the PRV. Those sand and gravel volumes were stated to be calculated based on an assumption of continuity of the sand and gravel in the valley. The calculation of volumes could not be reliably or accurately performed without continuity. TCL relied on the Geo-Physi-Con report to confirm their assumption of continuity:

> "The results of the resistivity survey by Geo-Physi-Con Ltd. indicated that over the area of their investigation, the granular alluvium is nearly continuous over the entire valley. This is contrary to the theory that the coarse alluvium is restricted to old channel deposits, and confirms the assumption of continuity used in making estimates of quantities."

[53] Alberta Environment knew that the Geo-Physi-Con report could not be used to support an assumption of continuity. None of the investigations carried out prior to March of 1981 by Alberta Environment, EBA, Dr. Mollard or, indeed by TCL themselves, supported continuity. In fact, all of the reports and information in the possession of Alberta Environment to that time demonstrated that the gravel deposit was actually segmented, pocketed and discontinuous rather than continuous. TCL made a serious technical error in relying upon Geo-Physi-Con to confirm an assumption of continuity. Alberta Environment knew of but did nothing to correct that error.

[54] TCL prepared a second, and the final borrow material investigation report which was provided to Alberta Environment in August of 1981. This report also relied upon the Geo-Physi-Con report to confirm the assumption of continuity which was made in order to perform the volume calculations

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performed.

[55] Yet, the Thurber (TCL) Report which was included in the contract documents (tender package) read: "The gravel has an expected common thickness of approximately 1.0 to 3.0 metres." I will return to this.

Embankment - Stage I Contract

[56] The Stage I Embankment contract, performed by Thompson Bros. between August and December of 1981, had, as its main purpose, diversion of the river from its original course to the south side of the valley and preparation and construction of the foundations of the dam. Opron's contract in Stage II was to complete the construction of the embankment.

[57] The dam, itself, was flanked by abutments on each end known as the north abutment and the south abutment. The abutments were to be constructed by excavating into the valley walls on both ends of the dam and removing the overlying soil until competent material upon which to found the dam was exposed. The amount of excavation required was dictated by the lines and grades shown on the contract drawings as well as the characteristics of the material itself.

[58] On the south side, Thompson Bros. had constructed a diversion channel for the Paddle River. This was a temporary diversion required to be removed and backfilled by the Stage II contractor after the permanent conduit was made operable. The south valley wall was virtually untouched by the Thompson Bros.

[59] Across the valley floor stretching from the temporary river diversion on the south side of the valley to a point close to the north side valley wall, Thompson Bros. had excavated the foundation of the embankment. Thompson Bros. had placed both pervious and impervious fill materials which formed the base of the permanent embankment.

[60] During the late fall of 1981, Thompson Bros. excavated the toe of the north abutment slope having completed excavation of the foundation to the level of clay till. During the final excavation a slide occurred extending over approximately 70 metres, which was one half of the distance of the north abutment upstream of the centerline of the dam. Slide material slid out along the base of the excavation. The escarpment of the slide was nearly as deep as the height of an average man.

[61] Temporary repairs were performed in December of 1981 which consisted of construction of a berm at the toe of the slope to prevent further sliding by pushing down material from above to fill in the existing foundation excavation and to dress and cover over the area of the slide. Owing to the temporary nature of the work and the time of year, the only compaction applied was track packing by the dozing equipment. There was no inspection or testing of this material and no requirement that it meet the normal specifications for fill placement.

[62] In the course of Stage I, the designated pervious borrow area was exhausted, despite the fact that Alberta Environment had reduced the required volumes from 181,000m^3 to approximately 142,000m^3, a reduction of approximately 20%. An additional pervious borrow area was provided to allow the Stage I contractor to recover even the reduced volume required. In addition to the gravel not being recovered in the volumes that had been expected, there was a substantial increase in the volume of overburden excavated.

[63] As a part of the Stage I contract, Thompson Bros. was directed by Alberta

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Environment to fill in the old river channels and oxbows in area downstream of the dam. These areas were filled as directed with waste material and then landscaped over with a layer of clay-type material.

Creation Of The As Built Or As Constructed Drawings Of Stage I

[64] After the completion of the Stage I contract, one of Ruttan's responsibilities as the Resident Engineer was to create the record or As Constructed drawings for Stage I. Such drawings are often referred to as the As Built drawings. Exhibit 615I was one of those drawings. That drawing, which was "Certified as Constructed" by Ruttan on February 23, 1982, showed darkly shaded old river channels and oxbows in the area immediately downstream of the embankment constructed by Thompson Bros. in what became the downstream foundation excavation area under the Stage II contract. In addition to the dark shading, there were text and arrows indicating that the old channels had been "filled to ground level with waste material". This drawing, together with the other As Built drawings that were created, were sent by Alberta Environment to TCL for their use in preparing drawings for subsequent contracts.

[65] TCL prepared the Stage II contract documents, including drawings, in draft form and sent them to Alberta Environment for review and comment. Included in the draft Stage II drawings sent by TCL to Alberta Environment on March 26, 1982 only one month after Ruttan had certified Exhibit 615I as being accurate, were two As Built drawings. One of these was Drawing 3 of 28. This showed the same area depicted in the "Certified As Constructed" drawing, Exhibit 615I.

[66] Ruttan, having been the resident engineer on Stage I, was in a unique position to carefully and thoroughly review the As Built drawings that were to be published by Alberta Environment as part of the Stage II tender documents. Ruttan acknowledged that TCL sent the draft drawings to Alberta Environment for review. He testified that he did a review of Drawing 3 of 28, but that it was just a "general review". He admitted that there was no notation on that drawing that the channels had been filled to ground level with waste and no shading of the channels. He testified that he did not discover the omission until Opron was working on Stage II. As will be seen later, he did nothing even then to inform Opron of this fact. His evidence disclaiming prior knowledge of this deletion of the critical notation regarding waste must be considered in this context.

[67] The evidence establishes that an As Built drawing is to be, and was understood by Opron to be, a complete and accurate record of all previous construction activities. Such a drawing is to include all features of note. Further, the absence of a feature from an As Built means that such a feature does not exist.

[68] Ruttan confirmed that As Built drawings are created to include features of note and features that are considered to be material and relevant. He agreed that the notation about waste could and should have been on the As Built, Drawing 3 of 28, contained in the Stage II tender documents.

[69] Thiessen also confirmed that the relevant information from the Stage I certified As Constructed drawings should have been included in the Stage II tender drawings.

[70] Dr. Matheson, called as an expert by Alberta Environment, testified that a review of contract drawings by the design agency or

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owner should take place prior to tender for the purpose of insuring that the As Built drawings accurately represent the condition of the work as it exists. He agreed that it would have been appropriate to include in the Stage II tender documents any certified As Constructed drawings from Stage I.

[71] Nicolson, the officer of the defendant, acknowledged at discovery that it would have been material for the Stage II contractor to know that waste material had been placed in the old channels. He testified that the only way contractors would have known that the channels had been filled with waste would be either if Alberta Environment was good enough to tell them or if they went out and dug it up. The evidence confirms, as admitted by Nicolson, that Alberta Environment did not tell the contract bidders and only after the contract was awarded did Opron dig it up.

[72] The plaintiff's ordinary witnesses testified that they were not aware that waste had been buried in the downstream foundation excavation area by the Stage I contractor. Schindell, Mulyk, Hutton and Cameron all testified that their approach to the job would have changed had the true conditions been disclosed in the As Built drawing.

[73] Cameron testified that indeed, in order to determine the expected conditions to be encountered in the foundation areas of the dam, and to gain an appreciation of the subsurface conditions, he looked at the logs for the test pits and boreholes in that area. He understood that the test pits in the area would describe the material in that area and would be representative of the material in that area. In order to form his conclusions as to what material existed in the area of the downstream foundation, Cameron relied on what was shown in the logs in the area, and he viewed what was on the surface when he went on the site visit. He expected that Alberta Environment would have told them if there was something markedly different between what was in the test pit and borehole logs in the tender documents and what was actually in the downstream foundation area.

[74] Ruttan admitted that he knew, as of the date of the site visit for the Stage II contract, that there had been waste buried in the downstream foundation during Stage I. He also admitted that he knew, as of that same date, that the test hole logs actually within the area of the downstream foundation that the Stage II contractor would have to excavate, did not disclose the existence of the buried waste. Indeed, the logs that were provided to the Stage II contractors could not have disclosed the waste, as they were all dug before Thompson Bros. buried the waste. Ruttan further admitted that he did not tell the contractors at the site visit that the logs could not necessarily be taken as being indicative of the nature of all of the material that was in that area.

[75] A further omission from the drawings included in the Stage II tender documents was the failure to disclose on Drawing 7 of 28 the repair work performed as a result of the slide in the north abutment in the late fall of 1981.

The Design Changes Between Stage I And Stage II

[76] Opron was not told that the work upstream and downstream of the existing Stage I embankment was as the result of a design change between Stage I and Stage II. These design changes were the result of movements in the dam foundation. Since it had not been contemplated that these areas would be used as foundations for the dam, the areas were not treated as such. Opron, having been given no notice of the design change, had no reason to suspect the area

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had not been treated as a foundation zone or that waste was buried there. It would seem unlikely that a contractor would suspect that an owner would bury waste under one contract only to be re-excavated under the next. That was a further reason the absence of the notation of buried waste on the As Built drawing and of any reference to a design change was so critical.

The Contract Documents

Representations With Respect To Pervious Borrow

[77] Section of the Contract

"1.13 Soil Conditions and Data

"The Engineer has obtained certain information regarding the soil conditions in the area covered by the Contract. The approximate locations of all boreholes and test pits within the area of the dam site are shown on the drawings and the logs of these holes are given in Schedule F.

"The soil information for the pervious borrow area is shown on the drawings so that the Contractor can evaluate his operation for Borrow Excavation. Geotechnical cross sections of the impervious borrow area, and the south abutment area are shown on the drawings. No interpretations of these cross sections have been provided and the Contractor is responsible for any interpretation which he, or others employed by him make from this information.

"Included in Schedule E is a report entitled 'Geotechnical Information for Contract Bidders'. Other technical reports, photographs, and information may be viewed by Tenderers, by arranging a meeting with Alberta Environment.

"The accuracy of this information is not guaranteed and in no circumstances whatever shall the Engineer be held responsible or liable to the Contractor for any consequences resulting from the strata, ground water and/or conditions as actually encountered being different from those implied in this information. Additional payments on such grounds will not be made in any circumstances."

[78] The first paragraph of section 1.13 of the General and Detailed Specifications of the contract documents is an express representation and warranty that the locations of all of the boreholes and test pits in the area of the dam site were to be shown on the contract drawings. Further, logs for all of those boreholes and test pits were to be included in Schedule F, being volumes 3 and 4 of the contract documents, "Soils Data".

[79] Alberta Environment did not show on the contract documents, nor provide logs for, the following borehole or test pit logs that were within the area of the dam site. These logs would have provided information that would have been relevant to contractors with respect to the distribution of the pervious borrow: M22, M476; M477; M478; M479, M480; M597; PR-BA5-3; M256.

[80] Dr. Matheson agreed that the model presented, fairly represented the materials shown in each of the six borehole logs contained in Exhibit 843. He identified that the cluster of six borehole logs was located approximately on the centerline of the dam, just south of the eventual location of the conduit. He agreed that the borehole logs were within approximately a 7 metre by 7 metre square, approximately as represented by the model. He agreed that in the area of the six boreholes, the gravel ranged in thickness from over three metres in one place to no gravel at all in another place, with other

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holes showing depths between those two extremes. He confirmed what was visible to the eye, namely, that there did not appear to be any pattern to the distribution of the gravel in the area illustrated by the model. He agreed that over the area shown by the model, the gravel was extremely variable, and certainly not continuous. If only borehole M22 had been put in, there would be a finding of no gravel, and if only borehole M477 had been drilled, there would have been a finding of over three metres of gravel.

[81] In response to questions by the court, Dr. Matheson testified that in the triangular area formed by boreholes M476, M477 and M479, he, as an expert, would say that there was a probability that there would be gravel between. When questioned as to how far away from that triangle he would move before he changed his mind as to the probability of finding gravel, Dr. Matheson testified 10 to 15 metres would not be unreasonable. I take it that beyond that distance, he was not prepared to predict a "probability" of gravel.

[82] Confirmation of that came from Dr. Matheson when he said that he would not say, between any two test pits that were 50 metres apart, that the gravel would be continuous if gravel was shown in each. His evidence was clearly that the strip logs that are 50 metres apart in the contract documents would not show if the gravel was continuous between them. The gravel between two test pits is not necessarily continuous and in fact could be absent. If it is absent, the absence could be caused either by the actions of the river or by the actions of man. It naturally follows that if it cannot be said that the gravel between any two striplogs is continuous, then the strip logs cannot be said to accurately indicate the distribution of the gravel.

[83] Dr. Matheson further testified that even in his "heartland" (which is the area near the dam with gravel), which he referred to as an anomaly because all of the test pits in the area, covering the entire valley floor between stations 71+000 and 71+600, showed some gravel, Dr. Matheson would not say that the gravel in that area was in a continuous deposit. He then modified his evidence to say that statistically, the test pits "indicated" in that area that there was a very low probability of finding significant areas between the test pits where there is no gravel.

[84] This evidence from Dr. Matheson of what the "indication" was of the nature the gravel deposit in the "heartland" must be contrasted with the evidence of what the actual distribution of the gravel was. In 1982, Maio Construction started to work in what they called "Area 1". As shown on Exhibit 702, Area 1 is located squarely within Dr. Matheson's heartland. Maio, his superintendent Adams, his foreman Grespan and his backhoe operator Perconi, all testified with respect to the gravel deposits actually found in the field. To a man they testified that there were large areas where there was no gravel, and that this nature of deposit was encountered as soon as they started to work in Area 1. (I Accept That Evidence Of Maio, Adams, Grespan And Perconi)

[85] The plaintiff also operated in the "heartland" in 1983, and did not find any areas where the gravel did not start and stop abruptly. Finally, I note that there was test pitting done by J.A. Cameron, site engineer and project manager for the plaintiff, between areas stripped in 1983, some of which was in the "heartland". One such test pit, shown to Dr. Matheson and not plotted on the defendant's summary of test holes, showed no gravel.

[86] In summary, I find, as confirmed by all

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of the evidence of witnesses who worked in the field, that in the "heartland", the gravel was segmented, pocketed and erratic throughout.

[87] Clearly, logs for boreholes in such close proximity to each other, as the missing test holes were, showing a noncontinuous distribution of gravel over distance of a few metres, would have been relevant to contractors estimating the Stage II contract. Contrary to the express representation that all boreholes had been shown, and all logs produced, these logs do not appear anywhere in the Stage II contract documents.

[88] Exhibit 844 is a compilation of the borehole and test pit logs for three more holes in the area of the dam site that were not included in the Stage II contract documents. The three holes are approximately 13 metres apart. The most northerly shows approximately 1 metre of gravel, the middle one no gravel, and the most southerly one, approximately 1.3 metres of gravel. That distribution most likely, according to Dr. Matheson, would have been the result of erosion, or the activities of man. He agreed that the problem is in predicting where the river has had its effect. Again, I find that these holes which were not shown or provided in the Stage II contract documents would have been of significance to contractors bidding on the Stage II contract.

[89] The second paragraph of this section of the contract is a clear direction to contractors that the soil information for the pervious borrow area that is shown on the drawings is provided specifically to each contractor so that he could evaluate his operations for the excavation of pervious borrow. This must, by a plain meaning of the section, be understood to mean that the drawings provided for the pervious borrow area, P1 to P19, can be used, and further, can be relied upon as being accurate in conducting an evaluation for borrow excavation.

[90] Evidence was led by both the plaintiff and the defendant about the use that could be made of the strip logs that were provided for the pervious borrow. It was Cameron's evidence, which was not challenged, that in order to be of use in the evaluation of borrow operations, the soil information in the strip logs on the drawings must be representative of the material between them. Only by calculating volumes of material, and being able to determine where in the valley that material could be found, would a contractor be able to "evaluate his operation", as set out in this section.

[91] Ruttan agreed that the contract documents had been published with the intention that they be relied upon. He also testified that the results of the test pitting that had been done by Alberta Environment prior to the tendering of this contract were set out on the drawings intentionally in a manner that was convenient for the contractors use in preparing estimates and so that the contractors could use conventional means of estimating quantities such as an average end area method.

[92] Thiessen, the project manager, confirmed that contractors were entitled to rely on the information in the tender documents to prepare their bids, and indeed, he expected that they would rely on the information.

[93] Alberta Environment's witness on geotechnical matters, Dr. Matheson, agreed that contractors read and are entitled to rely on the accuracy of contract documents. Dr. Matheson, during the course of cross-examination on the model and the test pit logs that were not provided to the Stage II contractors, acknowledged that the owner, or

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his consultant, must conduct the investigations and prepare the data for contractors. The contractors, in what Dr. Matheson described as a reasonably short time, must make an assessment of the data provided to them to determine volumes, procedures of operation, and equipment.

[94] Every witness that was involved in bidding for this project in 1982 gave evidence that their bid involved evaluation of the gravel operation and the estimating of the cost for the same based on the tender documents, and in particular, on the cross sections indicating the distribution of gravel in the pervious borrow area as shown on the drawings. Maio relied upon the strip logs in order to plan his areas of operation, as shown in Exhibit 702.

[95] Expert witnesses called by the plaintiff confirmed that the way in which a contractor would evaluate his borrow operation would be by making calculations from the strip logs, and planning his operations based on the strip logs contained in the contract.

[96] Similarly, Johnston, the defendant's estimating expert, acknowledged that in 1982, the contractor that he had assisted in preparing a bid on this project had performed calculations based on the strip logs to determine quantities of overburden and gravel and to determine where in the valley the gravel would be found. Johnston was of the understanding that the contract documents could have been used in the field to specifically choose the areas of operations for pervious borrow.

[97] I find as a fact that the plaintiffs were misled by section 1.13.

[98] Section of the Contract

"6.3.3. Pervious Borrow Excavation

"Pervious borrow excavation shall involve all stripping and excavation to the depth necessary to remove all the required gravel material from the pervious borrow area. The boundaries of the pervious borrow area are shown on the drawings and the distribution of pervious borrow in the pervious borrow area is indicated by the strip logs shown on the drawings. The contractor shall be responsible for any interpretations, deductions and conclusions which he, or others employed by him, make from this information. (underlining mine)

"No pervious borrow excavation shall be made outside the limits shown on the drawings and as described in subsection 6.5.2."

[99] Section 6.3.3 of the General and Detailed Specifications in the contract documents was published by Alberta Environment to contractors, including the plaintiff. Section 6.3.3, on a plain reading, told the contractors that the strip logs for the pervious borrow indicated the material that would be found between them. This was an express representation and warranty, and it was not true.

[100] On cross-examination Dr. E.C. McRoberts, geophysicist and expert witness for the plaintiff, testified that his reading of section 6.3.3 was that a contractor would understand that the material in the test pits represented the material that was between them, and in his opinion, such an understanding was reasonable based on a reading of section 6.3.3. He was also asked on cross-examination whether he knew what the plaintiff's employees had taken from

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section 6.3.3. His evidence was that he understood that they had taken section 6.3.3 as indicating that the test pits represented the material between them. He also testified that the understanding held by Opron was what he understood when he read the section.

[101] Section 6.3.3, as further strengthened by the Thurber Report, and section 4.2 in particular, tells the contractor that the gravel is continuous.

[102] Dr. McRoberts further stated that to suggest that the words in section 6.3.3 "the distribution of the pervious borrow in the pervious borrow area is indicated by the strip logs" meant that the vertical distribution of the material in each strip log was indicated by that strip log, as did the defendant's counsel, and said nothing about the material between, could not be what was meant. It would be tautological, or irrelevant, to tell a contractor that the vertical distribution of material in a strip log was shown by the strip log, because that is self-evident. Further, as soon as each test pit was excavated, and then back filled, any vertical distribution that may have existed had ceased to exist at that location. I find that the distribution had to mean, and indeed, could really only mean, the distribution between the test pits.

[103] Section 6.3.3 is a geological interpretation, provided to the bidders, that the gravel was continuous. The drawing of lines between the tops and bottoms of the gravel shown in adjacent strip logs shows the distribution of pervious borrow in the pervious borrow area, as stated by section 6.3.3. This distribution, as indicated, was not in fact correct in Dr. McRoberts' opinion, but it is what the contract said the distribution was. That continuity assumption, as shown by the drawing of the lines between adjacent strip logs, as illustrated for example on Exhibit 615K, Ma's cross sections, is what the contract told contractors was accurate and was the actual distribution of gravel.

[104] Members of Opron's bid team also gave evidence that they had read section 6.3.3 of the contract documents. Simmonds, chief estimator for the plaintiff, testified that he understood from that section that the pervious borrow that was necessary to build the dam would be found in the pervious borrow area, and that its distribution would be indicated by the strip logs. He understood that the gravel would be in continuous seams, and that they could determine quantities of material by drawing cross sections using the strip logs, and then using an average end area method of calculation.

[105] LePage, an engineer in the employ of the plaintiff, who actually performed the gravel quantity calculations during the tender period, testified that he understood from section 6.3.3 that the gravel was continuous. He did not consider that he needed to make any interpretations from the information provided in the tender documents. All that he was required to do was to take the information provided and perform a quantitative exercise, by calculations using the average end area method. When he had completed drawing his cross sections, he considered that the lines he had drawn accurately reflected the distribution of the gravel in the pervious borrow area. When he had completed his calculations, he considered that he had made an accurate quantification of the gravel based on the tender information.

[106] Cameron, on his reading of section 6.3.3, understood that the strip logs were representative of the gravel that was in the valley. If there were adjacent test pits showing 2 metres of gravel, you would find 2 metres of gravel between them. Because the strip logs indicated the distribution of gravel

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in the valley, they could be used to estimate and plan the work. You could also use them to calculate volumes of gravel, and corresponding volumes of overburden, which was vital given the pay structure for gravel on this job.

[107] It was Cameron's evidence that if the test pits were not representative of distribution of the material in between them, they could not have been used to calculate volumes. The volume calculation method relies on the fact that the test pits are representative, and can be used to predict not only quantity but distribution of gravel. The fundamental interpretation, that the test pits were representative of the distribution of the gravel in the valley, was made by Alberta Environment and provided to bidders in the contract. After the fundamental interpretation had been made for the contractors, it boiled down to a mathematical calculation.

[108] On cross-examination, Cameron said that he read the contract and he understood the plain meaning of what was written in it, including the fundamental interpretation, that the test pits represented the pervious borrow distribution. Alberta Environment, through the contract documents, told the contractors what the strip logs were for, told the contractors that the strip logs represented the nature and the distribution of the gravel, and told the contractors that they were to use the strip logs to assess the nature and distribution of the gravel and to evaluate their operations. All Opron did was rely on the information represented in the contract, and use it to calculate volumes for the bid.

[109] P. Hutton, general manager of the plaintiff's western division, also read section 6.3.3 of the contract documents. He understood from that section that the strip logs could be used to determine the ratio of overburden to gravel, using an average end area method, and to determine price, because the distribution of the material was indicated by those strip logs.

[110] Hutton understood that the illustration in the contract documents, including section 6.3.3, was that the gravel was continuous between strip logs. That continuity was carried forward into Opron's calculations and pricing. Without that illustration of continuity, Opron could not have done average end area calculations.

[111] Similarly, it was Hutton's evidence that without the illustration of continuity, which was a major factor in Opron's selection of its method of operation and its equipment, it would have been very difficult to price the job, if not impossible, without conducting extensive field investigations. The evidence at trial is that it would not have been possible to duplicate the defendant's investigations of the pervious borrow area in the short tender period.

[112] In addition to reading the contract documents, including section 6.3.3, Hutton looked at the strip logs. He knew from the contract that the strip logs were included to illustrate to the contractors the distribution of the gravel. The contract provided the continuity assumption and represented that the test pits indicated the distribution of the pervious borrow in the pervious borrow area. Hutton assigned the task of equating the illustration with the physical numbers, by performing calculations, to an engineer who worked for Opron. The gravel deposit was described, and backed up by technical information. If one chose not to accept the interpretations provided by Alberta Environment, Hutton understood that you would be on your own.

[113] In preparation of his work to arrive at a quote for a subcontract of the pervious work, Maio read the contract documents and reviewed the drawings. He understood that

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section 6.3.3, in conjunction with the Thurber Report, and the drawings said that there was a gravel layer in the valley that was represented by the logs. The logs were contained in the contract documents to show the distribution of the gravel, and there would be a continuity of gravel between the logs. Based on the continuity of gravel between test pits, the test pits could be used to perform volume calculations. If there had not been continuity between the logs, it would not have been possible to calculate either the gravel or the overburden. Each strip log is the information at the test hole location itself. The distribution being indicated by the strip logs, as stated in section 6.3.3, meant that Maio could take that information from the strip logs, and spread it over the area that was being examined.

[114] Maio did not consider that he was required to make any interpretations with respect to the distribution of gravel. The interpretation of continuity had already been made, and was given in the contract. The only interpretations, conclusions or deductions that Maio had to make were limited to the selection of the type of material they would include in their calculations.

[115] There was no caution in the contract documents to the effect that the strip logs were not necessarily representative of the material that was between them. In fact, the contract documents contained representations to the contrary. It was because of the representations contained in the contract that Maio performed his computations in the way that he did.

[116] Mulyk, who prepared an estimate for another bidder for the PRD Embankment Stage II contract, read section 6.3.3. It showed him the area that he would be mining, the depths of the gravel and overburden, how long his haul would be, where he would start his operations, and what method of operation he would use. From section 6.3.3, he understood that any two adjacent test pits would indicate the distribution of material between them. He could look at the strip logs, and see the depth of the deposit through the valley floor, how wide the deposit was, how far up and down the valley he would have to go, and the amount of overburden associated with the identified gravel.

[117] If what was represented by the adjacent strip logs was not what was anticipated by Alberta Environment to be present between the adjacent strip logs, then in Mulyk's experience, Alberta Environment would have dug another hole, and included the log of the hole in the contract documents.

[118] Mulyk gave evidence that he agreed with Maio's understanding of the gravel deposit, and his selection of areas 1, 2 and 3, as basically matching what Myluk's understanding and concept of the distribution of the gravel was in 1982 when he bid the job.

[119] Mulyk was also asked to review the cross sections as drawn by LePage. He testified that the lines on that drawing depicted exactly what he expected from the contract documents in terms of the distribution of the gravel between test pits.

[120] Based on the strip logs and the contract documents, Mulyk did not expect that, if he had gotten the job, he would encounter gravel in pockets, or areas where there was no gravel. He expected that in the field, he would find a seam across the valley, on average between 1 and 3 metres deep. That is the understanding on which he based his pricing. He did not expect, and he did not get any indication from the contract documents, that the gravel would be erratic,

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segmented or pocketed. He did not even have the "slightest inkling" that that was the true nature of the deposit. If the deposit was erratic, segmented or pocketed, he would have expected to be told that in the contract documents. In his experience, with the Department of Transportation, if a deposit is erratic between test pits, you will put another test pit between them. If these contract documents had indicated that the gravel was erratic, segmented or pocketed, his pricing would have been "way up there".

[121] It was the evidence of Paget, the construction expert called by the plaintiff, that section 6.3.3 was a clear and definitive geological interpretation that the owner provided to the contractors. It was a statement of horizontal distribution. It was a very positive statement that the strip logs would represent that horizontal distribution, not that it "may" or it "could". Section 6.3.3 says that the distribution "is" indicated. A contractor would read that section and apply it, in conjunction with the geotechnical information, and simply do a mathematical calculation to determine quantities. Because the owner had supplied the interpretation of the distribution of the pervious borrow, the contractor did not have to.

[122] It was Paget's conclusion that the nature of the distribution of pervious borrow that was illustrated in the contract documents was a basically continuous deposit, on average between 1 and 3 metres thick. He performed mathematical calculations as a contractor would have, based on the contract documents, and concluded that there was sufficient gravel represented to be present to build the dam and that there was a strip ratio of approximately 1.2 to 1 based on the contract documents.

[123] It was Paget's evidence that the geotechnical engineers should have done enough holes to satisfy them that their interpretation of the distribution of gravel that they gave to the contractors was correct. If they were not satisfied that the strip logs indicated the lateral distribution of the gravel, they should have drilled in-fill holes. It would not have been possible, in Paget's opinion, to do a geotechnical evaluation in the one month that was available in the tender period. It was clear that the owner had been in the valley for years, and had provided a summary report of the geotechnical conditions. If he was going to bid, the contractor had no choice but to accept the defendant's information.

[124] Ruttan agreed that if the purpose of the test pits is to indicate the distribution of the gravel, then it is necessary to have spacings between the test pits that are adequate to enable one to be confident that what is between the test pits is represented by what is in them. In an erratic or highly variable deposit, Ruttan agreed that the spacings may need to be down to as close as 25 feet.

[125] Ruttan testified that during the course of the Stage I contract, he suggested that for Stage II, Alberta Environment should do a better job of delineating the gravel. He made that suggestion so that the contractors, at the time of tender, could determine from the contract documents, the distribution of economical gravel in the valley. The government intended the contract documents to indicate the distribution of gravel so that the contractors could prepare their tenders and determine such things as what their overburden to gravel ratio would be and what their haul distances would be. In order to do those things, Ruttan testified that it would be necessary for the contractors to know the distribution of the gravel and where they would likely find it when they went out to do their work.

[126] Alberta Environment's idea, according

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to Ruttan, was to indicate the distribution of the pervious borrow in the pervious borrow area for the purposes of the Stage II tender in such a way that tenderers could easily understand it and employ conventional and recognized estimating means to prepare their tenders. As set out in section 6, Alberta Environment intended that the contractors rely on the contract documents.

[127] Ruttan agreed that the Stage II contractors should have been able to rely on the strip logs as indicating the distribution of the gravel for the purposes of estimating the work, including determining volumes, overburden to gravel ratios, haul distances, equipment types, scheduling and sequencing and method of operations, so that he could arrive at his price.

[128] Ruttan testified that to make an average end area calculation, such as Ma, an engineer in the employ of Alberta Environment, did in the spring of 1983, the results of which are shown on Exhibit 340, it is necessary to either assume continuity or it has to be a given. If you are told that the distribution of the gravel between the strip logs is indicated by the strip logs, you can make an average end area calculation. Ruttan also acknowledged that if the distribution of the gravel between strip logs is not as indicated by the strip logs, you would get a different calculation.

[129] Ruttan was aware that a bidder would be expected to bid differently if he could predict the nature of the deposit that he was going to be working in than if he could not.

[130] Dr. Matheson, the expert in geotechnical matters called by the defendant, testified that although it was not standard practice to include geotechnical interpretations to bidders in contract documents, an owner could say in his contract documents that the strip logs indicated the distribution of gravel.

[131] It was Dr. Matheson's evidence that he made his conclusions and arrived at his opinions based on his assumption that the distribution of the gravel was indicated by the strip logs. He also used the assumption for the purpose of making his volume calculations that he testified to.

[132] He then testified that the strip logs in the contract could be used to make a reasonable estimate of the quantity of gravel in the whole valley, but not to determine what kind of equipment he would use, how he would recover the gravel, or how much was even recoverable. There was absolutely no caution of any kind included in the contract documents to suggest that the information was accurate enough to support quantity calculations, but not accurate enough to support the other essential components of a bid. It was not enough in the case of the Stage II embankment contract, with only one payment unit for gravel, to calculate a quantity of gravel. It was critical to the contractor, as confirmed by all witnesses, plaintiff and defendant alike, for the contractor to determine his overburden to gravel ratio. In order to do this, it was necessary to know how much gravel there was in a given area, and how much overburden would have to be removed to get to that gravel. It was essential to determine how far the gravel, once found, had to be hauled. In order to do this it was necessary to know where the gravel would be found. It was crucial that the contractor know how the gravel was deposited, so that an appropriate method of operation and appropriate equipment could be selected. If a contractor could not determine these things from the strip logs, he could not have priced the job. It is not possible, in my view, to reconcile the positions taken by Dr. Matheson that, firstly, you

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could accurately calculate volumes of gravel within 1 or 2%, but secondly, that you could not use the source of those calculations, namely, the strip logs, for planning your operation.

[133] Dr. Matheson agreed on cross-examination that due to the action of the Paddle River on the gravel in the valley, there has been random erosion. The river had moved all over the valley over the years. The action of the Paddle River could be expected to substantially affect the concentration, uniformity and distribution of the gravel deposit between two test pits. Due to the action of the Paddle River, there could be less gravel or even no gravel between two test pits. This is the case with test pits that are 50, 40 or even 30 metres apart. The river had impacted on the distribution of the gravel in the Paddle River valley, and the impact was as a result of the laying down of the gravel by the river, and the erosion of the gravel after it was laid down.

[134] It was Dr. Matheson's evidence that between any two test pits, there may have been changes in the depth and the extent of the deposit created by the movement of the river that is not indicated by the depth of the gravel shown in the test pits on either side. Dr. Matheson confirmed that the distribution of gravel between any two test pits is not predictable, nor indicated by the test pits, to the extent that the gravel between the test pits has been either eroded by the river or removed by mankind.

[135] Thiessen, the defendant's project manager, was aware that the specifications in the contract documents provided that the distribution of pervious borrow was indicated by the strip logs. He expected that a contractor would make an estimate of the quantities assuming continuity between the test pits as shown in the strip logs. Any technologist could make an estimation of volume, using established principles, if he was given the right information. Thiessen also knew that the Stage II contractor was required to submit a pervious borrow development plan, showing his method and location of work. Thiessen knew that the contractor would have to determine the distribution of gravel from the strip logs in order to prepare that plan and to determine where to start excavation. He also knew that the contractor would use the strip logs to determine and estimate the overburden to gravel ratios.

[136] Thiessen also admitted that in any area where there were two adjacent strip logs, each showing gravel, and the gravel in between those strip logs has been removed, then those strip logs would not indicate the distribution of the gravel between them. In the area of test pits M323, M1182, M1183 and M1189, all on the Smith property, Thiessen agreed that the strip logs indicated that there was gravel between them, in an average depth of 1.4. In fact, in that area, there had been prior mining between those four holes. Thiessen agreed that the distribution of gravel between those four test pits, to the extent that prior mining had removed it, was not indicated by the strip logs. He agreed that the strip logs themselves do not show the prior mining in that area.

[137] Bevis Osterman was called by the defendant to give evidence concerning estimating and construction. He made some quantity calculations in order to give his evidence. He admitted that in order to do so, he had to accept that the strip logs showed where the gravel was, and he assumed that there was gravel between adjacent strip logs showing gravel.

[138] Osterman testified that his quantity calculation was that there was approximately 1,000,000m^3 within the area of the permanent pool, below elevation 695. That figure was accurate provided the distribution of

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gravel was indicated by the strip logs. If the distribution was not as indicated, Osterman testified that the contractor may end up having to go elsewhere for gravel. He also acknowledged that the contractor may have ended up stripping overburden off of areas where there was no gravel. The degree of difference between what was indicated and what was there would determine how different the contractor's excavation area would have been from what he had planned. Osterman agreed that if you had to move more overburden to get gravel, the costs of the operation would increase, and the duration of the job may be extended.

[139] Russ Gerrish, an expert in the finding of gravel, was called by the defendant. He plotted the contract test pits onto a computer model, and generated from that model various drawings. Those contours illustrate what Gerrish expected was the distribution of the pervious borrow based on the tender documents. Gerrish admitted that the computer program that he used to generate his contours assumed continuity between each two points. If the strip logs did not indicate the distribution of the gravel, the program would not generate accurate results or contours. The Stage II contract documents told him that the strip logs did indicate the distribution of the pervious borrow, and consequently Gerrish testified that he was able to create the contours.

[140] Gerrish understood from looking at the contract documents that he could delineate areas of the most economical gravel from the contract documents. The contract documents told him that there was a generally continuous deposit, and using that information, he interpolated between test pits to determine concentrations of gravel. Those concentrations are part of what is given and represented in the information that is presented in the contract documents. From the contract documents, contractors would determine their concentrations, and plan the operation based on that information. Gerrish expected that contractors bidding on this job would have done an exercise similar to what he did to delineate economical gravel.

[141] In the course of his cross-examination, Gerrish was taken to a number of places where his contour drawing indicated that gravel was present, and where test pitting in 1983 indicated that in fact there was no gravel. Gerrish agreed that in these instances, the distribution of gravel indicated by the contract documents was that there was gravel when in fact there was none.

[142] Gerrish indicated that there was no way to tell from the contract documents where the river had moved through the valley historically. He agreed that where it did move through the valley, it shifted, eroded and changed the distribution of the gravel. The action of the Paddle River could have segmented the gravel, as reported by EBA or could have resulted in the gravel often being absent in some locations.

[143] Because of the action of the Paddle River, it was Gerrish's evidence that in the PRV it was not possible to predict where gravel would be found until it was dug up. Having regard to the action of the Paddle River on the gravel in the valley, the contract was incorrect in stating that the distribution of gravel was indicated by the test pits, and in giving an indication of continuity, because, due to the effect of the river, it was not possible to know where the river had been, where there were empty spaces, or where the pockets of gravel were. These things could not be predicted with certainty in the PRV, and that was because the river had reworked the deposit and made it erratic.

[144] Gerrish, after being referred to the

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model that was entered as Exhibit 841 in this trial, said that it may be the case that in actual fact, the distribution of gravel between strip logs is not indicated by the strip logs, because there is no continuity between the strip logs, the continuity having been interrupted by the actions of the Paddle River. This was an admission by the defendant's own expert witness that the representation that the distribution was indicated was wrong.

[145] Gerrish agreed that it would be important to a contractor to know if the deposit he was going to work in was continuous or erratic. Such knowledge would affect a contractor's approach to a job, and his method of operation. An estimate of costs would be approached quite differently if the deposit was erratic as opposed to continuous.

[146] Gerrish candidly admitted, when he was asked if he could say if the distribution of the pervious borrow in the pervious borrow area was indicated by the strip logs, that he could not "say exactly where the gravel is and isn't".

[147] I find as a fact that the plaintiffs were misled by section 6.3.3.

Part Of The Contract

Report No. TCL 82-14, "Geotechnical Information for Contract Bidders": The Thurber Report

[148] Having reviewed the Thurber Report, Dr. McRoberts was of the opinion that most, if not all contractors would see the Thurber Report as a comprehensive statement, and would look no further. He noted that the Thurber Report was prepared specifically for the contract bidders, to allow them to become familiar with the site, and not for other experts, nor for the owner.

[149] I find that it is significant that this report was said to have been prepared for contract bidders. This must be contrasted with what various witnesses testified was standard practice, namely that the geotechnical information in contract documents is expressed as being for the owner. I also note that in the **Catre** decision, in which the Court of Appeal found that the plaintiff's cause of action was barred by exclusion clauses, the following clause appeared:

> "The information pertaining to the data as shown has been compiled for the use of the Department of Highways. No responsibility will be assumed by the Department for the correctness or completeness of the data shown and should any such data be found incorrect or incomplete the contractor shall have no claim on that account."

[150] No such disclaimer appears in this case, and in fact, as noted, the Thurber Report was prepared for the use of the contractors, and not for the use of the owner.

[151] Simmonds read the Thurber Report during the tender period. He understood that the purpose of the report was to provide contractors bidding the project with sufficient information so that they could produce a competitive bid to the owner. Upon reading all of the soils information and reviewing the drawings, it was Simmonds' view that the Thurber Report was quite an extensive report that it contained enough information to allow Opron to price the work.

[152] LePage also read the Thurber Report during the tender period. He understood from the introduction that the purpose of the report was to provide information to bidders as to the existing conditions on site. On reading the report, he gained an understanding of the geology and of the pervious borrow in particular. It was his understanding from the report in its entirety that the

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pervious borrow would be found in a continuous and uniform deposit.

[153] Cameron gave evidence that he had read the Thurber Report during the tender period. The introduction to the report set out its purpose. He understood that, as a summary, the report summarized all of the information that was available, for the use of the bidders. The introduction indicated to Cameron that everything that he needed to know about subsurface conditions for the project was in the report, which appeared to be complete, and in the drawings.

[154] The title of the Thurber Report was of significance to Hutton. It was unusual, in his experience, to see a report prepared for specifically for the bidders, as opposed to having been prepared for the owner. The level of exploration and thoroughness seemed such that Hutton could not see any area in which he should look behind the report, even if he had thought of it. Given the owner, Alberta Environment, he saw no reason, whatsoever, to doubt the accuracy of what was represented to them.

[155] Given his knowledge that there would have been detailed work done before the tender of Stage II, Hutton understood the report to be a summary of the work leading up to the preparation of the report, prepared so that those unfamiliar with the site could gain an understanding of it. He understood that for the purposes of tendering, TCL 82-14 was a focused compilation of all of the pertinent information that contractors needed, to be able to bid the job.

[156] Mulyk testified that he was not used to getting such reports with contract packages. It was his experience that reports prepared for owners, and not contractors, would be provided, if anything. As a result of the Thurber Report stating that it had been prepared for contract bidders, Mulyk went through it thoroughly, assuming that it would really help him in his bid. Having the report made his bid more competitive. Without this report, there would have been more guesswork involved. He would have built in more risk factors, and would have submitted a higher bid.

[157] Given the title of this report, and the introduction to the report, Maio understood that this document, having been prepared for this project specifically and for the bidders, would include all information that a person contemplating submitting a tender would require to submit a proposal. He took from the introduction that the report would summarize all pertinent conditions that a tenderer would need to be familiar with in order to bid.

[158] Ruttan agreed that Alberta Environment had intended to present, to bidders, a summary of site investigations conducted by Alberta Environment, which they intended bidders to rely upon. It was his evidence that the Thurber Report was prepared specifically for contract bidders, and agreed that the purpose of the report was as set out in the introduction.

[159] Dr. Matheson, one of the experts called by the defendant, agreed that the Thurber Report had been prepared for the bidders, to allow those unfamiliar with the site to become familiar. He described the purpose of including the geology section of the report as being to provide the framework within which the contractors, as they were bidding the job, could consider what was shown on the strip logs.

[160] I find that the Introduction to the Thurber Report represented to the bidders that the report was prepared specifically for them; that the defendant intended the bidders

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to rely on the information provided; and that the report purportedly accurately and comprehensively summarized, omitting only needless detail, the geological information that had been obtained by the defendant over the course of the investigations leading up to the Stage II contract.

The Thurber Report

"Section 2. Brief Description of Proposed Construction

"The final dam will be constructed to an elevation of 710.8 metres which is approximately the elevation of the surrounding upland. The high level outlet will be a concrete spillway on the south abutment and the low level outlet will consist of a reinforced concrete conduit through the dam embankment. The dam will be constructed with a clay core and gravel shells, with stabilizing berms on both the upstream and downstream sides. All materials with the possible exception of the coarser fraction of the upstream slope erosion protection are available within close proximity of the dam site."

[161] Section 2 of the Thurber Report represented to all of the bidders for the Stage II contract that the only material that they might need to get from an off site source was riprap. All other material, which obviously included 2A gravel, was represented as being available within close proximity to the dam site.

[162] Simmonds testified that this representation confirmed other statements in the contract documents that the granular material would be available, and it gave him a further level of comfort.

[163] Cameron understood from section 2 of the Thurber Report, together with the rest of the information in the tender package, that all of the material that they needed in terms of clay and gravel, with the possible exception of riprap, would be available to them on site.

[164] Hutton also read section 2 and understood from that section that all of the material that they needed, including the gravel and with the possible exception of some of the riprap, would be available within the construction area made available to the contractor by Alberta Environment.

[165] Maio similarly took comfort from this representation in the Thurber Report. In terms of the work that he was intending to bid upon, this statement assured him that he would be able to find enough 2A, and sufficiently good 2B material to be processed, within the immediate area of the dam, meaning the pervious borrow area.

[166] I find as a fact that the plaintiff was misled by this section:

"3. Geology (paragraph 4)

When the glacial lakes drained, the Paddle River cut down through the lake clays and glacial till to form the present river valley. Sand, silt and gravel were deposited by the river and cover the valley bottom to an average depth of about 5 metres, typically from 2.5 m. to 6 m."

[167] The resident engineer, Ruttan, was aware, when he read the Thurber Report, that the geology section made no mention of the fact that the Paddle River had meandered all over the valley bottom. He was aware, from all of the information that had been gathered, that the process of the river meandering had had an effect on the gravel deposit, and that the river had redistributed the gravel. That effect had been such that with test pits 100 metres by 50 metres apart

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it was not possible to predict with any certainty, or even with a high degree of reliability, whether there would be gravel between any two test pits, and if so, its depth.

[168] Ruttan admitted that there was no mention made to the bidders at the site visit conducted by Alberta Environment, that they should look beyond the contents of the geology section of the Thurber Report, that the geological summary that had been provided was incomplete, because it did not mention the effects of the Paddle River on the gravel, or that there was other information in the possession of Alberta Environment that either expanded upon, or differed from, the geological summary that had been provided.

[169] Paget, the construction expert called by the plaintiff, testified that his understanding from reading the geology section in the Thurber Report was that there was a uniform blanket across the valley floor consisting of sand, silt and gravel. Taken together with the rest of the contract, Paget would have expected the gravel to be found in a continuous layer. He did not gain any impression from the contract documents that the gravel was erratic or segmented by the actions of the Paddle River.

[170] I find as a fact that the plaintiff was misled by this section:

> "4.2 Pervious Borrow (paragraph 1)
>
> The pervious borrow is one unit of the alluvium located in the base of the valley. The overburden overlying the gravel is variable over the site and ranges from clean sand to sandy silt and clay, which is generally moist to wet. The gravel is generally underlain by firm to stiff clay till at depths ranging from approximately 2.5 to 6 metres. The gravel has an expected common thickness of approximately 1.0 to 3.0 metres. In isolated pockets and channels, the clay till surface is deeper than the maximum stated above, and in some locations it does not exist. The water table within the alluvial sediments varies according to the season. However, it has generally coincided with the surface of the gravel material at approximately 1.0 to 1.5 metres depth. The approximate elevation of the Paddle River during the period of test pit exploration was near the top surface of the gravel." (underlining mine)

[171] As set out in the Hardy Report, prepared for Opron and submitted to Alberta Environment in December of 1983, the following information was conveyed by the description of the gravel found in section 4.2 of the Thurber Report:

> 1. Gravel is typically 1.0 to 3.0 metres thick.
>
> 2. Gravel is typically covered by 1.0 to 1.5 metres of overburden.
>
> 3. The gravel deposit is generally uniform.

[172] At trial, Dr. McRoberts, one of the authors of the Hardy report, testified that the reference to gravel in section 4.2 was a reference to gravel as a unit of the alluvium. A unit is a geologic term, and the gravel in that unit was described by Thurber as having an expected common thickness. The use of the word "unit" implies continuity. Given the absence of any mention of the effect of the Paddle River on the gravel, section 4.2, in conjunction with the geology section in the Thurber Report, was effectively a statement that the gravel was continuous. That, in Dr.

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McRoberts' opinion, as supported by all witnesses who actually worked in the field with this deposit, was not a correct statement.

[173] It was Dr. McRoberts' evidence that the use of the phrase "expected common thickness" was a departure from standard practice, and very clearly indicates what Thurber thought the deposit was. Dr. McRoberts reviewed the series of reports written by Thurber after the receipt of the Geo-Physi-Con report in March of 1981, up to and including the Thurber Report, TCL 82-14. He was of the opinion that not only did the contract documents, including the Thurber Report, say that the gravel was continuous, but they fully intended to convey that it was continuous.

[174] Dr. Matheson agreed that the use of this phrase conveyed a view held by Thurber, and testified that it was not necessarily an industry standard way of expressing a view. It was Dr. Matheson's evidence that in any area where the gravel had a depth of less than 1 metre between two test pits where each test pit showed a metre or more of gravel, the statement that the gravel has an expected common thickness of 1 to 3 metres was incorrect.

[175] To Simmonds, section 4.2 confirmed that the gravel was in a seam-like deposit. On cross-examination, he testified that he expected, based on this section, to find gravel in this seam-like deposit between 1 and 3 metres thick. He noticed that there were test pits included in the contract documents that showed gravel less than 1 metre thick. This did not concern him, because he knew that Thurber had produced the soils report, they had summarized their information, and they had spelled out specifically what a contractor could expect to find. These facts gave him a comfort zone and a confidence that they could do their take-offs from the test pits.

[176] LePage also gave evidence on cross-examination about this section. His reading of section 4.2 told him that the gravel in the valley was constant and uniform, and that led him to believe that there was no problem in doing quantitative calculations of the gravel from the test pits by using recognized methods.

[177] Cameron, Hutton, Mulyk and Maio all testified that they considered the description of the gravel provided in section 4.2 in the Thurber Report as a confirmation of the understanding that they had gained from the contract overall, and in particular, section 6.3.3, that the gravel was deposited in a seam, and was continuous across the valley floor.

[178] From his reading of this section, and section 6.3.3 of the contract, Cameron fully expected LePage to prepare his quantity calculations using the test pits. Based on his understanding that the test pits represented what was in the valley, Cameron testified that he understood that a volume calculated, using the test pit data, would be the volume that was in fact in the valley.

[179] Hutton read this section as specifically confirming that the average end area method of calculating gravel volumes in the Paddle River valley was an appropriate method. He understood, based on his overall review of the contract documents, including the Thurber Report and the drawings, that the representation was that there was sufficient quantities of gravel below 695 to complete the project, and that the gravel would be found in a continuing layer of varying thickness, that would be suitable for a strip mining operation.

[180] Dr. McRoberts testified that as a result of the statements made in section 4.2, which

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meant that the granular material between strip logs was uniform and continuous, it was very appropriate for a contractor to use a conventional method of calculating quantities.

[181] M.A. Dee, project manager for the plaintiff in 1983, had reference to the Thurber Report in the work that he did to plan for the 1983 pervious borrow operations, after the receivership of Maio Construction. He assumed that Thurber had done a proper geotechnical interpretation, and he placed heavy reliance on the written report. From the Thurber Report, he understood that gravel was deposited throughout the valley and that the depth of the gravel would vary between 1 and 3 metres. Counsel for the defendant suggested to Dee that there was, in fact, gravel in 90% of the valley. It was Dee's evidence that if they had found gravel in seams in even 90 percent of the areas they worked in 1983, they would not have noticed breaks in their planned operation. Dee believed in and relied on the accuracy of the geotechnical analysis performed by Thurber until he got to the field, where he saw from the physical evidence that the report was incorrect.

[182] Paget, the construction expert called by the plaintiff, testified that in his experience, the word "common" has a meaning similar to that conveyed in the expression "lowest common denominator". The use of that word in section 4.2, as opposed to simply making a statement of expected thickness, communicated to him that Thurber was reporting on more than just an average thickness, and that the use of the word meant that the geotechnical engineers intended to convey that the gravel, in thickness of 1 to 3 metres, was "basically all over".

[183] Most, if not all, contractors would see section 4.2, and section 6.3.3, as clear, simple and unequivocal statements of continuity of the gravel, and would proceed on that basis to do their volume estimates and planning.

[184] Indeed, it was clearly on the basis of a continuity of gravel that Opron, Maio Construction, the Caribou-Estabrook joint venture and even Double N estimated and planned their work.

[185] In the best possible light, section 4.2, standing alone, was ambiguous. If section 4.2 standing by itself was ambiguous, I need only to have reference to the context in which it was set, namely the whole of the contract, including section 6.3.3, to remove any such ambiguity or equivocation inherent in it. In the context of the whole contract, I have no trouble finding, and I do so find, that the section 4.2 was clearly a representation to the contractors that the gravel in the valley would be found in a continuous layer.

> "4.2 Pervious Borrow (paragraph 4)
>
> ... For this Embankment - Stage II Contract the drawings include a detailed grid pattern of test pits plotted on cross sections at regular intervals within the pervious borrow areas. These cross sections show a geotechnical strip log for each test pit and have been provided for the Tenderers to assess the distribution of gravel in the pervious borrow area."

[186] I note here, however, that the evidence before me was clear that a significant number of the test pits shown in the contract documents for the pervious borrow area were not on the grid pattern at all. As reviewed above, of the 71 test pits in Dr. Matheson's "heartland", 51 were off the grid. Dr. Matheson agreed that over 150, or 35 to

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40% of the test pits included in the contract documents were off the grid, rather than on the grid.

[187] It was Dr. McRoberts' opinion that the 150 test pits that were located off the grid were definitely biased in favour of finding gravel, and that the balance, of approximately 250, should be viewed with suspicion.

[188] It was Cameron's evidence that he understood, from paragraph 4 of this section, that the test pits had been provided to the contract bidders all neatly laid out on cross sections so that they could calculate and determine the volumes of overburden and gravel, and also, so that the contractors could determine where the gravel would be found in the valley.

[189] Maio took particular note of the fact that the test pits that were provided with the contract documents were laid out on a grid. He took that to be a direction that they should use the cross sections to calculate volumes of overburden and gravel in the valley.

[190] I find as a fact that the plaintiff was misled by section 4.2.

Thurber Report (Paddle River Alluvium Subsection)

> "Approximately 800,000 cubic metres of granular material may be mined from the pervious borrow area for use in the construction of the pervious zones of the embankment."

[191] It is important to note that as at the date of the Thurber Report, May 7, 1982, the pervious borrow area was defined in the contract documents, section 6.5.2, as being the downstream pervious borrow area, as shown on the drawings, and the upstream pervious borrow area below elevation 695. The area above 695 did not became a potential extension to the defined pervious borrow area until the Addendum was published by Alberta Environment on June 14, 1982.

[192] This section clearly represented to the contract bidders that approximately 800,000 cubic metres of granular material could be mined out of the downstream pervious borrow area and the upstream pervious borrow area below elevation 695. As Dr. McRoberts testified, the 800,000m^3 of Paddle River Alluvium from which 1 percent riprap could be recovered must have been a reference to gravel, as it would not have been possible to get gravel sizes large enough for riprap out of either sand or silt.

[193] Cameron understood the section to mean that there was at least the quantity of 800,000m^3 available. He considered that number to be the approximate volume they would have to mine in order to place the contract quantity of 691,000m^3 in the dam or in stockpiles. Given that this reported volume corresponded to Cameron's concept of the total amount that would have to be mined in order to place the contract quantities, net of all losses, he derived a further level of assurance concerning the gravel deposit from this section of the Thurber Report.

[194] Maio similarly had determined during his estimating work that he would need to mine 800,000m^3 in order to actually place the 691,000m^3 required by the contract. He felt comfortable with his concept when he read this section, as it appeared to him that someone had spent considerable time preparing the documents and had arrived at the same conclusions concerning the pervious borrow that he had.

[195] Mulyk also took reassurance from this section of the Thurber Report that the required volume of gravel was available

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right in the pervious borrow area as staked out by Alberta Environment in the tender documents. He understood that the 800,000m^3 was made up of the contract quantity plus an allowance for shrinkage and loss.

[196] Hutton also testified, during cross-examination, that he discussed this section of the Thurber Report with Thiessen after the tenders closed. Thiessen explained to him that they would be permitted to mine 800,000m^3 from the valley, which would be enough to yield the required contract quantities, and after that, they would have to stop mining. Thiessen did not dispute this evidence given by Hutton.

[197] Paget also reviewed this section of the Thurber Report. He understood it to be a statement not of all of the gravel that was in place in the defined pervious borrow area, but as a statement that one would have to handle this volume in order to obtain the required contract quantities.

[198] Thiessen testified that he would not dispute that Thurber's expectation, as reflected in this section, that a contractor would have to mine 800,000m^3 in order to get 691,000m^3 into stockpiles or the embankment, as required by the contract.

[199] I note here that in the area actually worked by Maio Construction in 1982 and up to February of 1983, the contract documents indicated that just over 800,000m^3 of gravel existed. As I have reviewed elsewhere, contrary to the representations in the contract documents as to the volume of gravel which existed in the areas worked by Maio Construction, only approximately 400,000m^3 of gravel was actually recovered.

[200] I find as a fact that the plaintiff was misled by this subsection.

[201] Having considered the foregoing, I find the contract documents for the PRD - Stage II Embankment Contract, as published to prospective tenderers, included the following representations:

A. Pervious Borrow

(1) The approximate locations of all boreholes and test pits within the area of the dam site were shown on the drawings and the logs of these holes were given in "Schedule F" (Section 1.13 shown on the drawing so that the contractor could evaluate his operation for Borrow Excavation (Section 1.13)). The drawings included a detailed grid pattern of test pits plotted on cross sections at regular intervals within the pervious borrow area. These cross sections showed a geotechnical strip log of each test pit and were provided for the bidders to assess the distribution of gravel in the pervious borrow area (Thurber Report, section 4.2, page 5).

But the gravel deposit in the Paddle River valley was actually erratic, segmented and pocketed. The spacing of the test pits included in the contract was not close enough to enable a prediction of gravel between any two test pits showing gravel. Consequently, as cautioned by Ma in April of 1983, the test pits could not be used to accurately calculate volumes of gravel. Similarly, the test pits could not be used to calculate overburden, determine overburden to gravel ratios, determine haul distances, select equipment or a method of operation or price the work. (Sections 4.1.1 and 4.1.7 and sections 5 and 7.6)

(2) The distribution of pervious borrow in the pervious borrow area was indicated by the strip logs on the drawings (Section 6.3.3 General and Detailed Specifications).

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But the distribution of the gravel was erratic and the test pits were not spaced sufficiently close to indicate the gravel that existed between them. As stated above, the spacing of the gravel pits was not close enough to indicate the gravel that existed between them. (Section 4.1.2 and section 7.6)

(3) A summary of the site soil conditions providing geotechnical information for contract bidders was included in the contract documents to give those unfamiliar with the site some understanding of the site conditions and project design in a relatively short time. (Title to the Thurber Report and section 1).

But as I have found above, the Thurber Report was not an accurate or comprehensive summary of the geotechnical information in the possession of Alberta Environment and it failed to disclose essential information, particularly the effect of the action of the Paddle River on the gravel deposit and the fact of prior mining. It did not allow bidders to become familiar with the site conditions as represented. (Section 4.1.3 and section 5)

(4) The geology of the area surrounding the site of the Paddle River Dam was as summarized in the Thurber Report. Sand, silt and gravel were deposited by the Paddle River and covered the valley bottom to an average depth of 5 metres, typically from 2.5 to 6.0 metres. The gravel had been deposited in, and covered, the valley bottom, by the river. The river had no effect of significance on the gravel since its deposition (Thurber Report Section 3, Geology).

But the river had had a significant effect, and was a material feature of the geology having caused the nature of the gravel deposit encountered by the plaintiff to be segmented. The omission of any mention of the river or its effect on the gravel deposit rendered that which was stated false. (Section 4.1.5, section 5 and section 7.6)

(5) The gravel had an expected common thickness of 1.0 to 3.0 metres (Thurber Report Section 4.2).

But the gravel in the Paddle River valley was segmented, pocketed and erratic. It did not occur in anything like a continuous layer of 1 to 3 metres thick. This representation was false. (Section 4.1.6, section 5 and section 7.6)

(6) All materials with the possible exception of a coarser fraction of the Upstream Slope Erosion Protection were available within close proximity of the dam site (Thurber Report, section 2).

But as is shown in the review of the actual conditions encountered in the pervious borrow area in 1982 and 1983, not all of the gravel required for the project was available on site. (section 7.6) This representation was false. (section 4.1.4)

(7) 800,000m^3 of gravel, which could be mined from the pervious borrow areas downstream of the dam and upstream below the 695 elevation, would be enough to yield to the contractor the contract requirement of 691,000m^3 in place in the dam or in stockpiles (TCL 82-14, volume 2, section 8, Paddle River Alluvium, page 9)

But there was not enough gravel below the 695 contour to meet the contract requirements. (section 4.1.8 and section 7.6)

(8) The pervious borrow areas were well explored, and the strip logs from that well explored borrow area could be used as the

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basis for a proper estimate. (drawings P1 to 19, volume 5)

But as I have found above, the pervious borrow area was not a well-explored borrow area. The strip logs could not be used as the basis for a proper estimate. The test pits were biased in favour of finding gravel, and were not representative of the gravel in the valley. (section 4.1.9)

(B) Downstream Foundation

(9) The extent of the work performed by the Stage I contractor was shown on the drawings that were included in the contract. (General and Detailed Specifications, section 1.1.2, Work by Others, (a) Embankment Stage I, page 1)

But work was performed by the Stage I contractor which was not shown on the drawings at all. The As Built drawings of the downstream foundation area were not accurate and did not show the buried waste. (section 4.2.1 and section 5.6)

(10) All of the test pits and boreholes in the area of the dam site were shown on the drawings and logs for each were included in the contract. (section 1.13 of the General and Detailed Specifications, page 14)

But not all of the test pits which would have been relevant to the contract bidders were provided. (section 4.2.2 above)

(11) No work of significance to the Stage II contractor had been performed in the area of the downstream by the Stage I contractor. (Drawing 3 of 28, Topographic Plan of Site, Embankment Stage I - As Built, Outlet Works Stage I - Under Construction By Others; Drawing 4 of 28, Typical Sections, Embankment Stage I - As Built, Outlet Works Stage I - Under Construction By Others; TCL 82-14, Volume 2, Descriptions of work performed during Stage I as contained in section 2, Brief Description of Proposed Construction, paragraph 2, section 3, Geology, paragraph 5, section 4.1, Impervious Borrow, paragraph 2 and section 5, Excavation, paragraph 1)

But the Stage I contractor had worked in the area of the downstream foundation excavation area in placing waste in this area, as directed by Alberta Environment. Alberta Environment had documented this work on drawings and had surveyed the actual extent of the work. (sections 4.2.3, 4.2.4, and 4.26)

(12) The conditions to be encountered in the downstream foundation excavation were represented by the test pit and borehole logs contained in the contract and on the drawings. (Volumes 3 and 4 of the Contract and TCL 82-14, Volume 2, section 5, Excavation)

But the test pits in the contract documents did not represent the conditions encountered in the downstream foundation excavation area. (section 4.2.5 and section 7)

C. North Abutment

(13) The extent of the work performed by the Stage I contractor was shown on the drawings that were included in the contract. (General and Detailed Specifications, section 1.1.2, Work by Others, (a) Embankment Stage I, page 1)

But the extent of the work in the north abutment performed by the Stage I contractor was not shown on the drawings. (section 4.3.1 and section 5.7)

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(14) No work, other than that shown on the contract drawings, had been performed in the area of the north abutment by the Stage I contractor. (Drawing 3 of 28, Topographic Plan of Site, Embankment Stage I - As Built, Outlet Works Stage I - Under Construction By Others; Drawing 6 of 28, Excavation Plan; Drawing 7 of 28, Detailed Excavation Plan and Excavation and Fill Sections, North Abutment; TCL 82-14, Volume 2, Descriptions of work performed during Stage I as contained in section 2, Brief Description of Proposed Construction, paragraph 2, section 3, Geology, paragraph 5, section 4.1, Impervious Borrow, paragraph 2; and section 5, Excavation, paragraph 1)

But the extent of the work was not disclosed in the contract documents. (sections 4.3.2, 4.3.3 and 4.3.5 and section 5.7)

(15) The conditions to be encountered in the north abutment excavation were represented by the test pit and borehole logs contained in the contract and as shown on the drawings. (Volumes 3 and 4 of the Contract and TCL 82-14, Volume 2, section 5, Excavation)

But the test pits in the contract documents did not represent the conditions encountered in the north abutment foundation area. (section 4.3.5 and section 7)

(16) The slide that occurred during the execution of the Stage I contract was a small slide. (TCL 82-14, Volume 2, section 3, Geology, paragraph 5)

But the slide that occurred during the Stage I construction was significant. (section 4.3.5)

(17) The ground level at which the Stage II contractor would start work in the foundation of the north abutment was the limit to which the Stage I contractor had excavated. Beneath that limit would be naturally occurring and undisturbed material. (Drawing 7 of 28, Detailed Excavation Plan and Excavation and Fill Sections, North Abutment)

But in any area where the slide had occurred, or the berm had been built, or fill had been placed, the line in question did not shown a "limit of excavation". (section 4.3.5)

(18) No portion of the slide still existed and the material beneath the Stage I excavation limits would be naturally occurring and undisturbed. (General and Detailed Specifications, section 1.1.2, Work by Others, (a) Embankment Stage I, page 1; Drawing 3 of 28, Topographic Plan of Site, Embankment Stage I - As Built, Outlet Works Stage I - Under Construction By Others; Drawing 6 of 28, Excavation Plan, Drawing 7 of 28, Detailed Excavation Plan and Excavation and Fill Sections, North Abutment; TCL 82-14, Volume 2, Descriptions of work performed during Stage I as contained in section 2, Brief Description of Proposed Construction, paragraph 2, section 3, Geology, paragraph 5, section 4.1, Impervious Borrow, paragraph 2; and section 5, Excavation, paragraph 1)

But contrary to the representations contained in the contract documents, the slide had not been removed. It had only been masked. The Stage II contractor, unbeknownst to him, had to remove it as part of his excavation work. (section 5.7 and section 7)

D. Alberta Environment Had Furnished All Geotechnical Information With The Contract Documents

(19) All of the geotechnical information

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that was relevant for bidders, except for a "report summarizing the results of test pits in the pervious borrow area that [sic] the presence of oversize material" relating to riprap, and "Sand and Gravel Resources of the Whitecourt Area, Alberta", both of which were referred to by title in the Thurber Report, was included in the information that provided with the contract documents. (General and Detailed Specifications, section 1.13; TCL 82-14, section 1, Introduction; TCL 82-14, section 8, Other Geotechnical Information; TCL 82-14, section 9, Summary of Sources of Subsurface Information)

But Alberta Environment was in possession of numerous reports, drawings and memoranda which provided geotechnical information. These sources of information were not included, by reference or by summary, in the contract documents. The existence of these sources of information was not disclosed in the contract documents. (section 4.4 and section 5)

[202] I find as a fact that the defendant was deceitful concerning the upstream pervious borrow and the downstream foundation excavation area and negligently misrepresented the conditions in the north abutment.

Reliance

[203] The contract documents, as published by Alberta Environment, were intended by Alberta Environment to be relied on by the bidders. Contractors were not expected to verify the accuracy of what was represented in the contract documents. The contract documents contained interpretations and these interpretations were made for the contractors' use in preparing their tenders, again without independent verification of accuracy.

[204] Ruttan testified that he knew that contractors would, and indeed, he expected contractors to rely upon the information contained in the contract documents as published by Alberta Environment. In fact, the pervious borrow information was specifically set out in a manner to be convenient and suitable for the contractors' use in preparing their bids and so that they could use a conventional means of estimating quantities such as an average end area method.

[205] The contractors were given the logs and interpretations, as contained in the Thurber Report and elsewhere in the contract, for their use in preparing tenders. They were expressly told in the contract documents that the distribution of gravel was indicated by the strip logs (section 6.3.3). Ruttan agreed that in order to do an estimate, a contractor should be able to rely on the logs as indicating the distribution of the pervious borrow in the pervious borrow area for the purposes of determining his overburden to gravel ratios, his haul distances, his equipment, his scheduling and sequencing, his method of operation and his price for pervious borrow.

[206] Ruttan also agreed that the Thurber Report was bound into the contract documents and had been compiled and prepared for the contract bidders. It was intended that it could be used by those unfamiliar with the site so that they could obtain some understanding of the site in a relatively short time. Indeed it was styled "Geotechnical Information for Contract Bidders". This was not a general report or a report done for the engineer's or owner's use in the design of the dam. It was prepared and included specifically for contractors to rely on.

[207] Alberta Environment, in general, and Ruttan, specifically, knew that to prepare bids, contractors would have to do quantity

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takeoffs, arrive at equipment selections, consider and develop a plan of work, price components of the work and assemble all of the information together to arrive at a bid. In the time frame available, about five weeks as compared to the several years that Alberta Environment had to carry out its investigations, Ruttan did not expect contractors to attempt to verify the accuracy of the design other than by reading the documents. He expected the contractors to rely on the information published for them.

[208] Ruttan also expected that contractors would rely on the As Built drawings contained in the contract documents as being accurate, although he also testified that the As Built drawings in these contract documents were not intended to be complete. Alberta Environment included test logs in the areas of the downstream foundation and the north abutment to provide information that was representative of the anticipated site conditions. Ruttan acknowledged that he was aware that the type of deposit that is expected to be encountered would affect a bidder's approach to his tender, his equipment choice, his sequencing and planning, his method of operation and his price.

[209] Thiessen, the project manager for the PRD, agreed that contractors needed the best possible information they could get. He acknowledged that contractors were entitled to rely, and he expected them to rely, on the information they were given in the contract documents. Contractors for this particular job had to be able to determine the overburden to gravel ratio due to the new payment structure that placed the risk of finding gravel on the contractor. Thiessen understood that the way the contractors calculated that ratio depended on the information that they were given in the contract documents.

[210] The defendant's officer, Nicolson, admitted that it would not have been possible for contract bidders to duplicate the investigations made by Alberta Environment prior to completion of the Stage II contract documents.

[211] Based on the representations in the contract documents, Cameron, project manager, and the other members of the Opron estimating team understood that the gravel was in a continuous seam. They understood, as stated in the contract documents, that the test pits could be used to predict the distribution of the gravel. This representation allowed Opron to estimate the quantity of gravel and the ratio of overburden to gravel, to plan the work, to identify the areas of work and where the gravel existed and to choose strip mining as the method of operation in the pervious borrow area.

[212] Hutton, Opron's western general manager, confirmed that as a result of the pricing structure for the gravel in this contract, Opron knew they had to recover all of the costs for locating gravel, removing overburden, excavating gravel and hauling it to the dam from one unit price based on gravel in place in the dam. The payment structure made it critical for Opron to know where the gravel was actually deposited, how it was deposited and how far from the dam it would be found. Opron was only able to make all of these calculations and price the job because the contract told them that the distribution of gravel was indicated by the strip logs and gave them an assurance of continuity. Had Opron been aware that the gravel, rather than being as represented, was actually erratic and segmented, it would have been unable to do the necessary calculations, especially within the time frame of the tender period.

[213] In order to determine what material could be expected in the foundation areas of the dam, Cameron, who performed the majority of the evaluations for impervious

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materials during the tender period, relied on the information in the contract and on what he saw at the site visit. He understood that the information contained in the test pit and borehole logs was representative of the material that would be encountered in the areas.

[214] The defendant called as one of their expert witnesses, Harold Johnston ("Johnston"). Johnston was a consultant to Double N Construction in 1982 for the purpose of assisting that company in preparing an estimate for this project. Johnston testified that he did not look at any additional information at the time of tender. He considered that the information provided in the tender package was ample and he also had a time element to adhere to. He considered that the tender package could be used to submit a reasonable and accurate bid. He relied upon the package, including the Thurber Report, as being accurate for the purposes of the work that he did in preparing the tender.

[215] I find as a fact that the plaintiff relied on the information supplied by the defendant in the contract documents.

The Site Tour

[216] During the tender period, the defendant arranged a site visit for all prospective tenderers. This site visit was held on June 9, 1982. Representatives from a number of companies attended, in total approximately 50 people. All participants were free to make such other site visits as they deemed necessary and appropriate. Some parties availed themselves of the opportunity to revisit the site.

[217] Three representatives of the plaintiff attended, only two of whom were directly involved in preparation of the plaintiff's estimate. Three other individuals, who were directly involved in the bid preparation, did not attend. The plaintiff did not make any additional visits during the tender period. After the tender closing date, Maio made private visits on at least two occasions.

[218] Prior to the commencement of the site visit, those present were provided with a package of basic introductory information to allow them some familiarity with the project and location. The documents set out that the design was evolving and would continue to evolve as the project progressed.

[219] Representatives of the defendant and of the design team were present to explain the project, answer questions and cause test holes to be dug, both in random locations and where requested. The Stage I portion of the project was discussed and questions asked in that regard were answered. The presence of the Stage I contractor was pointed out to allow questions to be asked of it as well. Additionally, those present were allowed to wander where ever they wished and do what they wanted to ensure their familiarity with the site and conditions likely to be expected. They were also advised that additional information and documentation was available in Edmonton and could be reviewed on request. The plaintiff's personnel never availed themselves of that opportunity.

[220] The site visit commenced with all attendees arriving at the north abutment. From there they were able to look at the dam site itself, all areas of required excavation and those other working areas in near proximity to the dam. They next went to the downstream foundation area and stopped at the conduit outlet works. They were able to walk in and around the downstream foundation excavation area. They were able to observe or walk into the downstream pervious borrow area as well as all areas

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containing stockpiles and all work areas both expected for use by themselves or being used or which had been used by earlier contractors. Encompassed in that was the ability of all visitors to walk along side of and on top of the embankment as it then existed.

[221] The site tour group then travelled along a road built on top of the clay cut off in order to drive along the downstream foundation excavation area by the diversion area and into the area upstream of the dam as it then stood. In doing this they were also able to observe the south abutment area and water flowing through the diversion area. (The tour stopped at the river diversion).

[222] The group stopped along the upstream side of the embankment again allowing visitors the opportunity of viewing and walking around that area as well as portions of the Stage I pervious borrow.

[223] The group continued into the upstream pervious borrow area where a number of stops were made. First, the group stopped at existing test holes which had earlier been dug, and then at areas where test holes were excavated in the visitors' presence.

[224] At all locations where the tour stopped, participants understood that they were able to go anywhere and observe or do anything they wished in order to enable themselves to become familiar with the project and the area in which it was being constructed.

[225] Approximately eight test holes were dug by backhoe during the site visit, in a variety of locations, in the course of the trip upstream. The first two or three test holes which were dug did not locate any gravel. The remainder, however, did locate gravel of varying thickness at varying depths covered by varying types and amounts of overburden which overburden was also of a widely varying moisture content.

[226] At the conclusion, those present were returned to the starting point, from which point they were then free to do whatever they required or deemed necessary to prepare themselves to be in a position to bid on Embankment Stage II.

[227] Ruttan, the defendant's resident engineer, conducted the site visit and carried out a commentary as the tour progressed. He answered those questions put to him as well.

[228] He was a graduate engineer, had been resident engineer on the Paddle River Project during and prior to Embankment Stage I, and was familiar with conditions at the site. He remained the resident engineer for all phases of the PRD.

[229] During Ruttan's commentary, he mentioned that a slide had occurred in the north abutment during Stage I excavation work, that the slide had been repaired, that additional information in the form of reports and photos was available, that permanent relief wells would be later constructed within the foundation excavation area, that previous mining had occurred within parts of the reservoir and that a gravel stockpile beyond the 695 contour belonged to others and was not available for use.

[230] Johnston, a long time consulting engineer to the construction industry, and an individual who had previously estimated, bid and also constructed earth fill dams, was present at the site visit although representing another contractor (Double N Construction). During the site visit, he noted a number of items which assisted him in helping Double N create an estimate for Embankment Stage II.

[231] In the north abutment he noticed that

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no vegetation remained on the slopes. It had been cleared and stripped. As a result, he expected that the slopes would be wetter and harder to work with than the test holes for that area were likely to indicate. He noticed the gap between the north abutment and the embankment - though relatively dry at the site visit - and believed that during construction it would require extreme care and considerable effort as it would collect water.

[232] He indicated that the downstream pervious borrow area looked wet - water from the conduit outlet works was being pumped there on the date of the site visit. The fact that the dam was a flood control structure located on a valley bottom was also of significance to him.

[233] In the upstream pervious borrow area, Johnston observed a number of previously excavated test pits. They were filled with water and the top of the water level was generally at or near the top of the gravel located in the pit. He also noticed that, at times, water had percolated, in places upwards of a foot, above the gravel layer making the overburden wet. As a result, Johnston expected to be working with wet overburden in mining for gravel.

[234] Similarly, after watching excavation of some test holes in areas further upstream, he noted that at times the gravel was very wet (the hoe was excavating both water and gravel). Johnston concluded that extensive de-watering would be required in the pervious borrow areas as well as in the foundation areas. In his trip up the valley, Johnston also noted other areas which had to some extent been mined previously and recalled being told the same by Ruttan.

[235] With respect to the pervious borrow area, he recognized that it was to be a tough job requiring extensive planning, much water control and carefully controlled operations to ensure that mining losses would be kept to a minimum.

[236] After the site visit and review of the contract documents, Johnston viewed Embankment Stage II as a risky, difficult job, particularly in its early stages.

[237] At the site visit, none of the plaintiff's representatives asked any questions, made any notes, took any photos, or made any detailed investigations in respect of any items. I fault the plaintiff in this regard.

[238] Both Cameron and Hutton noted that the downstream pervious borrow area looked wet and might be hard to work in. They noted that the conduit contractor was pumping water into areas where, were the plaintiff successful, it would have to excavate. They noted that there were some existing stockpiles of various materials in and near those same areas which would have to be dealt with in some fashion.

[239] Similarly, with respect to the area of the downstream foundation excavation, they noted that it had been and was being used as a lay down or construction area by other contractors. They also noted that it appeared to have been dressed or levelled. Both noted that the previously existing river channel and old oxbow, which formerly had run through that area, were no longer in evidence or existence. They noted that the conduit contractor had placed a pile of granular material in that area and also made note of some other piles of material there. In their review of the contract documents during the estimate period, they also noted that some test holes in the valley bottom contained fill material.

[240] None of the plaintiff's site visit team investigated any of the locations in the

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downstream foundation excavation area where they had noted previous work, stockpiles or dressed conditions to determine the type or nature of the material which may have been placed there or to determine the nature of the material existing there or to determine any subsurface conditions in that area which would likely be encountered when it was being excavated.

[241] With respect to that portion of the site visit upstream of the dam, the plaintiff's representatives observed the excavation of test holes and both Cameron and Hutton felt that those holes were representative of what their previous review of the contract documents indicated to them was likely to have been expected in the pervious borrow areas. As for Schindell, Opron's superintendent, he noticed that the gravel varied in depth and nature from test hole to test hole and recalled that some disclosed no gravel.

[242] Both Schindell and Cameron noticed some areas which appeared to have been mined previously, at least to some extent. As well, the plaintiff's representatives recalled noting an area within the upstream pervious borrow where a stockpile of granular material was stored and which had been indicated as belonging to others and therefore not available as construction material on the project.

[243] During the site visit, Hutton indicated that a number of prospective tenderers asked about various of the Stage I contractor's experience and that both the owner's representatives present at the site and the Stage I Contractor himself responded to those questions.

[244] Despite the prior knowledge of Alberta Environment, however, no further mention was made of the Stage I experience, the buried waste in the downstream foundation area, the prior mining in the upstream pervious borrow area or the erratic nature of the pervious borrow deposit. Passing reference only was made to the slide which had occurred in the north abutment. Neither the slide nor the buried waste in the downstream foundation area were apparent upon visual examination. No list of other geotechnical reports was included in the prepared handout distributed to bidders.

[245] The following features were known to Alberta Environment at the time of the site visit. These features were or should all have been known to Ruttan, and obviously to Nicolson and Ramage of Alberta Environment, as well, but were not mentioned.

(a) The Paddle River had meandered all over the valley. This process had been occurring since the last Ice Age some 10,000 to 15,000 years ago. In so doing, the river had affected the deposit of gravel making it unpredictable and according to Ruttan, inconsistently variable which he conceded meant "erratic". By Ruttan's definition, it was a "dog's breakfast". This was a feature of the area.

(b) No mention of the action of the Paddle River was made in the Thurber Report, (although Ruttan denies having known this as of the date of the site visit because he did not read it). Obviously Ramage would have known this because he was a co-author of the report.

(c) Prior reports from Alberta Transportation and the County of Lac Ste. Anne confirmed that the gravel was in pockets, and prior reports from EBA and TCL confirmed the effect of the action of the Paddle River on the gravel deposit.

(d) Gravel had not been found in continuous or contiguous layers of one to three metres during excavation of the pervious borrow area by the Stage I contractor; it

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was segmented and noncontinuous.

(e) Gravel had not been recovered in the planned or expected quantities from the pervious borrow area in the Stage I contract.

(f) Significant prior mining had been done in the upstream pervious borrow area of the Stage II contract area. (This had been communicated to Alberta Environment by Alberta Transportation and the County of Lac Ste. Anne as early as September, 1977. The location of some of this prior mining had been plotted on a drawing by Alberta Environment. Other areas of prior mining had been plotted by EBA and TCL and were shown on landowner reports prepared by these consultants which were available and known to the engineers of Alberta Environment Design and Construction. Quantities of prior mining were also estimated by those consultants in their reports).

(g) The design of the dam had been changed between Stage I and Stage II, including:

- the footprint of the dam had been extended downstream over an area now requiring excavation, backfill and the construction of a berm. This extension was over the old channels and old oxbows of the Paddle River;

- the deletion of approximately half a million cubic metres of gravel from the embankment;

- a slide approximately half the length of the north abutment upstream of the centre line of the dam had occurred, requiring a re-design in the area of the slide so as to now require excavation by the Stage II contractor of the slide area and the removal of the temporary berm which had been built at the toe of the slope to restrain any further potential slide activity.

(h) Only temporary repairs had been effected to the slide in the north abutment. These repairs were not shown on the As Built drawings.

(i) Waste had been buried in the old channels and oxbows in the downstream foundation area and such waste extended beyond the actual channels. This area had then been bladed off and dressed up so that neither the buried waste nor the original ground were any longer visible.

(j) Surveys had been taken in the downstream foundation area so that measurements of quantities of buried waste material could be made in that area.

(k) The results of test pits in the downstream foundation area were taken from test pits dug before the waste was buried in that area. Those test pits obviously did not disclose the existence of this waste.

(l) The reference to "waste" on the certified As Constructed drawing of Stage I dated February 23, 1982, did not appear on the As Built drawing, sheet 3 of 28, for Stage II.

(m) The Stage I Excavation Limit shown on drawing 7 of 28 as having existed from the Stage I contract in the north abutment upstream of the centre line actually showed a limit of fill placed by the Stage I contractor.

[246] With this knowledge in mind and with an appreciation of its materiality to the bidders, Ruttan, Nicolson and Ramage pro-

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ceeded to give the prospective bidders a tour of the site for the purpose of pointing out features to enable the contractors to more accurately prepare their tenders, all in the hope of securing the best price.

The Contract Award

[247] Tenders closed June 29, 1982. Opron was the low bidder. After investigation, Alberta Environment was satisfied that Opron was capable of performing the work. During the course of the evaluation, Thiessen met with Hutton and confirmed Opron's proposed approach to the pervious borrow. Opron subcontracted the excavation and hauling of the gravel to Maio Construction. The securing of a subcontract for the gravel was financially advantageous to Opron based on the price submitted and agreed upon.

[248] Maio, whose firm specialized in earthworks excavation, performed his own quantity takeoff utilizing a standard average end area method and concluded that, based on the contract documents, a strip mining operation was the most feasible method of excavation of the gravel. By letter dated July 15, 1982, Maio Construction provided a quotation to Opron. This was followed by discussion between Hutton and Maio and the revision of the initial quotation by letter dated August 13, 1982. By that time, the work had already begun.

[249] It was understood and agreed that Maio Construction would produce gravel to the dam at a rate that would match Opron's rate of production. Maio Construction also agreed to supply the 2B material and the riprap.

[250] Maio Construction planned to strip and load the gravel with backhoes and to haul the gravel to the dam with a fleet of its own Mack trucks.

[251] The securing of a subcontract price for the excavation and hauling of the 2A and 2B gravel as well as the riprap secured a margin for Opron on this portion of the work of $724,737 and accordingly reduced Opron's risk.

[252] Opron's contract was for the construction of an earthfill embankment. The embankment included seven different types or zones of material. The contract dictated that the various zones of the embankment be constructed at the same rate. The contract also dictated that construction begin in the north abutment, the excavation and backfill of which was critical to the work to be performed in the first year.

[253] The dam centerline ran roughly north/south. The base of the dam was approximately at elevation 677 and the crest of the dam was to be at approximately elevation 711.

[254] Contract Drawing 17 of 28 is a cross section through the embankment showing the location of 6 of the 7 required zones of material. Zone 2B is not shown on this drawing and it was required in only a few specialized locations in the embankment. The seven zones of material can be broadly grouped as impervious (or dirt) and pervious (or gravel) materials. Zones 1, 3, 4 (also referred as common fill), 5 and 6 were the impervious materials. These materials were obtained from the four impervious excavation items in the contract, foundation and abutment excavation, spillway excavation, conduit exit excavation and impervious borrow excavation. Zones 2A and 2B were the pervious materials and these materials were to be obtained from the pervious borrow areas.

[255] There were several restrictions imposed upon Opron's approach to the project by the terms of the contract and these

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restrictions dictated the sequencing of the work. The individual zones of material had to be placed in conjunction with each other such that adjacent zones of material did not differ in elevation by more than 600 millimetres. This meant that the rate of production of the various zones had to be co-ordinated to ensure that material for each zone was available to be placed in the correct proportions. This zone differential requirement also had the effect of restricting progress on the embankment to the rate of progress of the slowest zone.

[256] Special Provision 11 imposed further restrictions by providing for liquidated damages of $5,000 per calendar day of delay for failure to complete each of the following four items by the dates given, were:

(a) Zone 2B stockpile, spillway excavation, excavation for and placement of the berm south of spillway excavation, and vacate spillway area and south access road by November 15, 1982;

(b) all fill to elevation 684m north of the closure area by November 15, 1982;

(c) all work north of dam centerline station 1 + 350 and provide access from the north to the access shaft by October 15, 1983;

(d) completion of all work on this contract by December 15, 1983.

[257] Placement of the fill in the embankment was dictated by the contract documents to begin at the lowest level which was the north abutment. Before commencing the placement of fill on the main embankment, the north abutment foundation areas had to be excavated and prepared to accept fill material. Ruttan, during the first site meeting on July 26, 1982, repeated and reinforced this requirement.

The Plaintiff's Estimate Of Granular Material - The Background & Assumptions

[258] A review of the plaintiff's estimating process establishes that a number of required construction activities were not provided for. Similarly, a number of required operations were not specifically costed out and some were inaccurately dealt with.

[259] LePage was assigned the task of doing cross sections of the upstream and downstream pervious borrow areas to establish an estimate of the quantities of gravel likely to be in existence in those areas, together with an estimate of the quantities of overburden required to be removed to expose that gravel deposit.

[260] He does not recall the nature of the instructions given to him as to how to do this work nor does he recall who gave him those instructions.

[261] LePage went about the process of estimating quantities of available gravel through the use of an average end area calculation. He can not recall the criteria he used in order to determine from an individual test hole what to include as gravel and what to include as overburden. He felt he exercised no judgment in respect of the information contained in the test hole logs as set out in contract drawings P1 - P19, once he determined the depth of overburden in a test hole and the depth of gravel in a test hole. He made no attempt to determine what the expected horizontal distribution of gravel would be between adjacent test holes.

[262] He did not make any assumptions in respect of the depth of gravel located in a

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test hole to establish a minimum cutoff to account for either possible losses in excavation or minimum practicalities of recovery. Nor did he qualify his estimate to account for any risk factor in light of the wide variance in the depth of gravel shown in different test holes. He merely drew straight lines between these adjacent test pits that he used which contained gravel - irrespective of physical features that may have interrupted those lines.

[263] Where test pits contained no gravel and, at the edges of the valley, he assumed, for estimate purposes, that the gravel ended mid-way between a pit with gravel and a pit with no gravel or midway between the last pit and the edge of the valley. LePage then calculated the quantities of overburden contained between the lines he had drawn and the natural ground line. Similarly, for gravel he calculated quantities found between his drawn lines showing the top and bottom of his assumed layer.

[264] The method adopted by LePage (average end area) to do his estimate of pervious quantities, while one of a number of similar methods, is commonly used within the construction industry to calculate estimates of quantities of both surface and expected subsurface deposits.

[265] All such methods start from the basis of certain real information (the result of a test hole program usually excavated on the basis of a grid of some sort) followed by an assumption of continuity of some sort; either between pits (for example if a deposit is shown to exist at two locations, it is assumed to exist between those locations whereas if it only exists at one location, it must end somewhere between the location where it exists and the location where it does not), or to a certain point at a certain depth in a certain area.

[266] Each different method used will arrive at a different interpretation of the profile between pits and yield different estimates of quantity. (i.e. in the average end area method, the material between pits is assumed to vary uniformly; in the block method, the area influenced by a pit has a profile which is uniform in depth with an abrupt change when one reaches another area influenced by a different pit; with a contour method, the area between pits will vary unevenly; when averaging is used, the material is assumed to be uniform in depth for the whole area).

[267] Once that assumption is made, a mathematical calculation can be done to determine the estimated quantity located within a particular area. The expertise and judgment of an estimator lies in determining where, for quantification purposes only, he should draw his line, and what material he should include in his calculations in order to arrive at an estimated quantity.

[268] Once that is done, he has merely obtained an estimate of quantity. It is not and can not be any proof that a deposit exists in that quantity at any exact location. There could equally be more or less. It is an averaging calculation only.

[269] The validity and reliability of that mathematical calculation must now be determined or assessed in light of the expected variability of the deposit itself which is ascertained from a review of the totality of available information. The validity and reliability of an estimated quantity necessitates an experienced assessment of risk of whether the estimated quantity is likely to exist in that amount. LePage did none of this additional assessment.

[270] He was not, to his recollection, made privy to any of the information obtained from their site visit and made no use of such information in his estimate of gravel and

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overburden quantities. He used only the contract drawings.

[271] LePage was somewhat unfamiliar with the soil classification system used by the defendant in the contract documents however he did not review any literature to familiarize himself with the system being used in order to assist him in the work he did.

[272] Upon completion of his estimate of quantities, LePage commenced preparation of a contour drawing based again on the test holes set out in the contract documents. (The same data he used in his previous calculations).

[273] Hutton requested that LePage create a contour drawing as a result of having noticed that the test holes indicated a variance in the depth of gravels located in various parts of the upstream pervious borrow area.

[274] For this activity, he directed LePage to exclude from his contour and from his calculations all gravel layers with a depth that was less than 2 feet, in that he felt that such layers would be difficult to excavate and not economical to mine. He also felt that such thin layers could be excessively wet. However, when his forces were to go into the field in 1983, they would strip mine all areas.

[275] Neither LePage's contour work nor his average end area calculations were checked by anyone from the plaintiffs' operation. Hutton reviewed the contour after it was prepared and says he used it in work he did on the estimate.

[276] Cameron was unaware of what materials and soil categories LePage included as gravel and as overburden. At no point however did Cameron contact LePage, who incidently worked in the same room and office as Cameron, to determine for himself just what criteria LePage had used.

[277] Prior to this time, neither LePage nor Cameron had any experience with searching for, locating, quantifying, or mining granular material or for that matter any other specific material from a river valley flood plain where one could expect to encounter a high water table. Both were also unaware of the nature or quantity of losses one could expect in such process.

[278] Simmonds, although not a field person (he had been an estimator for a variety of companies since his arrival in Canada some 16 years before), and although he too had never worked on the construction of a zoned embankment or excavated or mined granular material from a river valley flood plain, was however aware that within the mining process (his experience was coal mining in Great Britain) a contractor could expect to lose material from the top of a deposit through the stripping process and similarly would leave material unmined at the bottom of a deposit, again as part of the mining process. However, in the plaintiff's estimate work, Simmonds was not involved in any decisions relating to any of the pervious borrow operations.

[279] Similarly, Schindell, although experienced in mining granular in western Canada, and although familiar with mining losses at the top and bottom of deposits, and although familiar with the variability of granular deposits found in flood plains in western Canada, was not utilized in any planning or estimating operations dealing with the pervious borrow aspect of the job.

[280] During preparation of the plaintiff's estimate, it decided to treat all of the impervious excavation items in the same fashion

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because in the bid team's view, it was all bulk excavation work. The equipment they chose and the productivities they used were based on bulk handling operations. They recognized that work from the top of the abutments and from the impervious borrow pit was easier and would be more productive than work from the foundation areas in the valley bottom. However, for the purposes of their estimate, they blended all of this work and for bid purposes arrived at blended costs for this work. The easier and quicker and more productive work on the abutments and from the impervious borrow pit, subsidized the harder and slower foundation excavation work.

[281] There were large variances in the production rates for various different areas and different haul ranges. This affected the durations on later scheduling because the more difficult foundation excavations - assuming estimated quantities in each area were accurate - are scheduled to take less time (because of the blending) than they actually would if the schedules used the actual expected production for each specific activity and location. The actual placement of fill in these locations would also start later than scheduled. The effect of this on the estimate was an underestimation of durations for all foundation work (assuming accuracy in quantities to be excavated and filled).

[282] Similarly, the plaintiff also blended its placement efforts for all zones. Placement and compaction, again easier in drier, less plastic material, subsidized those areas requiring more work, using wetter or more plastic materials.

[283] These decisions were made by the plaintiff's bid team even though at least Hutton and Cameron were aware that the ease and productivity of excavating, handling, hauling, placing and compacting material depended largely on the strength and moisture contents of that material.

[284] The plaintiff, during its estimate preparation, did not appear to analyze the boreholes from the contract documents for the abutment and foundation excavation areas before determining either the appropriate equipment mix or the expected productivity for such equipment for both the excavation and placement of such materials.

[285] Such an analysis would have revealed many test holes where soft and weak soils well over the optimum moisture content, making a choice of bulk excavation equipment and its productivities clearly inappropriate. (For example CH material up to 18% over optimum; CL materials up to 19% over optimum; silty soils materials up to 18% over optimum).

[286] In addition to blending the dirt items, the plaintiff went a step further during its estimate process in respect of costing the project. They unbalanced their estimate in a number of aspects.

[287] When it came to adding their indirect costs, profit and other adjustments onto their direct costs, they chose to, inter alia, move monies from the impervious borrow item to the mobilization item. This allowed the plaintiff to obtain some extra monies, in accordance with the terms of the contract, earlier on. The possible detriment to such procedure was that since this was a unit price contract, if the actual units of impervious borrow moved on the job became larger than those set out in the estimate of design quantities, the plaintiffs would not recover any mark-up beyond their actual estimated cost (direct) per unit for each extra cubic metre of that material moved. In that event, the plaintiff's income would be artificially reduced because of this unbalancing.

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[288] In addition, by treating direct cost items as indirect costs, the costs get distributed to all items rather than the specific ones to which they apply. This artificially reduces the unit prices of those specific items. Any increases in quantities of those specific items will not generate enough revenue to cover the actual cost of those items.

[289] The plaintiff later subcontracted the easier impervious work to Kidco keeping the harder work for itself. From that point the easy work stopped subsidizing the hard work but the plaintiffs were now dependent on their margin on the Kidco subcontract to subsidize this work.

[290] LePage's calculations were done using every second cross section rather than every cross section. He, for some reason, used only one half of the test hole logs to assist him in the calculation of estimated quantities of his type of gravel and his type of overburden.

[291] In order for him to do this, he had to assume continuity not between adjacent test pits down the valley, but between test pits approximately 200m apart irrespective of what the intervening strip logs between the logs he used actually indicated. He clearly was using this test pit information as a very approximate source of quantities both of overburden and granular without regard to practicalities of harvesting of the granular since he used all gravel thicknesses in his calculations.

[292] No adjustments were made in any later calculations to account for any harvesting or mining losses. Nor were adjustments made for the possibility of having to strip and mine additional areas because of these losses.

[293] The information from option 3 in Document 13063, was carried forward and was used by members of the bid team in respect of the plaintiff's calculation of required hours and equipment needed to strip, excavate and haul 900,680m^3 of excavated gravel from the identified pit to the embankment.

[294] The plaintiff expected that by providing for an extra 209,600m^3 (an amount 30% more than that amount shown on the approximate tender quantities for bid comparison purposes), they would have enough granular material to construct the embankment as designed.

[295] In addition to mining losses, there are a variety of other losses that occur during construction operations such as Embankment Stage II where materials are taken from one place moved, processed as necessary, then placed and compacted. These losses are associated with things such as loading, hauling, processing (cleaning, washing, crushing, remove oversize or riprap), shrinkage, compaction, overbuild, other uses, waste (diversion ditches, etc.), contamination, areas not mined (used as haul roads, buffers) and interim stockpiling.

[296] In Document 13061 the plaintiff's bid team established an average payload of 25m^3 (banked) per 773 rock truck and assumed a productivity of 124m^3 (banked) per hour for hauling mined gravel to the dam. They assumed an average haul distance of about 2,200m.

[297] The plaintiffs say they arrived at their average haul distance by calculating along a direct line between the centroid of the dam and the centroid of their upstream pit as it was identified in Scenario Three of Document 13063.

[298] However, the valley is not straight but curves which prevents the haul road from

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being constructed as assumed. As well, as a haul road approached the dam, it would have to approach the dam for one or the other abutment arriving at the embankment at one side so that at least one half of all material placed would have to travel a minimum distance of one half of the length of the dam. Similarly, in the valley itself about one half of the material mined would have to travel for at least the distance of one half of the valley width. None of these extra distances were dealt with in the plaintiff's estimate of haul length. The effect of this omission was to underestimate the length of the actual hauls which would be required on this part of the Embankment Stage II.

[299] A review of Document 13061 shows, however, that the calculations arriving at an average production of 124m^3 were not based on an average haul distance of 2,192m. 2,192m equates to about 7,200 feet. Looking at Document 13061, the plaintiffs indicate that at a haul distance of 7,000 feet, their average production would be 107m^3/hr so their average haul distance for bid purposes clearly was much less than 7,000 feet. (In fact, a production of 124m^3/hr means an average haul distance of only about 1,780m.) Therefore, the haul distance used for calculations was less than the 2,192m stated. This means the plaintiffs underestimated the amount of hauling equipment they would need for the gravel hauls based on haul road and average productivity.

[300] Document 13055 details LePage's calculations regarding the foundation, abutment and spillway excavations. LePage never considered or analyzed the location, type or nature of the material expected in any of these areas nor did he deal with the questions of swelling, shrinkage or possible use. Except for providing for the removal of estimated quantities of topsoil in the areas of the spillway and the south abutment, he assumed that all excavated material was useable and would be used in the construction of the embankment although he had never looked at any test hole logs in any of the impervious works. I would question the following:

(a) LePage's calculations appear to have been taken from various contract documents and indicate some assessment or calculation of quantities for the north abutment, south abutment, spillway and impervious borrow areas. With respect to the downstream foundation excavation, it appears that no specific calculation was done by him.

(b) LePage broke down his excavation calculations into five areas: the north abutment and its foundation, the south abutment and its foundation (closure section), the downstream foundation including the downstream conduit exit excavation, the spillway excavation and finally the impervious borrow area.

(c) LePage arrived, through some calculations at a quantity of excavation in the north abutment and north abutment foundation of 179,883m^3. He similarly arrived through the same sort of calculations at an amount of excavation required from the south abutment and south abutment foundation or closure areas of 448,117m^3. He arrived at a downstream foundation excavation quantity of 25,000m^3 without any apparent calculation.

(d) LePage did not calculate the downstream foundation excavation but merely looked at the contract document approximate quantities for the same three areas (set out in the tender documents for tender comparison purposes) at 663,000m^3 and, after adding, his 179,883m^3 and 448,117m^3 then subtracted 663,000 from that amount and arrived at 25,000m^3 to be remaining for the downstream foundation excavation

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area (this appears to be an error of 10,000m^3 however it is noteworthy that otherwise the numbers equate exactly to the 663,000). Cameron's testimony on that point indicated that as best he could recollect, two of the items were calculated, the third was arrived at by deducting the 663,000m^3 from the estimated total calculated amounts.

(e) None of LePage's calculations appear however to have been carried forward to the plaintiff's other estimating work in respect of Embankment Stage II. Other numbers appear to have been used and no comparison or accuracy check appears to have been done among these various different calculations done by others.

(f) This method of deductive calculation is not recommended by texts in respect of estimating heavy civil construction projects nor does it appear to be standard in the industry where all items of actual work are expected to be reviewed, assessed and calculated and where pricings arrived at are derived from actual work expected rather than from assumed quantities.

[301] Yet, in spite of warnings from LePage, Opron relied upon his work in calculating their bid.

[302] Simmonds determined fuel, oil and grease charges for all equipment which he expected to be used on the project.

[303] He also calculated the hourly equipment rental rates which the plaintiff used to cost out their estimate and which formed the basis of the plaintiff's tender insofar as it related to equipment costs.

[304] The following items were allegedly provided for by way of contingency within the plaintiff's estimate rather than having been specifically costed out: the construction and maintenance of haul roads; construction of diversion ditches and river crossings; double handling of overburden in the pervious areas; double handling of reject 2B material; care of water within the pervious borrow areas; double handling of 2B material to the dam; moving top soil and stock piles in the downstream pervious borrow area; conduit exit excavation; diversion ditches upstream of the dam to the conduit; creation of coffer dams; construction of blanket keys; excavation of the downstream pervious borrow area and movement of overburden to the upstream pervious borrow area or to the embankment for disposal; excavation of interim channels from the conduit to the river downstream of the dam and from the spillway to the river and downtime due to weather. All of these activities occurred during Embankment Stage II. In my view, these items should have been costed out.

Mobilization And Commencement Of Construction (1982)

[305] This was the plaintiff's and, for that matter, Hutton's, Cameron's and Simmonds' first comprehensive dam construction job.

[306] The mix of equipment which arrived initially was more expensive than allowed for in the plaintiff's tender.

[307] The plaintiff's initial operations were to set up the camp, create the required lay down and work areas, construct a main haul road to the upstream pervious borrow area and do all of the miscellaneous operations necessary to get the job site into the condition for the commencement of actual embankment construction activities.

[308] It was now determined that once these setup operations were complete (that was

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expected to take approximately two weeks), the plaintiff would initially commence work on the north abutment and in the north abutment foundation, placing the excavated material from those areas either in the existing waste area or in the upstream berm extension area, as appropriate.

[309] Once excavation of the north abutment foundation and north abutment were completed, the plaintiff planned to go to the downstream foundation excavation area, excavate portions of that area, in turn preparing those areas for the placement of the required granular and thereafter commencing construction of the extension of the downstream berm above the downstream foundation excavation area.

[310] Work commenced in the north abutment foundation area on about August 9, 1982. Neither, prior to that time, nor during the time the plaintiff was working in the north abutment foundation were any concentrated efforts occasioned at water control to assist the plaintiff's forces in excavation of this hole although it was expected from a review of the contract documents and from a review of the conditions observed by Schindell himself during the site visit that water would accumulate in that hole whether through seepage or by run off from the slopes immediately to the north.

[311] As well, work in the north abutment foundation was slower than planned by the plaintiff because conditions had been found to be wetter than that expected by the estimating team when they prepared the plaintiff's estimate. the area got muddier as the excavation got deeper. Rain soaked into the area during the time it was being worked.

[312] The plaintiffs were surprised at the conditions they encountered in the north abutment foundation area. It was much wetter than Hutton had expected. Others were surprised when they encountered what might be classified as fill or slide material.

[313] Hutton had noted that some of the logs indicated possible wetness. However, the plaintiffs, in their review of these various test hole logs during the estimate process, never ascertained the possibility, let alone the likelihood, of water and soil condition problems in the north abutment.

[314] Similarly, with respect to the north abutment foundation and the lower slopes of the north abutment, test hole logs dug after the slide in the north abutment and its repair indicated that in these areas, fill or non-naturally existing material, together with colluvium which had fallen earlier from the slopes, could be expected to be encountered.

[315] During the plaintiff's excavation of the downstream foundation excavation area, they were plagued by equipment breakdowns, poor weather, a lack of water control, non-completion of haul roads and a lack of space to put excavated materials resulting from not getting gravel to those areas quickly enough for backfilling which necessitated the stock piling of some fill materials until more space was available to receive such fill. McCallion, Patry, Stokotelny and Schindell, all of Opron, indicated that rains also made conditions worse in the downstream foundation area as well.

[316] A difficult portion of the downstream foundation excavation area was an area north of the conduit and north of the old oxbow where no Stage I waste material had been placed. The closest test log for that area indicated soft material with a high water level (much too soft for scrapers). When the plaintiff excavated the area, it was very slow work with a dozer pushing material to a hoe. Other test logs on the valley bottom, had they been closely reviewed, would have indicated to contractors of the likelihood of

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running into soft and weak materials well over optimum moisture content in the flood plain alluvium.

[317] Because of the presence of material which had to be wasted in those areas, the plaintiff was required to obtain additional suitable fill material from the impervious borrow pit. This additional amount had not been considered or costed out, nor had equipment for this operation been provided for in the estimate. (Time, equipment and money would be required to replace the time, equipment and money which were being used to carry the waste from the excavation. The waste area durations would also be longer.)

[318] During the plaintiff's initial operations (haul roads, camp areas and lay down and work areas), the plaintiff used some granular materials excavated from the upstream pervious borrow area. Use of this material reduced the quantities of granular from the upstream pervious borrow area which was available for use for dam construction purposes and consumed some of the 209,000m^3 of excess materials which the plaintiff had estimated as being available in their borrow area. Periodically, throughout the time the plaintiff worked on the PRD, granular resources continued to be used for purposes other than the construction of the embankment. As well, haul roads were constructed through the upstream pervious borrow area without the granular located beneath them having been first excavated. Further granular was not excavated from areas immediately adjacent to the haul roads or to the diversion ditch (where spoil piles existed). All those factors therefore reduced the quantities of granular from the upstream pervious borrow area which were available for use in the dam.

[319] During the initial construction period of August 9 to December 15, 1982, the moisture in the area was as could have been expected by the plaintiff had historical records been reviewed. The plaintiff suffered from weather delays on 24 different days between August 3 and September 30 which coincidentally is the same number of occasions historically one could expect measurable precipitation over the same period.

[320] The plaintiffs, in their estimate, did not cost out excavation of the downstream pervious borrow area, nor did they cost out or provide for the excavation of channels either as an interim or final operation. Similarly, they did not cost out or provide for men or equipment within the estimate to do other required tasks ancillary to excavation of the downstream pervious borrow area.

[321] The plaintiffs choice of equipment for excavating the downstream channels was a hoe and trucks. This was different from that planned in the plaintiff's estimate for the excavation of areas along the valley bottom in close proximity to the embankment. At that time, the plaintiff's estimate team saw no problem with those areas and envisaged them as a bulk materials handling job at bulk excavation production rates with rubber tired scrappers. (By comparison, the plaintiff's choice of equipment for removing overburden from the valley bottom in the upstream pervious borrow area was a combination of twin-engine, rubbertired scrappers and back hoes at relatively high production rates).

Opron's Approach To Work

[322] The evidence establishes that Opron planned to begin work in the north abutment and the downstream foundation areas virtually concurrently. Progress in the north abutment was dependent on progress in the downstream foundation. The north abutment

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was critical to the rest of the project. Until the north abutment was completed, no mass filling or work could begin on the main embankment.

[323] The work in the south abutment and the spillway could not begin in earnest until the main embankment was ready to receive the material which was to have been excavated from those two areas.

[324] The impervious zones and pervious zones of the embankment had to be constructed concurrently. This meant that the production rates from the various impervious excavations had to be matched to those from the pervious borrow area. Progress on the impervious excavation and fill was, therefore, dependent on progress in the pervious borrow areas.

[325] The first critical area of impervious work on the project was the north abutment. The contract specifications dictated, as noted above, that the foundation of the north abutment had to be excavated and backfilled before any excavation of a substantial or sustained nature could begin from the impervious borrow pit.

[326] Opron planned to place the balance of the material into the downstream foundation area after it was made available to accept excavated material. Opron planned to start the downstream foundation excavation at the south end and proceed towards the conduit. North of the conduit the area was occupied by another contractor, Stuart Olson. Based on the contract representations, Opron expected that the material from the downstream foundation area would be suitable for Zone 4 and the excavation could be performed with a conventional scraper operation. Opron intended to perform the excavation and placement of the first layer of pervious fill in sections. When the downstream foundation excavation was complete to the conduit, it would then be available to accept the balance of the material excavated from the north abutment.

[327] A combination of the upstream Zone 4 berm extension and the downstream foundation area provided sufficient area for the Zone 4 material coming from both the downstream foundation and the north abutment. Consequently it would not be necessary to temporarily stockpile usable Zone 4 material for later re-excavation and placement.

[328] The evidence at trial was, and I accept, that the timely excavation and backfill of both the north abutment and the downstream foundation areas was critical to the work to be performed in the first year.

[329] Upon completion of the north abutment, large scale excavation and hauling operations from both the pervious and impervious borrow pits could begin. When the construction of the embankment proper had begun and Stuart Olson had completed its contract, Opron planned to divert the river thus allowing access to the south abutment and Spillway sections of the project. These areas would be excavated and the material placed into the embankment. It was only after the main embankment was available to Opron (which in turn required that the north abutment be complete) that the work on the south abutment and spillway could begin. Until the embankment was available for mass fill operations, there was no location for Opron to place the material excavated from the south abutment and the spillway excavations.

[330] Opron planned to complete the embankment to elevation 688 during the first construction season. It can be seen on Drawing 17 of 28 that at this elevation, the design of the embankment changed significantly. The Zone 4 berms stopped at that

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elevation and a large portion of the impervious zones in the upstream half of the embankment changed to pervious, Zone 2A. The proportion of dirt to gravel changed significantly at this level from more impervious to more pervious proportionately. A significant change in the equipment crews would be required at this level to change the emphasis of the excavation from impervious to pervious.

[331] When Opron began the excavation of the north abutment foundation area, it immediately encountered excessively soft and wet materials, consisting of clays and organic material. Frozen material was encountered as well as logs and similar organic debris. In the foundation portion of the north abutment, this material extended from the level at which Opron began work down to the clay till level at which Opron's excavation was complete. The production rates achieved by Opron's equipment were lower than the productivity rates upon which Opron had based its estimate. This dramatically reduced production caused a significant increase in the amount of time required to excavate the north abutment.

[332] Opron witnesses Cameron, McCallion, Schindell, Hutton, P. Patry and G. Patry all described the conditions in the encountered in the north abutment. The conditions were extremely soft and wet, with organic materials, including topsoil and parts of trees and logs. All of Opron's witnesses recalled some amounts of frozen material present in the north abutment.

[333] Inspectors called for Alberta Environment, particularly Jordan and O'Donnell, also provided evidence of the conditions encountered by Opron in the north abutment. O'Donnell acknowledged that the material in the north abutment was soft and wet and there was organic material present. O'Donnell testified that, because of the nature of the material in the base of the north abutment, Opron's attempts to use its scrapers there proved to be ineffective.

[334] Opron attempted to excavate material from the downstream foundation area on August 13, 1982. Immediately upon commencing operations, a D9 bulldozer sent to work in that area became stuck. The conditions experienced on that day were recorded in Alberta Environment's inspector's diaries, "Started excavating D/S berm extension [downstream foundation area] and hauling to u/s b.e. [upstream berm extension]. Discontinued due to v. wet conditions." Opron was unable to proceed and so temporarily suspended work in that area until a backhoe was brought to site. Opron next worked in the downstream foundation area August 20, 1982. Throughout the downstream foundation area Opron encountered widespread waste material, saturated organic debris, logs and stumps, the nature of which made it impossible for Opron to excavate this area with the scraper equipment it had initially planned.

[335] The conditions were described by Opron's witnesses, Cameron, Schindell, McCallion, Stokotelny, Hutton, G. Patry and P. Patry, as exceedingly poor and unsuitable for the conventional scraper operation that Opron had planned on and priced for during the estimate. The conditions in the downstream foundation area are graphically described, occasionally in the vernacular, in numerous entries in Alberta Environment's inspectors diaries. Alberta Environment's witnesses Ruttan, Andrew, O'Donnell and Jordan all confirmed the nature of the material described by Opron's witnesses.

[336] The nature of the materials encountered and the difficulties experienced in excavating those materials, in both the north

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abutment and the downstream foundation areas, necessitated Opron bringing to the job site equipment that was different from and in addition to that which had been planned. In response to the conditions encountered, Opron was also required to alter its method of excavation from a conventional scraper operation to a more expensive and slower method using a backhoe to load scrapers and trucks.

[337] As a further consequence of the difficult ground conditions, and the large amounts of waste material excavated from these areas, additional backup equipment was required to support the production equipment.

[338] The nature of the material encountered in the downstream foundation area made the excavation operation slower. It also necessitated the use of an additional piece of equipment, a backhoe, to load the scrapers, rather than the conventional push loading or self loading method. Additional backup support equipment was required to assist the scrapers throughout the operation.

[339] I find that the nature of the material encountered in the downstream foundation area disrupted planned production to such an extent that the work took substantially longer than planned. As a result, the downstream foundation area, which Opron had planned to use as the location for the placement of fill materials excavated from the north abutment, did not become wholly available until September 20, 1982, a delay of approximately four weeks.

[340] The effect on the progress of the work in the north abutment, already slower than planned as a result of the nature of the material, resulting from the conditions in the downstream foundation is apparent and obvious. Excavation from the north abutment was further disrupted and delayed because the downstream foundation area had not become available as a location to place material.

Granular Mining And Losses

[341] When any subsurface deposit is mined, losses are incurred in various stages of the mining process. The magnitude of such losses are dependent on such things as: choice of equipment for mining and hauling; skill of operators; care of operators; use of spotters; nature of material forming the overburden; undulations at the top and the bottom of the seams of the material being sought; nature of the material upon which the material to be mined lay; level of the natural ground water; extent of drainage of natural ground water from the area; extent of excavation under existing water; nature of the interface between the top and bottom edges of the material which is to be mined; whether mining occurs in winter; depth of the deposit; location of the hauls (over the seam or beside the seam); and amount of sloughing occurring from the edges of the pit.

[342] The plaintiff's expert, in his report of December 1983, indicated that assuming a uniform (not variable - one of constant depth) deposit with an average depth of 1.66m he believed that losses of 25% could be expected. (25% of 1.66m is .4m or 16 inches) He stated that in his experience if a variable deposit was encountered, as indicated by the logs in the upstream pervious borrow area, these losses could go higher without extreme care on the part of the excavating contractor.

[343] The plaintiff, in its estimate, provided for a 23% loss from, in their words, "all sources". In their estimate, they expected to excavate and attempt to recover granular from all areas where granular existed with no minimum cut off depth beneath which

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they would not attempt recovery. (30% mark up of quantities equals a 23% loss factor).

[344] Mining granular in winter is a difficult operation where one is working in frozen conditions with a high water table. It is slower and more costly. Extra efforts are required in the stripping of overburden because the overburden often has to be ripped before it can be removed. So too extra efforts are required in the granular for the same reason.

[345] During winter mining, losses at the top and bottom of the interface between both the overburden and till on one hand and the gravel on the other are also more extensive because of the various layers freezing to each other. In practice little gravel is usually recovered (for a variety of reasons) from below the natural ground water level in these conditions. As well, wet granular sticks to equipment when it freezes and causes hauling and excavation difficulties requiring additional efforts and smaller loads.

[346] Both Maio and the plaintiffs indicate that they believe they left virtually no unmined granular at the bottom of the seam and lost one or two inches at the top of the seam.

[347] The defendant's various inspectors believed their observations indicated that the plaintiff's losses at the bottom of the seam areas were six or more inches on average.

[348] I find that losses were suffered at both the top and the bottom of the seam, but that the operators, and particularly the Maio crew, did as good a job as could be done. I do not accept that they left six inches of granular at the bottom.

Maio Construction Western Ltd.

[349] Maio's mining plan was to mine strips; first clearing overburden from a strip 150 to 200m long by 80 to 100 feet wide and placing the overburden on each side of the strip. They would strip a number of strips in similar fashion.

[350] The area was then mined and the material previously stripped would be pushed into the mined areas. Now the intervening areas upon which overburden had been placed initially would be stripped, drained and mined and then overburden pushed from where it had been moved, back into the holes thereby levelling the area just mined.

[351] This process would continue up the valley in an alternating strip operation.

[352] Once on the project, Maio found its equipment was constantly breaking down further hindering their construction operations, causing downtime and escalating their costs. In fact, to the end of December, 1982, Maio had incurred, with respect to its gravel operations alone, maintenance, parts and repair (including welding) costs in the amount of about $408,000. They also spent almost $60,000 on equipment rentals. This contrasted with the plaintiff's estimate expectations for the whole of the project for repair and maintenance of $10,000 (exclusive of a mechanic). Also, Maio's haul roads were frequently in bad condition.

[353] By the end of October 1982, Maio had located, stripped, mined and hauled to the embankment sufficient granular to allow the plaintiff to complete its expected and planned for 1982 embankment fill operations (to approximately 688) level for the areas actually constructed by the plaintiff in 1982.

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Maio decided to continue mining, hauling and stockpiling granular for use in the 1983 construction season. Maio believe that winter conditions would assist the company by being easier on its equipment, allowing for better haul roads and requiring less water control efforts.

[354] Despite the large increase in its productive capability, Maio Construction was unable to meet the demand for pervious borrow material imposed by Opron's increased equipment fleet. They couldn't find enough gravel. The design of the dam was such that the proportion of pervious material to impervious material increased as the dam got higher up to elevation 688. This meant that the deficiency in the production of pervious material would be exacerbated as the dam was raised. In recognition of both the problems encountered to date and the fact that those problems would only get worse as the height of the dam approached elevation 688, Opron began to demobilize scrapers after October 16, 1982 and reduced its rate of production to match Maio's.

[355] Maio Construction had approached its operations in the pervious borrow area as it had planned to in the pervious borrow pit development plan which Opron submitted to Alberta Environment. Maio Construction's inability to supply pervious material at a rate matching Opron's impervious production resulted from the fact that the pervious borrow did not exist either in quantity or distribution as represented by the contract documents. This fact was confirmed by Maio. When a comparison is made between Maio Construction's capacity and productivity, this fact is more than borne out. The lack of gravel was also confirmed by Maio Construction's superintendent, Ron Adams and by the foreman and a backhoe operator employed by Maio Construction. I accept the evidence of Maio and his employees in the upstream pervious borrow area. They virtually turned the Paddle River Basin over looking for gravel. They convinced me, and I accept, that the gravel was pocketed, segmented and erratic and was not nearly continuous as described in the contract documents.

The Maio Construction Insolvency

[356] Maio Construction was a financially healthy, successful earthmoving contractor at the time it approached Opron about subcontracting the gravel portion of the Paddle River Stage II project. It planned its operations in reliance upon the representations contained in the contract documents. Over the course of the Paddle River project, Maio Construction suffered enormous financial losses, and was placed into receivership in February of 1983. The losses suffered at Paddle River by Maio were to some extent as a result of the actual conditions encountered, which were at variance with the conditions represented in the contract documents. As a result of the Maio Construction receivership, Opron lost the financial benefits associated with the subcontract of approximately $725,000, became responsible for the pervious borrow work in 1983 and became liable for numerous Public Works claims filed by Maio Construction's creditors.

[357] Maio tendered simply by estimating the hourly capacity of each piece of equipment and multiplying this by an hourly rate. Maio Construction's price was then determined by applying this per cubic metre cost to volume of overburden and gravel anticipated to be excavated. Based on the contract documents, Maio says he estimated on overburden to gravel ratio of approximately .96 to 1.

[358] Exhibit 708 is a comparison of gravel actually excavated to gravel indicated to exist by the contract documents. This indi-

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cates that in the area actually excavated by Maio Construction, the quantity of overburden, from an average end area calculation based on the contract documents, was 784,405m^3. The volume of gravel anticipated from the same area was 819,729m^3. In fact only 431,738m^3 of gravel was recovered, meaning that the overburden was 1,172,396. This increased the ratio of overburden to gravel from .96 to 1 to 2.72 to 1. Maio Construction only recovered approximately 50% of the gravel indicated to exist by the contract documents. There are only two possible explanations for the large divergence between what was represented by the contract documents and what was recovered. Either the gravel was not present in the volumes or distribution represented by the contract documents, or it was lost or wasted in the field.

[359] The defendant suggests Maio simply did not remove all the gravel. Having heard the evidence of Maio Construction's personnel and the defendants inspectors, I am satisfied that Maio Construction excavated most of the recoverable gravel.

[360] The magnitude of the difference between the gravel quantity calculated based on the contract documents and the actual quantity encountered is just too great to be explained by hypothetical losses that are not even supported, and certainly are not confirmed, by the evidence of those witnesses who were in the field. The defendant's theory of gravel losses is not borne out by the evidence. I am therefore driven to the conclusion that the gravel did not exist in the area excavated by Maio as indicated by the strip logs contained in the contract documents. This conclusion is supported by Maio's evidence as the hourly capacity of equipment utilized versus the gravel recovered. From the defendant's own records, Maio was able to show that his backhoes worked over 10,000 hours. These backhoes, Maio estimated, had an excavation capacity of approximately 2,000,000m^3. The hourly capacities of these units were confirmed by the expert evidence. In fact only 386,600m^3 of gravel was measured as being excavated by Maio Construction. Even if grossed up to take into account compaction and mining losses, the volume is only 431,738m^3. This indicates that a much higher overburden to gravel ratio was encountered, which I find was because of the erratic gravel distribution, and because there was much less gravel found than indicated by the strip logs. These factors were the cause of the insolvency of Maio Construction.

[361] I was very impressed with Maio and his men. They gave honest evidence. They were there at the scene while things were happening and they saw the problems and they did their very best. I am convinced that Maio Construction has not wasted, lost or left behind any significant amounts of gravel.

[362] Patrick Ma, a geotechnical design engineer in Campbell's Design and Construction Division of Alberta Environment, was instructed at the direction of Thiessen, the project manager, to calculate the quantities of gravel available in the upstream pervious borrow area utilizing the strip logs contained in the contract documents. Ma performed such a calculation using an average end area method and the same criteria which Opron had used in their March claim.

[363] The results of Ma's calculations are recorded in exhibit 340, a memorandum of April 6, 1983 prepared by him. Ma was not called as a witness at trial by the defendants, although he is still in the employ of Alberta Environment. In a discussion portion of his memorandum, Ma cautioned as follows:

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"The cross sections indicated that a considerable amount of the gravel exists erratically in pockets rather than in uniform, continuous layers. Consequently, it is very difficult to interpret the continuity of the gravel profiles between adjacent test pits and adjoining sections. Therefore, it should be recognized that estimating the volumes using Average End Area calculations on 100 metre interval cross sections is only an approximate approach."

[364] The failure to provide all of the information rendered incomplete and untrue the information that was communicated. The Department told Opron that the Geotechnical Branch estimated 1,142,500m^3 of gravel to exist in a defined area. That figure came from Ma's calculations contained in his memorandum. But Ma did not say that much gravel existed. In fact, he cautioned otherwise because of the erratic nature of the deposit. What was communicated, therefore, was false.

The Pervious Borrow Work

[365] Because gravel was found to be erratic, pocketed and segmented, Opron changed its operation to a hunt and seek method. As a result of insufficient gravel resources in the area, in which Alberta Environment had expressly told Opron there existed 1,142,500m^3 of gravel, Opron was forced to import sand from off site and to excavate gravel from above the 695 contour. In total, Opron recovered approximately 110,000 to 120,000m^3 from the area below 695, approximately 100,000 from the area above 695, and imported 138,000m^3 from off site.

[366] Dee, the plaintiff's project manager in 1983, in a memorandum to Alberta Environment of June 24, 1983, advised that Opron had completed stripping the areas where gravel had been located in the upstream pervious borrow to elevation 695 and estimated having uncovered approximately 100,000m^3 of gravel. Further, Opron had completed a series of 34 test pits in the Borrow Area above elevation 695. The results indicated the area was not a viable pervious borrow area. These test pits had been taken on the northern portion of the upstream pervious borrow above elevation 695. As it turned out, this area had been heavily mined on prior occasions. Despite this information being in the possession of Alberta Environment, Ruttan did not communicate this information to Dee. The fact that Gust had previously indicated to Alberta Environment's consultants that considerable gravel existed south of the river on his lands in an area which was above elevation 695 was also not communicated to Dee. This area was an area that had been pointed out by Gust to Alberta Environment as containing considerable gravel. Subsequently, it turned out that Gust had been correct. As will be reviewed elsewhere, Opron had no way of knowing this from the information provided by the defendant in the contract documents. The strip logs did not indicate that the gravel in this area would be any different than it was represented to be elsewhere in the valley.

The Difference In Performing The Work In A Uniform Deposit As Opposed To An Erratic Deposit

[367] Opron had not bid contemplating this type of gravel deposit. The nature of the operation to which it was forced to resort in 1983 was substantially more costly. The reasons for the increased cost included:

(a) It was virtually impossible to plan an orderly approach to the work not knowing where the next deposit of gravel was going to be found. This contrasted to a planned strip mining operation where the work would have started at the east end of the

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borrow and proceeded upstream in a westerly direction.

(b) The search and find operation required additional equipment to test pit ahead.

(c) The overburden was required to be moved a greater distance in order to uncover all the gravel underneath a deposit. In a strip mining operation the gravel was discarded into an excavated strip or beside the area being worked. The backhoe would then proceed to load the gravel.

(d) The search and find method required considerable movement of equipment when a deposit was exhausted rather than the orderly progression of the operation up the valley contemplated in a strip mining operation. Equipment moving from place to place reduced productivity.

(e) Working in a deposit where the amount of gravel could not be determined until it was excavated led to instances where the deposit was exhausted during the night shift, making it virtually impossible to relocate and wasting both time and resources. The lights for night work had to be moved more often and set up and equipment relocated.

(f) In a strip mining operation a haul road can be built as the work progresses with a main spine road built up the middle of the borrow pit under development. In the search and find method the haul road had to be built into each localized deposit and then excavated as the work force retreated. This required the construction of additional haul roads as well as preventing orderly development.

(g) The additional haul road added additional distance and therefore increased the turnaround or cycle time of each truck load.

(h) In a strip mining operation it was contemplated that de-watering would occur through natural drainage primarily through the construction of a diversion channel to the south side of the borrow pit. As the work progressed, the water could be drained naturally into this diversion ditch allowing for excavation to take place in drained material. This limited the amount of de-watering through the use of pumps. In the method necessitated in 1983 by the actual conditions, however, drainage was no longer possible in the natural way since only pockets were being excavated. This required additional pumping and did not allow for the orderly drainage of the material in advance of excavation resulting in a much wetter, hard to handle material being excavated. This increased de-watering costs and decreased productivities. The trafficability problems caused by this development were partially mitigated by use of the drier Davis sand which was impacted to the site commencing in early July, 1983, at the contractor's expense.

[368] As a result of having to abandon the planned strip mining operation and resorting to the search and find method of locating gravel, the contractor's efficiency in the pervious borrow area was decreased, its costs increased and its productivity decreased. Additional and different equipment was required for a longer period of time and additional overheads were incurred.

Tri-Alta

[369] When the plaintiff decided to excavate granular from the Davis Pit (early July), it entered into another arrangement with Tri-Alta respecting this portion of the operation. Under the terms of this arrangement, the

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plaintiff agreed to pay Tri-Alta $2.20/m^3. This time material was to be measured in situ (in the cut) at the Davis pit.

[370] This situation created problems for the plaintiff and Tri-Alta because now granular was being provided to the embankment from two sources with payment being calculated in two different manners. One in situ; one as compacted on the fill.

[371] The plaintiff had to know how much material placed on the embankment came from each area as the quantity of granular coming from the valley was not being measured. Only the total granular placed on the embankment was calculated and that was on a compacted basis (hence the importance of knowing accurately the amount of granular actually mined from the Davis pit).

[372] The parties also had to know what the losses were in respect of the Davis sand between the in situ quantity loaded on trucks and the quantity of sand measured compacted in place. They could then determine how much granular was hauled from the valley and compacted in the dam.

[373] What the plaintiff did was to quantify the amount of Davis sand which it believed had been mined. It quantified the amount of granular fill placed on the embankment measured, as compacted for the same period and made a straight 100% deduction of the Davis sand quantity from the placed, compacted fill quantity to determine the amount hauled from the valley.

[374] It then paid Tri-Alta using the number generated by this method for valley granular.

[375] Tri-Alta similarly paid, or tried to pay, its truckers on that basis.

[376] Payment for valley granular, by straight deduction, did not account for the losses from the loading and hauling process from Davis to the dam site. It did not account for any losses associated with either stockpiling or reloading and hauling from stockpile to the embankment itself nor for any shrinkage and absorption in the placement and mixing operations (fine grained material filling voids around coarse grained materials).

[377] Tri-Alta felt that such items were required to be considered. The result of these deductions led to severe disruptions on the part of the valley truckers.

[378] Opron hired Tri-Alta under a subcontract in June of 1983 to haul gravel to the dam. Tri-Alta then subcontracted the gravel hauling to numerous independent owner-operator truckers. A dispute arose between Tri-Alta and its truckers which eventually lead to the termination of the Tri-Alta subcontract by Opron on September 11, 1983. There were **Public Works Act** claims filed by the owner-operator truckers. Many of these claims were solicited by and all were supported by Alberta Environment. The claims were based on demands for payment from the truckers on a basis of $9.45 per load. The truckers' agreements with Tri-Alta were for payment on a cubic metre basis, measured in place in the dam. Tri-Alta's agreement with Opron and Opron's agreement with Alberta Environment were also all based on payment per cubic metre measured in the dam.

[379] Alberta Environment, when it solicited and supported the truckers' claims, knew that total of the truckers' claims would amount to payment for the hauling of approximately 200,000m^3 of gravel during August, 1983. Alberta Environment's own volume calculations for August showed that only approximately 100,000m^3 had been hauled.

[380] Dee testified that during November of

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1983, Opron reached a tentative settlement with the owner-operator truckers based on payment of $6.50 per load. Dee testified that the truckers were subsequently advised by Alberta Environment personnel to reject Opron's offer, and those officials offered to secure for the truckers a higher rate per load. Such interference by officials of Alberta Environment is confirmed by Nicholson's handwritten note, Exhibit 475. That note records a telephone conversation which Nicolson had and states in part:

> "Also said that if in a position to not accept probably wouldn't do any worse if wait & maybe a chance (depending on outcome of meeting and government re-evaluating position) can do better."

[381] Dee recorded in his diary on November 1, 1983 that Nicolson advised him that the truckers should be paid at the rate of $9 per load, regardless of the volumes carried per load. Exhibit 462, also dated November 1, 1983, is a memo to the Minister of the Environment seeking approval for Alberta Environment to pay the owner-operator truckers directly at a rate of $9 per load. Melnychuk, the engineer under the Stage II contract, informed Opron by his letter of November 4, 1983, that Alberta Environment would be paying the truckers directly at a rate which Alberta Environment felt was reasonable.

[382] A meeting was held in the office of the Minister on November 29, 1983. At that meeting Opron was directed to settle with the owner-operator truckers within two days. If Opron failed to do so, Alberta Environment stated that they would pay the truckers directly using Opron's holdback funds. Faced with such an ultimatum, and in view of the experience Opron had with Public Works Claims following the Maio Construction receivership, Opron settled with the truckers. A significant number of those truckers, having been assured by Alberta Environment that their claims would be honoured by Alberta Environment at $9 per load, refused to settle with Opron for less. As a result, Opron was obliged to settle the truckers claims at higher rates than the truckers had agreed with Tri-Alta. One effect of these enforced settlements was that Tri-Alta filed a lawsuit in March of 1984. Throughout 1984 Alberta Environment seized upon that lawsuit as a reason to refuse to release Opron's holdback.

[383] Subsequent to Maio going into receivership, the defendant received notice of third party claims by Maio's creditors. Pursuant to the **Public Works Act**, the Department paid $466,393.61 into court to satisfy the total amount of claims received. It was left for the court to decide the validity of the claims and direct where payments were to be made. Without backcharges and quantity adjustments, Opron held a sufficient amount of Maio's money to cover the value of the claims and the amounts paid into court.

[384] In due course, the court dealt with and disposed of all of the Maio claims and returned excess monies amounting to about $414,000 to the plaintiff.

Plaintiff's Planning & Construction Operations - 1983

[385] As part of the work the plaintiff did to ready itself for the 1983 construction season, it requested a number of companies to review the contract documents relating to the upstream pervious borrow area and, if interested, provide an estimate for subcontracting the 1983 granular portion of the work. A number subsequently delivered quotations to the plaintiff (after reviewing the contract documents, visiting the site and, if they deemed it necessary, doing their own test-

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ing).

[386] The plaintiff, in light of all information then available to it, determined, on or about the 26th of May, that rather than subcontracting to another, they would excavate the upstream pervious borrow area for the 1983 season with their own forces.

[387] Once this decision was made, P. Spring, a superintendent for the plaintiff, and Dee were directed to design and cost out the plaintiff's 1983 pervious borrow operations. Again, Spring (in the same fashion as he planned the downstream channel excavation in November of 1982), based the plaintiff's intended 1983 operations on his experience and his review of expected conditions working on the Paddle River valley bottom. He chose a different mix of equipment than the plaintiff had originally chosen for the same work. Similarly, he arrived at different expected productions for the equipment because he expected that area to be wet and hard to work in.

[388] The plaintiff in early September formally requested permission to mine granular above the 695 contour and were immediately approved to do so as long as they had a plan in place regarding de-watering and reclaiming the area.

[389] The position of the plaintiff today is that they were of the belief that they could not go beyond the 695 contour until all of the granular had been mined from the area below 695 and further that they had continually been told this by the defendant.

[390] The defendant always insisted that sufficient granular existed within the pervious borrow areas to complete the project. It was viewed that the plaintiff had not excavated the whole of the upstream pervious borrow area below the 695 contour and that many places existed where significant thicknesses of granular remained, for example, underneath spoil piles and at the edges of mined areas. The defendant stated that if the plaintiff wanted, they could go above the 695 contour and provide a plan for their operations there.

[391] About September 30, 1983, although the embankment had not yet reached the design level, movements were detected in the deep foundation of the dam of a nature larger than expected and further construction in elevation was stopped.

[392] At this time, the defendant offered to let the plaintiff out of the contract but the plaintiff wanted to complete it.

[393] Stabilizing activities were then undertaken by the defendant, with the plaintiff's help, through the addition of berms on either side of the structure.

[394] When the plaintiff began placing granular on the embankment in June of 1983, they experienced some difficulties. It was wet and hard to work with. It was difficult to compact and led to trafficability problems which also led to slow operations.

[395] The haul roads that Opron and Maio constructed in the upstream pervious borrow were constructed in areas which had not been mined prior to their construction thereby eliminating all granular located under the roads without first removal of the road itself and the overburden.

[396] While some of the side haul roads may have been removed and granular excavated from beneath them while the plaintiff was involved in Embankment Stage II, the main roads were not mined.

[397] In the summer of 1983, some of the plaintiff's embankment construction operations required the placement of granular in

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an area around the stilling basin. The placement of material commenced initially in accord with specifications set out in the contract documents. Those construction operations were modified by the plaintiffs. On two occasions slides occurred and the plaintiffs were directed to make repairs by dozing out all material and properly replacing that material. A third slide occurred on July 26, 1983, the repair of which was left for further investigations until the next season. It was finally repaired in August of 1984.

Plaintiff's Bidding Errors

[398] There can be significant differences in the relationship of units of measurement (bank, loose, compacted). The planning of the work that is required to be done on a project as estimated by a contractor, may be based on a different unit of measurement than that used for the payment of the work. As a result, accurate determinations of these relationships is necessary to ensure that the contractor will get paid sufficient monies according to the unit of payment in the contract for all of the actual work activities he is required to perform.

[399] The defendant says the largest singular problem suffered by the plaintiff in respect both to the estimating and construction of Embankment Stage II was the failure to recognize, provide for and give effect to mining losses in their granular operations. This failure affected all aspects of the plaintiff's operations and cost both them and Maio a great deal of money.

[400] Not considering or providing for those mining losses resulted in the following costly errors through the failure to provide sufficient time, men, equipment and monies to allow a variety of necessary extra activities to be done.

(1) Underestimating the amount of stripping to get at the required quantities of gravel. This extra stripping also meant more backfilling was required in the pervious borrow area.

(2) Not providing for additional test pitting ahead of the operation because of the variability of the pit.

(3) Having to mine extra material to account for various mining losses (approximately 300,000m^3 extra of stripping would be required to account for reasonable mining losses in the areas identified by the plaintiff as mineable and correspondingly an additional amount of granular would have to be mined).

(4) The haul roads are now too short. (Even if they were the correct length originally.) Because of longer haul roads alone, production would be slower (again all other things being equal).

(5) Care of Water activities would have to be more extensive and over a much larger area.

[401] These types of losses are significant because as they occurred, the plaintiffs were now required to strip more areas further afield in order to obtain additional gravel to account for the gravel left in mined out areas.

[402] It is important to realize that the defendant is not arguing that excavation losses at the top and bottom of a layer are as a result of poor or careless workmanship, merely that these losses occur, are normal and must be considered when estimating the amount of pervious material that can be recovered from an in situ quantity. They occurred here but were not considered by the plaintiff's estimate or for that matter Maio's

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estimate.

[403] When the plaintiff prepared its estimate, rather than assess the expected uses and losses of material to ascertain whether mining and hauling 900,000m^3 would allow for completion of the contract, they arbitrarily assumed a 30% mark up on the 691,000m^3 of material they deemed required. This additional amount was originally said to account for processing losses. The plaintiff arrived at this 30% factor because they had experienced a 28% loss on an earlier job in Prentice, Alberta.

[404] Today the plaintiffs argue that they provided for 30% more granular material than they felt they actually needed to account for all losses, contingencies and other uses. Without a minimum mining criteria, it is clear that such provision was not necessarily enough to account for mining losses alone.

[405] The most significant of the other individual losses is the compaction loss, that being the reduction in volume from the gravel in situ in the pervious borrow area to the gravel compacted in the embankment. Neither the plaintiff nor Maio documented what they allowed for a compaction loss at the time they prepared their estimates. Both state they felt 7 to 8% would be an appropriate loss.

Equipment Selection/Productivities

[406] The next significant mistake the plaintiffs made in their estimate is their calculation of productivities in respect of overburden and mining operations being based on bulk excavation rates. That was not appropriate given the need for precision stripping and mining (in order to keep losses down), given the thin layers, given that those layers were expected to be highly variable in depth, and given that one could expect to find a high ground water table. Using the equipment chosen by the plaintiffs also resulted in less than the optimum depth needed for high production purposes. Each backhoe scoop would not be full in one pass.

[407] The plaintiff's next big mistake in estimating the pervious portion of the project was in determining the size of loads expected to be hauled to the structure. The plaintiffs chose a 25m^3 (bank) load of wet gravel, per 773 rock truck. The plaintiff recognized the inaccuracy of such an estimate when they alleged a 20m^3 (bank) load as being appropriate both in their March and December claims. That quantity is of course the same as arrived at by Johnston. He estimated 20m^3 (bank) of wet gravel as being an appropriate and realistic load for a 773 rock truck.

[408] The effect of this mistake meant that the plaintiff required more trucks and more loading equipment which caused lower productivities, longer durations and higher costs none of which were provided for within the plaintiff's estimate.

Care Of Water

[409] The next error made by the plaintiff in respect of their estimate regarding pervious matters was their failure to analyze - although the information was available - and specifically cost out the required de-watering efforts within the pervious borrow area (pumps and hoes as necessary).

[410] Similarly, there was no appreciation of weather and its likely effects upon the expected working conditions within the valley bottom so the plaintiffs failed to properly set the project's expected durations both in respect of granular and impervious materials. This is necessary because a contractor in determining his costs must be able to determine how many actual production

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hours he can expect from his men and his equipment per day and per month. This is especially important in an area such as Embankment Stage II located on a river valley bottom building a water control structure, working in respect of fine grained materials that lose strength and structure quickly, working with materials that have an affinity for moisture and as a result will cause difficulties with workability long after they have been affected by moisture in the first place.

Impervious - North Abutment/ Downstream Foundation

[411] A proper analysis of the north abutment, the north and south abutment foundation, and downstream foundation information provided within the contract documents indicated that conventional scraper operation would be slow and costly if it could be done, at times, at all. The test pits also indicated that a significant amount of material would have to be wasted, as some of the material would not be trafficable let alone useable.

[412] With respect to the north abutment, the plaintiff should have concluded from a review of the test holes information that scrapers and push cats while suitable at the top, would cease to work efficiently, at any reasonable production, if at all, as they got lower. Also, this conventional scraper work would be slow and costly. The plaintiff should also have concluded that they would require some hoe work in that area.

[413] They should have also concluded that they could expect seepage, poor drainage and even more problems in inclement weather unless they took specific steps to control water and to dewater the area on a continuing basis.

[414] They should have determined that access was limited. The area was small and confined and, at the best of times, efficiencies and productivities would be low.

[415] With respect to the downstream foundation, they should have concluded from the test hole logs that they needed to excavate at times between 2m and 3m of wet alluvial and colluvial silts, clays or silty sands to get to a clean sand or gravel layer and that based on the low undrained shear strength and consistencies of the materials, more than half would be too soft to handle with scrapers and that a backhoe would be necessary. Again they should have expected that more problems would be created in this work area if it rained or if they did not provide constant water control efforts.

[416] They would not have enough areas available to put the material that they were excavating. They would have to stockpile. These errors would throw off their whole schedule if it was correct in the first place.

[417] The problems of quantities in the north abutment area were compounded even more in that it appears that during the estimate the quantity chosen for use in determining scheduling and duration of excavation operations in the north abutment areas was the quantity of common fill needed to be placed in north abutment area after excavation had taken place. What this meant - again all other things being equal - was that the plaintiff estimated on excavating much less material from the north abutment than actually had to be removed from there. This meant that their scheduling and planning - even if correct in all other respects - would be off in both the north abutment and downstream foundation operations. Neither could be done in the time allotted.

[418] Waste was not considered, quantified,

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or provided for in any fashion notwithstanding the many notations within the contract documents.

Hard Work/Easy Work

[419] Yet another problem existed in respect of the plaintiff's estimate in this regard. This related to the plaintiff's blending of all dirt work. The easy work was expected to subsidize the hard work. That of course is a contractor's choice and a contractor's risk. He can make great deal of money or he can lose a great deal of money depending upon whether his choice proves to be appropriate.

[420] The main problem with this blending is that the hard work in the foundation excavations of the north abutment, south abutment and the downstream foundation were planned at actually being done at a lower production rate (leaving aside whether these rates were appropriate) but the schedule was based at the higher blended production rate. This meant that the schedule length for this preliminary and critical operation was based on the blended production, not the actual expected production. That of course immediately meant that even with respect to the amounts of excavation expected by the plaintiff, these items would take longer than provided for, throwing out the planned indirect costs since durations were too short. If the amounts of excavation were wrong, this mistake would be compounded and if the chosen productions were also wrong, as they were, the mistake would be compounded even more.

Impervious - Equipment

[421] Schindell indicated with respect to the foundation excavation areas that if he had felt water would be a problem, he would not have chosen scrapers. (Spring, immediately on his arrival, having dealt with other valley bottom work in the downstream channels, recognized the possibility of water problems and the effect that they would have on the materials along the valley bottom. Accordingly, he waited until freeze up in order to get reasonable production. He also used a completely different choice of equipment.) (The experts also indicated that rubber tired scrapers were the wrong choice given the expected conditions in the valley bottom.)

[422] This of course is the next bid error committed by the plaintiff. The plaintiff failed to assess the expected conditions in those areas and to properly choose the appropriate equipment and appropriate productivities given the expected conditions. These conditions included: water seepage, wet silts, clays and sands, weak soils, and possible weather problems in the summer and fall along the river valley bottom. Other significant factors which were not assessed included the presence of fill material in the north abutment slopes and the downstream foundation excavation area; the presence of standing water in the north abutment foundation excavation area (the gap); and the indications of eroded material in the gap having come from the slopes of the north abutment, all followed by the blind assumption that it was good material which other contractors representatives had noted, assumed otherwise and provided for.

Conduit Exit

[423] The next obvious bid error in the plaintiff's excavation operations was their failure to break out and provide for the excavation of the conduit exit. This was work at the lowest elevation on the project, well below the natural ground water level and within clays, silts, wet sands and gravels. The conduit exit was a small area to work in. There was no place on the plaintiff's schedule for that work to be done. No men, equipment, time or costs were set aside for that activity. There was no analysis of

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the material expected to come out, its possible use, its waste, its hauls, etc. Similarly, there was the wrong choice of equipment in that no hoes were provided.

Downstream Pervious Borrow - Channels

[424] Another error occurred with respect to the plaintiff's estimate in relation to the downstream channels item.

[425] The contract here is clear. Complete excavation of the downstream pervious borrow area was required. If this was not done before the river was diverted through the conduit, then channels would have to be dug as an interim measure until the area was completely excavated.

[426] The plaintiff in its estimate and in its schedule did not, however, consider or provide time, material, equipment or monies to either excavate the downstream pervious borrow area as a whole or to do any of the required other activities (moving topsoil, stripping overburden, moving existing stockpiles, digging interim channels). Nor did the estimate provide for the use of any material from the downstream pervious borrow area anywhere on the embankment, whether as Zone 4 or Zone 2A or 2B.

[427] Finally, the plaintiff did not provide time, labour, money or equipment to dig permanent channels through the downstream pervious borrow area nor was such activity scheduled in the plaintiff's schedule.

Equipment Estimated Costs

[428] Yet another problem with the plaintiff's estimate transcends both pervious and impervious operations. This relates to the costing out of the plaintiff's equipment and supplies. The plaintiff, through Simmonds, assumed that it could work its machinery 546 productive hours a month (22 hours a day, 6 days a week), priced out its operations accordingly and arrived at its hourly rentals. For every hour the equipment worked under 546 in a month, they were paying rent to the owner but they were not generating the income necessary to pay that rent.

[429] A second problem was that the plaintiff estimated this project on the basis of equipment rentals at one price however actually rented some equipment at a higher price with the result that they were losing money each and every time that piece of equipment worked. For example, a 245 back hoe was rented for $4,000 more per month than originally estimated. The 773 rock trucks cost $2,500 more per month per machine than estimated. The 637's scrapers cost $7,000 more per month per machine than the amount used within the estimate. Each time this equipment worked they also lost money on this basis.

[430] Nor did the plaintiff consider, cost out or provide specifically for haul road construction and maintenance, something everyone accepts as very important on such projects. This, in practice, time and time again caused the plaintiff difficulty, lowering production and slowing or delaying other related activities all, of course, at a cost which was not analyzed and specifically provided for.

[431] Yet another error in the plaintiff's estimate was that it provided $10,000 for small repairs and maintenance. On the job, that amount proved woefully inadequate.

[432] On the question of repairs, the evidence is clear that repairs are routinely necessary whenever equipment is brought to a job and used on the job.

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Indirect Costs

[433] The next significant error with respect to the plaintiff's estimate was in the area of their indirect costs. All of the above deficiencies earlier referred to would significantly lengthen the job. The defendant's evidence is that this job more properly ought to have taken upwards of 37 weeks rather than 25 weeks as planned by the plaintiff. According to the defendant's experts, this would add over $600,000 to the plaintiff's estimate.

[434] The plaintiff estimated the direct cost of pervious fill material to be $3.32/m^3 for zone 2A and $6.82/m^3 for zone 2B. These direct costs were marked up by a factor of 1.314 to cover indirect costs and profit to arrive at the plaintiff's bid price of $4.37/m^3 for zone 2A and $8.97/m^3 for zone 2B. Similarly, they estimated the direct cost of riprap at $36.51/m^3 marked up to cover their direct and indirect costs and profit, to $47.95/m^3. The indirects to be recovered from these items amounted to almost $1.14 million. If this was not recovered from Maio's operation it would have to come from elsewhere.

Scheduling

[435] The schedule which did exist and was created during the bid process was unworkable. Items were scheduled in an order in which they could not be done. Pay or tender items which had to be done were omitted. Nonpay items which also had to be done were not scheduled and would have to be done as part and parcel of a scheduled item. Items estimated at being done at one rate were scheduled at a different rate and so would take either longer or shorter than the time actually provided for.

[436] When other schedules were prepared those schedules were based neither on the original schedule nor on the estimate themselves. Quantities and durations changed as did equipment choice and sequencing of operations in these later schedules.

[437] Without proper planning the north abutment work would take much longer than the plaintiff estimated, at much lower productions with a much higher cost. Especially when one remembers that the downstream foundation excavation area also had to be excavated and backfilled with granular material before much of the common fill could be used, we can see problems such as work stoppages or interim stockpiling are likely to occur in the downstream foundation operations as well. At Paddle River, they did in fact occur.

[438] The plaintiff managed to mitigate some of their losses through on site decisions regarding equipment, work methods, labour hiring practices, and by subcontracting portions of the job, as construction progressed.

[439] During actual construction of the project, there are innumerable references to poor haul roads and poor materials conditions affecting operations. Similarly, throughout the job there are recorded many instances of labour problems, equipment breakdowns, truckers' strikes, operators' wobbles, camp fights, all of which would affect the plaintiff's operations.

[440] Similarly, various reports detail instances of poor borrow pit management, problems during embankment placement and compaction operations, again none of these are considered by the plaintiff as contributing to the difficulties suffered here by them. Finally, many, many reports detail and verify the effect of the weather and the failure to properly manage the job. It is totally unreasonable to place any responsibility on the defendant for such problems. However, costs

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arising from these things find their way into the plaintiff's claim because they claim for all costs which arose on this project even rental charges for equipment when the equipment was not working.

[441] One could similarly detail the plaintiff's operations for the rest of 1982 and for 1983 to establish that on virtually a daily basis additional costs arose of one sort or another caused by various of the activities of the plaintiff's employees which contributed to the magnitude of their loss. Only one item need be discussed with respect to 1983 in any detail however.

[442] The lack of planning during the estimating and preconstruction portions of the job resulted in such things as equipment arriving on site, and being charged against the job well before it was needed. Similarly, at times required equipment was not on site when it was initially required and other jobs had to be done until that equipment arrived. On other occasions unsuitable equipment was sent to the site and later more appropriate equipment was brought to the site to assist in construction while the less suitable equipment also remained. Finally, on many, many occasions, equipment suffered breakdowns or damage of such a nature to have such equipment out of service or working at much less than full capacity which effectively prevented the plaintiff from - all other things being equal - doing the work planned in the time allotted.

[443] A review of the various contemporary records generated by both the plaintiff and the defendant indicates that virtually every day some equipment was idle for one reason or another. All of this impacted on a job which ignored such a situation. (The plaintiff's use of historicals only dealt with equipment slow downs or breakdowns for small parts of one shift.)

[444] Similarly, the various labour problems suffered by the plaintiff, again on a regular basis, caused a variety of difficulties on the project. There was a high turnover of management staff, supervisory staff and equipment and other operators. Each of these caused disruptions, each of these had some impact on a project and some cost to the project. New workers work slower while learning the job itself, they require more instructions.

[445] Without supervisory staff in appropriate locations, a variety of things can and do occur. Again, there were many instances recorded where equipment was damaged - portions of survey work was done in error requiring work to be redone - material was placed inefficiently and ineffectively. On occasion excavated materials had to be wasted because although excavated it could not be placed because of contamination or wetness, and layering occurred during placement operations, requiring reworking or removal.

[446] Similarly, each management turnover led in part to a different emphasis on what was to be done and how and when. All of these types of things cost this job money. Also, weather conditions adversely affected the job's progress as it related to labour. Employees were occasionally paid show up and travel time on the project but these items had not been provided for in the estimate either.

[447] Perhaps the biggest labour difficulties suffered on this job were the various disruptive union/management actions which occurred. At times these disruptions shut the project down completely; on other occasions merely slowing production and no doubt damaging morale. These problems came to a height in the late fall of 1982 when the plaintiff - presumably at the end of its rope

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- attempted to dismiss all of its operators and rehire non-union people. Eventually this action was determined to be improper and the plaintiff was directed to rehire its former employees. After about two weeks of activities in these regards, the plaintiff subcontracted out most of the remaining dirt (impervious) work to a third party company. It also led the plaintiff to contract with that third party to pay those employees needed by the plaintiff to do its remaining work in 1982 and 1983.

[448] All of these things severely impacted upon the plaintiff's construction of the project and incurred costs which were not originally planned for.

[449] In 1983, the plaintiff suffered additional labour problems in respect of its granular hauling operations on a number of occasions in the form of both work stoppages, and a shortage of hauling equipment. These things also had a negative impact on the project.

Analysis Of Relevant Information Not Disclosed In The Contract; Alberta Environment's Prior Knowledge Of Geological History And Nature Of Gravel Deposit

[450] What follows is, to some extent, repetitious. However I find the defendant to have been deceitful and to have caused the plaintiff a substantial loss in its operations in the upstream pervious borrow. That finding of deceit is supported here below.

[451] I also find that the defendant was deceitful concerning the buried channel deposits in the downstream foundation excavation area.

[452] I also find that the defendant negligently misrepresented the situation in the north abutment.

[453] Those are very serious findings and I want to make it clear that they are well founded. It will be shown below that despite Alberta Environment's full knowledge of the shortcomings of the Geo-Physi-Con report, TCL relied, with the knowledge of Alberta Environment, exclusively on the Geo-Physi-Con report to confirm an assumption of continuity. That assumption of continuity was the foundation for volume calculations, which in the absence of continuity, were meaningless and wholly unreliable. Those volume calculations permitted the design of the dam to proceed on the erroneous conclusion that there was sufficient gravel material present in the Paddle River valley. TCL's conclusion was based on an erroneous reading of the Geo-Physi-Con report. Alberta Environment knew that TCL had made an error. That erroneous conclusion was incorporated into the representations and warranties contained in the Stage II contract documents. Alberta Environment did nothing to correct that error or mitigate the effects of that error when, during Stage II, Opron suffered the consequences of having relied upon TCL's conclusion.

[454] In exhibit 83, TCL stated categorically that it had assumed continuity in order to make the calculations which resulted in the volumes which it reported. The calculations were said to have been performed by multiplying the average thickness of the material under consideration by the area over which that material extended to arrive at the volume of that material. TCL also stated categorically that the results of the resistivity survey carried out by Geo-Physi-Con confirmed its assumption that the layers of material were continuous between test locations. In exhibit 83, TCL did not refer to, allude to, or imply, anything other than exhibit 68, the Geo-Physi-Con report, as a possible source of confirmation for its assumption of continuity. As noted above, there were no other reports to this time

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which supported that assumption.

[455] Campbell received and read exhibit 83. Campbell was aware that TCL had stated that their volume calculations were done by multiplying the average thickness of each layer by the area of excavation. Campbell also knew that these calculations relied on an assumption that the layers of material were continuous between the test pits. Campbell agreed that it was basic and fundamental to TCL's assessment of the available gravel that, as stated on page 6 of exhibit 83, the assumption that granular alluvium was not restricted to channel deposits but rather was nearly continuous over the entire valley. Campbell knew that TCL had cited the Geo-Physi-Con resistivity survey as confirmation that the granular alluvium was nearly continuous across the valley. Campbell knew that Geo-Physi-Con could not distinguish between overburden and gravel and also that the resistivity survey was of little assistance with the gravel evaluation.

[456] Ruttan read exhibit 83 prior to the Stage II tenders. He agreed that the coarse alluvium, for which TCL had reported a volume in exhibit 83, was generally the same material defined as pervious borrow (Zone 2A) in the Stage II contract. The volume estimates performed by TCL were communicated to Alberta Environment and subsequently used in the design of the dam. Ruttan knew that to make those volume estimates TCL made an assumption of continuity. TCL used the resistivity survey done by Geo-Physi-Con, exhibit 68, to confirm that assumption. Ruttan testified that he did not think, at the time he read exhibit 83, that the resistivity survey carried out by Geo-Physi-Con could be used to confirm an assumption of continuity used for making gravel calculations.

[457] Thiessen saw exhibit 83, and knew that TCL had calculated the material volumes by multiplying the average depth of the material by the area over which that material extended. Thiessen was also aware that TCL's calculation were done on the assumption that the layers were continuous from test location to test location. Thiessen was aware of the paragraph at the top of page 6 in exhibit 83, where TCL cited the resistivity survey carried out by Geo-Physi-Con, exhibit 68, as confirmation of the assumption of continuity. Thiessen agreed that the Geo-Physi-Con report, exhibit 68, could not be used to confirm an assumption of continuity in the granular alluvium because of the difficulty in distinguishing between overburden and granular.

[458] Nicolson, the defendant's officer, testified that the Geo-Physi-Con report could not be used to confirm an assumption of continuity, because Geo-Physi-Con's survey could not distinguish between the overburden and the granular and consequently told nothing about the nature of the granular deposit. As set out above, Nicolson testified that no sensible consultant would rely on the Geo-Physi-Con report to confirm an assumption of continuity. Nicolson testified in discovery that TCL, in relying on the Geo-Physi-Con survey in exhibit 83, were wrong and made an error. On this point, Nicolson's evidence was in complete agreement with Dr. McRoberts.

[459] One of Alberta Environment's positions, perhaps best explained by the defendant's counsel, is that the geologic conditions which prevailed in the pervious borrow areas of the Stage I contract were different and distinct from those which prevailed in the Stage II areas and therefore the Stage I experience was not applicable to the Stage II contract.

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[460] I find no evidence to support the position that the geology in the Stage I pervious borrow areas was so different than that geology which prevailed in the Stage II pervious borrow areas as to render a comparison between the conditions experienced in Stage I to the conditions expected in Stage II meaningless.

[461] Alberta Environment has also suggested that TCL made some sort of error in their volume calculations as set out in the material balance contained in exhibit 119. This error led, according to the defendant, to an artificially high volume of gravel expected.

[462] Even if TCL had made an error in calculating the volumes of gravel expected from the Stage I pervious borrow, which I am not convinced of, the effects of that error would have been offset by the reduction in the gravel volumes. Ruttan agreed that when he prepared his report for the week ending November 12, 1981, (exhibit 139), he still did not believe there was enough gravel in the Stage I pervious borrow area after the gravel volume reductions to satisfy the reduced gravel requirement.

[463] The gravel shortage experienced by Alberta Environment during the Stage I contract was real and did not arise as a result of alleged calculation errors by TCL.

[464] There was some suggestion by Alberta Environment, in particular Ruttan, that the shortfall of gravel experienced during the Stage I contract came about as a result of Ruttan's imposition of some economically based limit on the gravel that the Stage I contractor was instructed to recover. As a consequence of these economic factors imposed by Ruttan, the defendant suggests that the Stage I contractor left behind gravel because the overburden to gravel ratio was too high to be economically viable.

[465] I do not believe that the conditions experienced in the Stage I pervious borrow areas with respect to less gravel and more overburden were related to economic considerations. I find that the conditions reported in the documents, and the conditions admitted to during both discovery and trial by witnesses for Alberta Environment, were the conditions that existed in the Stage I pervious borrow areas. The reported nature of the deposit was not caused by or created by economic considerations. The opposite is true. The economic considerations were caused by the nature of the deposit, which was segmented and not continuous.

Alberta Environment's Determination Of What Information Was To Be Included In The Stage II Tender Documents

[466] Alberta Environment, having investigated the dam site for many years, and having completed the Stage I embankment contract work, provided direction and instruction to TCL in the preparation of the Stage II contract documents. After preparation, the draft documents were forwarded to Alberta Environment for review. There can be no question that the information that was included in the final contract documents, as published for tender, was determined by Alberta Environment.

[467] Alberta Environment chose not to, and did not, include in the Stage II contract documents the information that it had in its possession that concluded that the gravel was erratic, segmented and pocketed, including the TCL report, TCL 81-1, written by Naismith and Harris, the TCL landowner reports, the Mollard reports or the EBA landowner reports. Alberta Environment chose not to, and did not, include in the Stage II contract documents the information that it had in its possession concerning prior mining activities in the pervious borrow area, including the drawing it had prepared

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outlining some of the specific areas where prior mining had taken place. Alberta Environment chose not to, and did not, disclose information that it had in its possession relating to the work performed by the Stage I contractor in the pervious borrow areas, including the facts that the Stage I contractor had recovered less gravel than anticipated, had encountered a gravel deposit that was erratic and had encountered a higher overburden to gravel ratio than anticipated. The Stage II contract documents did not disclose that the Stage I contract included two payment items for gravel excavation. The Stage II contract documents did not disclose that the design of the dam had been changed to significantly reduce the volume of gravel required, or the reasons for that design change.

[468] Alberta Environment chose not to, and did not, disclose the extent of the work performed by the Stage I contractor in the downstream foundation excavation or in the north abutment. It published the contract documents containing erroneous As Built drawings with respect to these two areas of the work.

[469] I find that the ponded water which was present at the base of the north abutment had the potential to, and did in fact, saturate the loosely placed fill, turning that material into the "sloppy mess" which Opron encountered when they excavated. I find it likely that the water had the same effect on the slide material which was still in place on the slope from the Stage I contract. The presence of organic material, in both the slide and the temporary berm at the toe of the slide, acted as a sponge, soaking up the water and exacerbating an already poor situation. Had the material in that area been native undisturbed material, or had it been properly placed and properly compacted, the effect of the ponded water would have been greatly reduced.

[470] Alberta Environment's decision not to disclose all of the information it had, including information which was inconsistent with the representations made in the contract documents; information with respect to which it made a partial, and misleading, disclosure only; and that which it had a positive duty to disclose; was an active and conscious decision.

[471] During the performance of the contract, Alberta Environment elected to continue to withhold information from Opron. Alberta Environment, despite having been put on notice of the actual conditions in the downstream foundation area, chose to continue its course of nondisclosure with respect to the true and certified As Constructed Stage I drawing, confirming the areas into which waste had been placed. Instead, Alberta Environment closely monitored Opron's operations. Alberta Environment failed to provide Opron with any information concerning the actual conditions in the north abutment and the cause of the same while closely observing and noting Opron's difficulties in that area. Alberta Environment, on being asked specifically for any missing or corrected information in the pervious borrow area, in March of 1983, denied the existence of any information, and withheld the same from Opron throughout the performance of the work.

[472] Despite the wealth of information in the possession of Alberta Environment, there was no mention of any other geotechnical reports, documents or information which related to subsurface conditions contained in that summary.

[473] There was no mention in the "Summary of Sources of Subsurface Information" of either the north abutment or the down-

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stream foundation. Alberta Environment had copious amounts of subsurface information for those two areas. By virtue of its self described role as a summary of sources, this section can only mean there was no additional subsurface information for the north abutment and the downstream foundation area to be disclosed. The only subsurface information in the Alberta Environment's possession for these areas was represented to be that included in the contract documents.

[474] Campbell, at the time he reviewed section 9, the "Summary of Sources of Subsurface Information", considered it would be useful for bidders to know whether the gravel was continuously spread throughout the valley or whether the gravel was segmented, patchy and in pockets. Despite that, Campbell admitted at discovery that he made no suggestion that the Mollard reports, the Tedder report or the EBA report on the Arnold property be disclosed to bidders in the "Summary of Sources of Subsurface Information" provided.

[475] Thiessen, as noted above, also testified that he reviewed the "Summary of Sources of Subsurface Information" contained at page 11 of the Thurber Report. Thiessen agreed that none of the descriptions of sources of subsurface information referred to Mollard's reports, Tedder's report, EBA's reports on the Gust or Arnold properties, the TCL report on Smith or information related to the Stage I contract. Thiessen did not direct anyone at Alberta Environment to include that information in the material issued to the Stage II bidders.

[476] In addition to the reports which Campbell and Thiessen were specifically questioned about during discovery, there were many other reports and documents in the possession of Alberta Environment. These documents, the information they contained and which individuals within Alberta Environment knew of these documents are dealt with in considerable detail above in sections 5.2 to 5.7, inclusive. None of that information was transmitted to the Stage II bidders in the Summary of Sources of Subsurface Information provided.

[477] The Stage II tender documents did not convey to either Johnston or any of the Opron witnesses any understanding that Alberta Environment had in its possession voluminous amounts of subsurface information that would be relevant and important to Stage II bidders. Section 1.13 was not a clear statement that Alberta Environment had additional geotechnical information that would be of interest, or indeed necessary, to the bidding contractors. Sections 8 and 9 from the Thurber Report did, on the other hand, impart to the contractor a clear statement that all of the relevant geotechnical and subsurface information had been provided in the tender documents. The effect of sections 8 and 9 in the Thurber Report on those who prepared bids for this project and gave evidence was to assure them that the information provided in the contract documents was complete and that there was no need for the contractor to look beyond what had been provided.

[478] Alberta Environment decided what to include in the tender documents provided to the Stage II bidders. Had Alberta Environment decided to disclose additional information, a list of the documents they chose to disclose could easily have been inserted into the contract documents to clearly and unambiguously alert the bidding contractors to the existence of the other reports, documents and information which contained subsurface information. I do not accept Alberta Environment's preferred interpretation of section 1.13 with respect to the availability of "other technical reports" to be a disclosure of the existence of sources of subsurface information, additional to those disclosed in

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section 8 and in the "Summary of Sources of Subsurface Information" included in section 9 of the Thurber Report.

What Was Not Included And Exhibit 153

[479] Ruttan testified that he prepared exhibit 153 at sometime prior to the site visit of June 9, 1982. Exhibit 153 is a partial listing of some of the reports that were in Alberta Environment's possession. Ruttan testified he discussed the preparation of this list with Nicolson. Ruttan testified that he had not thoroughly read all of the reports listed on exhibit 153, but he agreed he would have looked at them. Ruttan agreed that exhibit 153 was not included in the contract.

[480] Ruttan conducted the site visit and it was Ruttan who prepared exhibit 187, the multi-page information package that was handed out to the contractors who attended the site visit. Ruttan agreed that exhibit 153, his single page list of reports, was neither referred to at the site visit nor included in the information package provided to bidders who attended the site visit. Ruttan agreed that exhibit 153 was not mailed to the contractors in the addendum that was issued June 14, 1982.

[481] If Ruttan had, as he testified, prepared exhibit 153, a question arises about the purpose for which this list was created. Ruttan had ample opportunity to provide exhibit 153 to the bidding contractors. Ruttan gave other suggestions and directions with respect to payment terms and specification changes that were incorporated in the Stage II contract. Ruttan chose not to do this with exhibit 153. Ruttan could have included this single page list into the multi-page information package (exhibit 187) which he himself prepared and provided to the bidders who attended Ruttan's site tour. It must be remembered [they] only had four weeks, extended to five to prepare their bids. They had to rely on the defendants.

[482] The evidence of the Opron employees who attended the site visit is consistent. Cameron testified that none of the reports listed on exhibit 153 were provided to the bidders at the site visit, nor were the bidders told that any of those reports were available. During cross-examination, Cameron stated that he did not recall Ruttan advising the bidding contractors that other reports and information were available for review, although I believe it was mentioned. Hutton testified that neither exhibit 153 nor any of the documents listed in exhibit 153 were handed out at the site. Schindell did not recall anyone from Alberta Environment mentioning that there were other reports or documents available for review.

Further Instances Of Nondisclosure

[483] The tenders closed on June 29, 1982. Opron was the low bidder. On July 14, 1982, prior to the contract being awarded to Opron, Thiessen met with Hutton at Opron's offices. During this meeting, Thiessen did not tell Hutton that Alberta Environment had in its possession reports from Dr. Mollard. Thiessen did not tell Hutton that EBA had reported to Alberta Environment that the gravel was segmented and in isolated pockets. Thiessen did not tell Hutton that Alberta Environment had reports which described the gravel in the Paddle River valley as existing in thin layers and patches. Thiessen did not tell Hutton that there had been a shortage of gravel in the Stage I borrow areas, or that those shortages had caused the Stage I design to be changed to reduce the required volume of gravel.

[484] By the time of this meeting, Thiessen

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was aware of most, if not all, of the reports and information which Alberta Environment had in its possession related to the pervious borrow, as well as the downstream foundation and the north abutment work that was carried out during Stage I. Thiessen testified that he had reviewed the Summary of Sources of Subsurface Information provided to Opron in the Thurber Report, TCL 82-14. Thiessen knew that summary did not disclose the information in the possession of Alberta Environment and was therefore both incomplete and wrong.

[485] Throughout the course of the work, as is shown in other sections, Alberta Environment maintained the veil of secrecy and did not disclose information which it had to Opron. Two incidents of particular note occurred. The first related to the downstream foundation after Opron had advised Alberta Environment in a memorandum that the conditions encountered in the downstream foundation area were not as had been illustrated by the tender documents. Alberta Environment generally, and Ruttan specifically, did not disclose to Opron the Certified As Constructed drawing which showed the old channels filled with waste. Ruttan did not disclose the survey information he had which showed exactly how much material had been buried, and where.

[486] The second incident of note relates to Opron's claim submitted to Alberta Environment in March of 1983. The covering letter to that claim referred to Special Provision 9, subsection 6 which directed that the contractor could not proceed with the work until missing or omitted information had been provided by Alberta Environment. Alberta Environment's response to the plaintiff's claim, in Ruttan's April 22, 1983 letter, was in part:

> "Therefore there is no corrected or missing information to be provided."

[487] The issue of what documents were made available to Opron during the tender period and what documents were provided to Opron by Alberta Environment was also addressed in a memorandum of September 1, 1983 from Melnychuk to the Honourable Fred Bradley, then Minister of the Environment. Thiessen admitted that he drafted the memorandum for Melnychuk. That memorandum stated:

> "As well, numerous engineering reports on these borrow areas [pervious] were made available for viewing by prospective tenderers during the tender period. A copy of these reports have since been provided to Opron." (note added)

[488] Alberta Environment did not inform the bidders of the existence of those numerous engineering reports. Alberta Environment did not advise prospective bidders that it had numerous engineering reports in its possession which described the conditions in the pervious borrow pit differently than had been described in the Thurber Report provided to contract bidders.

[489] Thiessen, at the time he drafted this memorandum, knew that Alberta Environment had in its possession geotechnical reports that contained information different than that provided to Opron in the tender documents. Thiessen admitted that Mr. Bradley had never been informed of that.

[490] The second sentence of that extract is of some considerable interest. To this time Alberta Environment had provided Opron only with a copy of the Gust and Becker landowner reports, which were provided to Cameron under copy of a letter dated on June 6, 1983. Cameron testified that he had learned of the existence of these reports from the landowners and had requested firstly from Brittain and then Ruttan that copies of the reports for Gust and Becker be

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provided. Cameron also testified that Alberta Environment did not advise him at that time or ever of the existence of exhibit 153 or the reports that were contained on that exhibit.

[491] Thiessen testified at trial that he did not know what reports had been provided to Opron. Thiessen also testified that he did not know whether the reports that were provided to Opron were the reports which had been available for viewing during the tender period. Thiessen had testified earlier during his examination for discovery that the reports Alberta Environment had provided to Opron were the reports which were available for viewing during the tender period.

The Law

I. Actionable Misrepresentation And Actionable Nondisclosure

A. Misrepresentation Generally

[492] In order to determine whether the defendant is liable in tort or contract, I must first consider the law of actionable misrepresentation and actionable nondisclosure.

[493] Spencer-Bower and Turner, in **The Law of Actionable Misrepresentation** (3rd Ed. 1974), at p. 3, define a representation:

> "[it] is a statement made by, or on behalf of, one person ... to, or with the intention that it shall come to the notice of, another person ... which relates, by way of affirmation, denial, description, or otherwise, to a matter of fact. A 'matter of fact' means either an existing fact or thing, or a past event."

[494] At p. 5 the authors write that a misrepresentation is a representation which, when made, or in the case of a continuing representation, when acted upon by the representee, was false. Falsity is established where there is a substantial discrepancy between it and any material fact which it expressly or impliedly purports to state. A discrepancy is substantial where it would be deemed material by any normal representee in the circumstances of the individual case.

[495] A true statement may also be considered in law as a false representation, as Spencer-Bower and Turner note at p. 6:

> "Where a representation, by reason of the omission therefrom of all reference to qualifying conditions, subject to which alone it would be true, or by reason of the representor's suppression of facts which in the circumstances of the individual case it was his duty to disclose, is rendered a partial, fragmentary, incomplete, or misleading representation of the entirety of the facts to which it relates, it is deemed false, notwithstanding that the statement, or each of the statements, if more than one, made by the representor may be, when taken by itself, literally accurate."

[496] Where, as here, the alleged representations consist of several connected statements in several connected documents, the question to be determined is whether such representations taken as an entirety, not any one particular statement or document, are false or true.

B. Express Statements In The Tender Documents

(i) Express Statements Of Fact

[497] An express representation is made either in writing or orally, whereas an implied representation is implied either from an express statement or from acts or conduct: Spencer-Bower and Turner, supra, at p. 6.

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[498] For an express misstatement to be actionable in deceit, something more is required beyond the mere representation of fact which turned out to be false, and which was relied upon by the representee. For deceit, dishonesty is required. For it to sound in negligence, it must have been made in the context of a special relationship giving rise to a duty of care.

[499] Express representations of fact can be found in plans and drawings, as in **Pearson (S.) & Son Ltd. v. Dublin Corp.**, [1987] A.C. 351 (H.L.), where the engineers retained by a public authority had prepared drawings which showed that a particular critical wall described as "the backbone of the scheme" ran to a certain depth when in fact it did not, and the engineers had no knowledge or reason to believe that it did. Similarly, in **Cardinal Construction Ltd. v. Brockville (City)** (1984), 4 C.L.R. 149 (Ont. H.C.J.), a misdescription of a utility installation in a drawing included in a tender package was an actionable misrepresentation.

[500] A statement as to the actual contents of a document is a statement of fact. Spencer-Bower and Turner, supra, at pp. 63-64 note that a misdescription, misreading or mistranslation of such contents to the representee is an actionable misstatement of fact.

[501] Similarly, statements as to the general effect, import or object of a document or any portion of clause thereof, are the same as statements purporting to record or report the actual language used. The only difference is that the one assumes to be a transcript, and the other a summary, version or analysis of the contents of the document. In **Arkwright v. Newbold** (1881), 17 Ch.D. 301 (C.A.), at p. 318 James, L.J., invoked an apposite example:

> "Supposing you state a thing partially, you may make a false statement as much as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you may make a false statement. For instance, if pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement."

[502] Thus a summary of a document must fairly represent its contents, including any qualifications to the statements chosen. The representee is entitled to rely on the summary without the necessity of auditing the source information to determine the efficacy and completeness of the summary.

(ii) Implied Representations Embedded In Express Representations

[503] The plaintiff relies on certain representations which it maintains were implicit in the express representations in the tender documents.

[504] The Supreme Court of Canada recently ruled in **Queen (D.J.) v. Cognos Inc.**, [1993] 1 S.C.R. 87; 147 N.R. 169; 60 O.A.C. 1, that there is no compelling reason in principle, authority or policy for the proposition that an implied representation cannot under any circumstance give rise to actionable negligence. Iacobucci, J., stated at p. 131:

> "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 ... 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

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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."

[505] The court found that the implied representation was not only reasonable in the circumstances, but was perhaps the only inference which a reasonable person would have drawn from the direct representations. This was not a situation where many different and conflicting interpretations could reasonably be drawn from a series of direct representations and where the representee advanced the implied meaning most favourable to recovery.

[506] It is thus open to me to find actionable implied misrepresentations, if the evidence shows that a reasonable person in the same circumstances would have drawn the same inference as the plaintiff.

(iii) Statements Of Opinion

[507] In **Semkuley and Patterson v. Clay, Bell and Doherty Bros. Realty Ltd.** (1982), 39 A.R. 526 (Q.B.), at p. 552, I adopted this passage from Anson, **Law of Contracts** (24th Ed. 1975), at p. 229:

"It should not be imagined ... that a statement of opinion can never constitute a representation of fact. In one sense it always does so, for it asserts that the opinion is actually held. Also the opinion will usually be based on facts; so the person making the representation impliedly states that he knows facts which justify his opinion. This is especially the case where the situation is such that the representor must know the facts much better than the other party. If it is shown that he never was of that opinion, or failed to investigate the facts which gave rise to it, he may be guilty of a misrepresentation."

[508] In the case at bar, interpretations and opinions given in the tender documents as to the expected common thickness of gravel, its distribution and estimates of the quantity expected to be mined are at issue. The threshold question is whether these opinions and estimates can prima facie be actionable as statements of fact.

[509] In **Piggott v. Nesbitt, Thompson & Co.**, [1941] S.C.R. 520, a statement in a share prospectus in which it was "estimated" that the site for a planned power station had a particular capacity was favourably reported by the company's engineers. The engineering reports did not justify that estimate and so amounted to a misrepresentation; the drafter's indifference to the truth of the estimate made the statements fraudulent.

[510] **Cana Construction Co. v. R.**, [1974] S.C.R. 1159, involved a "grossly inaccurate" estimate in a tender package for a contract for the cost of supply and installation of equipment required under a subcontract. The Supreme Court found at p. 1167 that it was of the utmost importance to the bidder to know the proper amount of the subcontract so that in preparing his own bid he could include an amount for overhead, supervision and profit. Spence, J., on p. 1169 disagreed with the characterization of the estimate as a "suggestion" or "guess" which could not be construed as a warranty that the estimate was correct:

"[T]he statement, in my opinion, was more than the mere usual estimate and was intended to be by the person who made it ... a representation and was accepted as

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such by a person who had to rely on it and on it alone in making his calculations."

The Crown was found to have made the representation by including the estimate in the tender documents. In the circumstances, bidders were entitled to rely on the estimate as being accurate within certain normal limits, generally accepted as being some 10% above or below the estimate.

[511] K.R.M. Construction Ltd. v. British Columbia Railway (1982), 18 C.L.R. 277 (B.C.C.A.), shows facts which may be implicit in a statement of estimated quantity. The estimate of approximate quantities and unit prices was extremely inaccurate. The trial judge accepted expert evidence that the words "estimated" and "approximate" in the construction industry were generally understood to indicate a maximum percentage variation between tender and actual quantities of 20%. The Court of Appeal on p. 282 upheld this conclusion, and also actionable representations of fact implicit in the estimate:

> "[The trial judge] concluded that the way in which the invitation to tender was presented was intended to convey to prospective bidders that sufficient and proper engineering procedures had been followed in arriving at the estimated quantities ... He held that in setting forth this information in the invitation to tender the appellant was representing that it had adequate information available and had used such information to arrive at the approximate quantities contained in the schedules."

[512] Thus there is in principle no impediment to an estimate being actionable as a misrepresentation of fact.

C. Misstatements By Omission

[513] Liability can spring from silence in certain circumstances. In **Brownlie v. Campbell** (1880), 5 App. Cas. 925 (H.L.), Blackburn, L., observed at p. 950:

> "[W]here there is a duty or an obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud ..."

[514] The question is when that duty or obligation to speak arises. Two distinct factual situations must be examined in the contractual (and so nonfiduciary) context: when an event occurs in the course of the parties' dealings in relation to the contract which creates a duty of disclosure, and where their relationship itself creates a duty of care. Obviously these fact situations may not be severed from one another in reality.

(i) Did Something Occur During The Negotiations Or Performance Of The Contract To Impose On The Defendant A Duty Of Disclosure?

[515] Duties of disclosure may arise in the course of negotiations from special facts in the particular case, irrespective of the kind of contract contemplated: Spencer-Bower, Turner and Sutton, **The Law Relating to Actionable Non-Disclosure** (2nd Ed. 1990), at pp. 205-206. Two of those instances are relevant here.

[516] First, where a contracting party says or does something, or something happens which, having regard to that party's previous declarations or acts, requires that party to correct or remove a delusion in the mind of the other party for which he or she is responsible for creating. Secondly, where one

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party is asked a question by the other in respect of any matter, whereupon a duty is incumbent on the first party, if he or she answers the question at all, to answer it truthfully and fully.

[517] A duty of full disclosure may arise in the course of performance of the contract, where there are fresh acts of reliance upon the original nondisclosure or misrepresentation which the defendant has discovered were untrue. **Loewen v. Hanford Homes Ltd., Robinson, Sivertson, E.P. Cooke Real Estate Services Ltd. and Kowalchuk** (1983), 23 Man.R.(2d) 131 (Q.B.), illustrates that deceit is complete where this occurs. The plaintiff in that case had relied on a representation that a company was in good financial health in making an investment, which the defendant subsequently discovered was untrue at all material times. The defendant did not disclose the new information, but requested the plaintiff to make a further investment. The plaintiff was given judgment in deceit.

[518] In ascertaining whether it is incumbent upon one party to the negotiations or the contract to make full disclosure, the following four questions provide a helpful focus.

(a) Did An Omission Render The Representations Incorrect?

[519] As a general rule, two contracting parties may remain silent; however, upon saying something there may be an obligation on that party to say more. Spencer-Bower and Turner, supra, states at p. 209:

> "After laying down the general principle that silence is not actionable where there is no duty to disclosure, Lord Eldon, L.C., is careful to add: 'but a very little is sufficient to affect the application of that principle. If a word, if a single word, is dropped which tends to mislead ... the principle will not be allowed to operate.' [quoting from **Turner v. Harvey** (1821) Jac. 169 at 178] ... Lord Selborne, L.C. ... put the proposition thus: 'inasmuch as a purchaser is (generally speaking) under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or proposes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of those facts would be necessarily, or naturally and probably, misleading.' [quoting from **Coakes v. Boswell** (1886), 11 App. Cas. 232 at 235-6 (H.L.)]. In short, though the party need not say anything at all, if he does say anything, he must say everything, that is, everything material to the topic in question; by breaking silence, he impliedly 'undertakes' a duty which otherwise the law would not have prescribed." (emphasis added)

[520] The same point was made by the Supreme Court of Canada in **Banque Nationale du Canada v. Soucisse, Groulx and Robitaille**, [1981] 2 S.C.R. 339; 43 N.R. 283. As noted on p. 351, once a party to a contract disclosed some information to the plaintiff, it assumed a duty to do this completely, "because partial information is misleading information". The bank could not "simply disclose what it was to its advantage to disclose and withhold what was in its interests to conceal".

(b) Did Silence Amount To A Positive Assertion That Certain Facts Did Not Exist, Or Create A False Impression?

[521] In **Leeson v. Darlow**, [1926] 4 D.L.R. 415 (Ont. C.A.), it was noted on p. 432:

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> "Active concealment of a fact is equivalent to a positive statement that the fact does not exist. By active concealment is meant any act done with intent to prevent a fact from being discovered; for example, to cover over the defects of an article sold with intent that they shall not be discovered by the buyer has the same effect in law as a statement in words that those defects do not exist."

Silence in these circumstances may actually amount to a positive misstatement, rather than a nondisclosure.

[522] The same holds true where the representor omits essential qualifying or modifying facts. Spencer-Bower and Turner, supra, state at p. 94:

> "To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a 'lie', and one of the most dangerous and insidious forms of lie."

Thus a representor cannot purport to summarize another document or report without including all of the qualifications placed by the author upon the statements included in the synopsis: **Arkwright**, supra.

(c) Did The Defendant Fail To Answer Accurately A Direct Inquiry From The Plaintiff?

[523] Where, in the course of negotiation, one party asks a direct question of the other as to some fact or matter which that other had no obligation to answer yet chooses to do so, the law imposes a duty to answer truthfully, honestly and fully. Any violation of this duty results in a misrepresentation, as an active misstatement: Spencer-Bower and Turner, supra, at pp. 215-217.

(d) Did The Defendant Make Statements With An Honest Belief In Their Truth, And Subsequently Discover They Were False?

[524] Fry, J., in **Davies v. London and Provincial Marine Insurance Co.** (1878), 8 Ch.D. 469, stated that supervening discovery or events can render a statement retroactively fraudulent if the falsifying information is not then disclosed. He noted at p. 475 that the duty of disclosure arises where

> "one of the negotiating parties has made a statement which is false in fact, but which he believes to be true, and which is material to the contract, and during the course of negotiations he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement ..."

Loewen, supra, is a modern example of the application of this principle.

[525] When the falsifying information is discovered, what was innocent becomes fraudulent, and the nondisclosing party becomes liable in deceit. This was made clear by Blackburn, L., in **Brownlie**, supra, at p. 950:

> "[W]hen a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on ... upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can no longer be honestly persevered in. That would be fraud ..."

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[526] This principle has been applied in the context of construction law in **Cardinal Construction**, supra, where it was held that when the owner and its engineer became aware before tenders were submitted that information in the plans was incorrect, they had a duty to convey that information to bidders because the information provided in the tender documents was intended by the owner to induce bidders to act upon it. Their failure to do so resulted in liability for negligent misrepresentation.

(ii) Did The Owner And Its Engineer Have A Duty To Disclose Certain Information To Tenderers, Arising From The Relationship Between The Parties?

[527] Thus far I have considered the circumstances where some event triggers an obligation to disclose. The law may also place upon a party an obligation to speak from the outset, originating in the nature of the relationship between the parties. If that duty of care is breached, the positive misstatement or nondisclosure may be actionable in deceit or negligence.

[528] The obvious example is a fiduciary relationship, but traditionally others have included contracts *uberrimae fidei*. **Hedley Byrne & Co. v. Heller & Partners Ltd.**, [1963] 2 All E.R. 575 (H.L.), dismantled the closed categories of relationships to which a duty of disclosure applied. A contemporary Canadian synthesis of the **Hedley Byrne** principles was recently provided by the Supreme Court at p. 110 of **Cognos**, supra:

> a) there must be a duty of care based on a "special relationship" between the representor and the representee;
>
> b) the representation in question must be untrue, inaccurate or misleading;
>
> c) the representor must have acted negligently in making the misrepresentation;
>
> d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
>
> e) the reliance must have been detrimental to the representee in the sense that damages resulted.

[529] **Cognos** makes it clear that nondisclosure in the course of precontractual negotiations may be actionable. In that case, the employer failed to disclose in the course of an employment hiring interview that the project for which the plaintiff was being hired had not yet been approved by senior management. Iacobucci, J., held at pp. 116-117 that it was foreseeable that the representee would rely on the information provided in the course of the interview, and it was reasonable for him to so rely; therefore, the relationship was such that the employer was under a duty to exercise reasonable care and diligence in making representations as to what opportunities the employment contract offered. That duty was not one of full disclosure as to the employer's financial commitment to the project, but rather a duty to give highly relevant information about the nature and the existence of the employment opportunity, to enable the plaintiff to evaluate the risk.

[530] Does a special relationship exist between an owner and its engineer or other technical advisors, and prospective bidders, so as to create an obligation on the owner to disclose all relevant - or at least highly relevant - information in the owner's possession which foreseeably could affect the bidders' assessment of the project and the proposed contract?

[531] The Supreme Court of Canada's deci-

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sion in **Banque de Montreal et autre v. Hydro-Québec et autres**, [1992] 2 S.C.R. 554; 138 N.R. 185; 48 Q.A.C. 241 (hereinafter **Hydro-Québec**) discusses the circumstances where a duty of disclosure arises between a tenderer and bidder in a construction contract.

[532] While the decision is based upon the **Civil Code of Lower Canada**, its reasoning finds common ground in the common law. The Supreme Court has recently emphasized the benefits of a comparative law approach between the two legal systems in Canada. In **Canadian National Railway Co. et al. v. Norsk Pacific Steamship Co. and Tug Jervis Crown et al.**, [1992] 1 S.C.R. 1021; 137 N.R. 241, the court drew on Quebec's civil law principles in analyzing solutions to the common law's conundrum of the recoverability in tort of pure economic loss. Stevenson, J., commented at p. 1174:

> "[T]his court has the benefit of being the final court of appeal in a country that has two legal traditions: the English common law and the French civil law. Our two legal traditions are independent and should not be confused. Concepts and solutions found in one tradition should not be imposed on the other tradition. But this does not mean that there is no place for comparative law on this court."

[533] It was found that Hydro-Québec had acted fraudulently in withholding critical geotechnical information from contractors at both the tender and the contract stage of a construction contract.

[534] The court outlined a general theory of the duty to inform in a contractual context, as a secondary obligation arising from a primary obligation of good faith between contracting parties. Gonthier, J., set out on pp. 586-587 the main elements of the obligation to inform:

> (1) knowledge of the information, whether actual or presumed, by the party which owes the obligation to inform;
>
> (2) the fact that the information in question is of decisive importance; and
>
> (3) the fact that it is impossible for the party to whom the duty to inform is owed to inform itself, the party to whom the obligation is owed is legitimately relying on the party who is obliged to disclose.

[535] He noted at p. 587 that "the obligation to inform and the duty not to give false information may be seen as two sides of the same coin". The same is found in the common law: once a party in a contractual context has embarked upon imparting information to the other, he or she must ensure that the information is not only accurate, but complete.

[536] The Supreme Court placed construction contracts in the category of "contracts of enterprise" in civil law (analogous to commercial contracts), and expanded upon the obligation to inform for this category of contracts. The elements relevant here are: allocations of risk, the relative expertise of the parties and continuous formation of the contract.

[537] Regarding allocation of risk, the Supreme Court noted that it is recognized that part of the risk assumed by a construction contractor is the responsibility for the nature and conditions of the soil, since it is in a position to assess this risk during the tender process. However, that allocation of risk may be altered by the tender process and the actions of the owner, as explained on p. 591:

> "The obligation to inform is an immediate corollary of the allocation of risk. The party assuming the risk has a duty to

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become informed about it, as this court held in **Corpex**, supra at pp. 663-664. However, the other party must not, by action or inaction, contribute to distorting the evaluation of the risk by the party who assumes that risk. In [**Groupe Desjardins assurances générales v. Société de récuperation, d'exploitation et de dévelopement forestiers du Québec** J.E. 911599 (Que. C.A.)], LeBel, J.A., moreover expressly excepted cases where the owner contributed to the contractor's error ... The relationship between the risk assumed by the contractor and the owner's obligation to inform the contractor, particularly when the information in question is contained in the call for tenders documents, is very close indeed." (emphasis added)

[538] A second element of the duty to inform in a construction project is the relative expertise of the parties. The court noted at p. 591 that in larger construction projects, the owner generally has not insignificant expertise in the field, which it uses in preparing the plans and specifications.

[539] The court in **Hydro-Québec** held at p. 592:

"The owner's obligation to inform increases with its expertise relative to the contractor's, particularly when it provides information to the contractor which falls within its field of expertise, and that information is incorrect. Although the contractor must check the information provided to it by the owner, it need not necessarily redo in detail the work done by the owner's experts." (emphasis added)

[540] Superiority of knowledge of the owner is not eliminated where the owner relies on the expertise of independent consultants. A representor cannot evade liability by asserting that it was merely repeating the representations of another.

[541] A third characteristic of contracts for larger projects that influences the obligation to inform is the process of continuing change during execution of the contract. The court noted at p. 594:

"Clauses in contracts where the owner reserves the right to make changes during the course of the work ... may lie on the borderline between formation and execution of contracts. Since, in any event, the changes to the contract are no longer within the unilateral will of the owner when they transform the object of the contract, the contractor must at least receive sufficient information to gauge the significance of the changes requested. Accordingly, there is always a certain element of the pre-contractual obligation to inform present when change orders are issued ...

"The obligation to inform therefore retains, throughout the term of a contract for a major project with multiple amendments, the characteristics of the pre-contractual obligation to inform. Thus a relatively high degree of disclosure is required."

[542] These factors from **Hydro-Québec** are not alien to the common law's obligation to disclosure imposed on an owner in the pre-tender process. The common law has long recognized that the allocation of risk in the contract itself may be altered by pre-contractual dealings between the parties which nullify clauses foisting the risk on the contractor: **Pearson**, supra; **K.R.M. Construction Ltd.**, supra; **TWT Enterprises Ltd. et al. v. Westgreen Developments (North) Ltd. et al.**, [1991] 3 W.W.R. 90 (Alta. Q.B.), affd. (1992), 127 A.R. 353 (C.A.).

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[543] Further, common law courts also focus on the degree of technicality of the data provided to tenderers by the owner, the lack of opportunity or time for the tenderers to acquire that information themselves, and whether the information was indispensable for tenderers to form a judgment. Common law construction authorities recognize that in most tender processes, those preparing the tender package possess much greater knowledge about the circumstances of the project than do the bidders. This differential in the relative knowledge of the parties favours the imposition of a duty of care on those preparing the tender documents to ensure they are accurate.

[544] Thus, in **Cardinal Construction**, supra, at pp. 187-188, the court found that there is no practice or understanding in the construction trade that a contractor is always obliged to investigate and verify information supplied by the owner - a point also made in **Davie Shipbuilding** and **Hydro-Québec**. It was noted at p. 188ff that only if the information required is not specified, or the documents raise some question as to the correct interpretation of the information necessary to the bid, or the engineer clearly warns the bidder that certain information was not verified and that he or she does not vouch for its accuracy, is the contractor required to conduct further investigation; otherwise, the contractor is entitled to rely on the engineers' and owner's duty to ensure that the information in the tender documents is reasonably correct and complete.

[545] The Supreme Court of Canada recently confirmed that the law reflects the economic reality of the tender process in **Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.** (1993), 157 N.R. 241; 32 B.C.A.C. 221; 53 W.A.C. 221 (S.C.C.). At issue was whether a construction contractor, after preparing its bid on the basis of engineering information contained in the tender documents, could sue the engineers for negligent misrepresentation where there was no privity of contract between the contractor and the engineering firm. The court ruled that the engineering firm, but not its individual employees, owed a duty of care to bidders which was not negated by an exclusion clause in the contract with the province. Furthermore, McLachlin, J., stated:

> "It is true that the engineers' work was incorporated in the tender package and thereafter in the contract. This establishes that the representations in the design became the representations of the province. But it does not, without more ... establish the further proposition that when the representations became the representations of the province they ceased to be the representations of the engineers."

[546] The court also rejected the argument that policy reasons dictate that no duty of care should arise. McLachlin, J., wrote that economic efficiency dictated that a duty of care exist:

> "If the engineering firm is correct, then contractors bidding on construction contracts will be obliged to do their own engineering. In the typically short period allowed for the filing of tenders ... the contractor would be obliged, at the very least, to conduct a thorough professional review of the accuracy of the engineering design and information work which in this case took over two years. The task would be difficult, if not impossible. Moreover, each tendering contractor would be obliged to hire its own engineers and repeat a process already undertaken by the owner. The result would be that the engineering for the job would be done not just once, by the engineers hired by the owner, but a number of times. This duplication of effort would doubtless be reflected in higher bid price, and ultimately, a greater cost to the

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public which ultimately bears the cost of road construction. From an economic point of view, it makes more sense for one engineering firm to do the engineering work, which the contractors in turn are entitled to rely on, absent disclaimers or limitations on the part of the firm. In fact, the short tender period suggests that in reality this is the way the process works; contractors who wish to bid have no choice but to rely on the design and documents prepared by the engineering firm. It is on this basis that they submit their bids and on this basis that the successful bidder enters into the contract." (emphasis added)

[547] Thus, the amount of time the plaintiff had to prepare its tender must be taken into account in determining whether the defendant owed a duty of care to bidders to impart accurate information in the tender documents.

[548] The court in **Cabott (Walter) Construction Ltd. v. R.** (1974), 44 D.L.R.(3d) 82 (F.C.T.D.), ruled that the Federal Crown owed a duty of care to bidders to make disclosure of the timing of the work to be done under other related contracts on the job site, holding at p. 98:

"I have no difficulty in finding that the relationship between the person who invites tenders on a building contract and those who accept that invitation is such a particular relationship as to impose a duty of care upon that person so as to render actionable an innocent but negligent misrepresentation in the information which he conveys to those whom he intends to act upon it. I am further of the view that, where the information is clearly material and obviously very much in the mind of the party withholding it, as in this instance, the failure to disclose it is a breach of the duty owed."

[549] Similarly, in **Brown & Huston Ltd. v. York (Borough)** (1986), 17 C.L.R. 192 (Ont. C.A.), the engineers appointed by the City of York owed a duty of care to the tenderers to ensure that the information contained therein was accurate, when they knew that tenderers would rely on it. The city was found vicariously liable for the engineers' negligence.

[550] In **Hydro-Québec**, supra, the Supreme Court agreed that there was "an onerous obligation to inform" the contractors about the existence of soil conditions which were inconsistent with information in the tender package. The trial judge's finding that Hydro-Quebec had committed fraudulent misrepresentation was upheld.

[551] Thus, a duty of care may lie concurrently on the owner and its engineers in respect of representations included in a tender package, absent effectively worded disclaimer clauses.

D. The Misrepresentation Induced The Representee To Enter The Contract Or Otherwise To Alter Its Position

(i) The Requirement Of Actual Reliance

[552] The onus is on the plaintiff to establish that the representations in the tender documents affected its judgment in submitting its tender and entering the contract.

[553] Knowledge of the untruth of a representation is a complete bar to relief, since in such cases the plaintiff cannot assert that he has been misled by the statement. However, relief will not be withheld on this ground except upon clear proof that the plaintiff possessed actual and complete knowledge of the true facts - actual not constructive, complete not fragmentary. The onus is on the defendant to prove that the plaintiff had

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unequivocal knowledge of the truth: Furmston, Ed., Cheshire and Fifoot's **Law of Contract** (11th Ed. 1986), at pp. 264-265.

(ii) Entitlement Of The Representee To Rely On The Representation

[554] In the torts arising from misrepresentation, the plaintiff must show that he or she was induced thereby to alter his or her position. For breach of contractual warranty, the plaintiff must establish injurious reliance, not to establish liability, but to prove damages.

[555] As a general proposition, there is no requirement on the representee to investigate the truth of the representation, even if sources are available from which he or she can be informed. As Jessel, M.R., stated in **Redgrave v. Hurd** (1880), 20 Ch.D. 1 (C.A.), on p. 13:

> "If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.'"

[556] Lieberman, J. (as he then was), applied this principle in **Northern & Central Gas Corp. v. Hillcrest Collieries Ltd. et al.**, [1976] 1 W.W.R. 481 (Alta. T.D.). The court found that records were available to the plaintiff's representative which would have disclosed that the mining operations of the defendant company were not meeting the forecast made prior to the contract being formed. The defendant's officers were aware of this, but never revealed it to the plaintiff. In finding liability in fraud, Lieberman, J., stated at p. 530.

[557] The applicable law is admirably stated in 23 **Halsbury's Laws of England** (2nd Ed.), pp. 85-86:

> "... nor is it of any avail to establish merely that the representee had such means of knowledge and materials within his reach as would have enabled a person of ordinary business habits and normal intelligence to discover the whole truth, though the representor himself may have supplied those means and materials ... The reason is [that no one can] complain that another has confided in a misrepresentation made, even if innocently, much less if fraudulently, for the purpose of inspiring that very confidence, or plead as an excuse that he whom he has misled was wanting in sagacity or intelligence in not testing the statement by inquiry. The representee never owed any duty to the representor to be circumspect, or active in suspicion; or if he ever did, it was the very office and effect of the representation to relieve him of it." (emphasis added)

His Lordship concluded that the availability of the means of knowledge is not in these circumstances a defence to the action.

[558] **Cardinal Construction**, supra, holds at p. 170 that those preparing tender documents are not entitled to be vague or imprecise, in the expectation that experienced tenderers will discover the accurate state of affairs:

> "... the documents must be prepared for tender having in mind the average bidder, not the bidder who has special knowledge or experience ... Given the general principle that a bidder is entitled and expected to rely on the tender documents as conveying the best information the engineer can give, it is not good enough in my opinion to provide information that is misleading, incomplete, or inaccurate with the intention that the more experienced or knowledgea-

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ble bidder will ferret out the problems from 'clues'. The information should be clear and intelligible to all bidders and in this case it was not." (emphasis added)

This passage was cited with approval in **BG Checo International Ltd. v. British Columbia Hydro & Power Authority**, [1990] 3 W.W.R. 690 (B.C.C.A.), at p. 703 and **A.B.S. Contracting Ltd. v. Richmond** (1988), 27 C.L.R. 113 (B.C.S.C.).

[559] Thus, the common law does not place any onus upon the plaintiff to investigate independently the truth of the representations, as prima facie the plaintiff is entitled to rely upon them.

(iii) Other Inducing Causes

[560] Once it is proved as a fact that the alleged misrepresentation was an inducing cause of the plaintiff entering the contract, the co-existence of other inducing causes - even the plaintiff's own mistake - is irrelevant: **Edgington v. Fitzmaurice** (1885), 29 Ch.D. 459 (C.A.).

[561] In **Arnison v. Smith** (1887), 41 Ch.D. 348 (C.A.), Halsbury, L., adopted this statement at p. 369:

> "[I]f the court sees on the face of the statement that it is of such a nature as would induce a person to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, unless it is shown that he knew the facts, or that he avowedly did not rely on the statement whether he knew the facts or not."

[562] Reliance upon the misrepresentation is therefore inferred from the very fact that it was made and by its nature was material to the representee's consideration of the contract; the onus then shifts to the representor to prove that there was no such reliance.

E. Conclusions As To Whether There Were Actionable Misrepresentations And Nondisclosures By The Defendant

[563] Applying the facts as I have found them above to the law, I am satisfied that the defendant and its agents have committed actionable misrepresentations and nondisclosures in respect of the three main areas of work in this contract: the pervious borrow, the downstream foundation and the north abutment.

[564] Next, I must decide whether the misrepresentations and nondisclosures were fraudulent or negligent, or constituted a breach of contract. If so, the issue of whether the contract has effectively excluded the defendant's liability to the plaintiff must also be examined.

II Liability For Breach Of Contractual Warranty

[565] In this section, I will review the law with respect to breach of contract.

A. Breach Of Express Terms

[566] The plaintiff submits that the contract contains a number of express terms which singularly, and in some cases collectively, amount to contractual warranties.

[567] In determining the meaning to be ascribed to express contractual terms, I must determine the parties' intention regarding the relevant clauses which the plaintiff argues constitute contractual warranties.

[568] In **Fischbach & Moore of Canada Ltd. v. Noranda Mines Ltd.** (1978), 84 D.L.R.(3d) 465 (Sask. C.A.), the court con-

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sidered whether a building contract contained an express term obligating the owner to deliver equipment at such times as to permit the contractor to complete its part of the contract by the completion date. Bayda, J.A., asked at p. 475:

> "Does the obligation to make delivery 'as work progresses' or 'from time to time as work progresses', as those phrases are used in the contract ... amount to an express obligation respecting the times for making deliveries of the additional drawings leaving for judicial construction the removal of any ambiguity or equivocation inherent in those phrases? Or, is this the case where those phrases are devoid of any sense, defy construction and leave one in a position of having to imply an obligation as to the times of delivery, if there is to be one (to give business efficacy to the contract and to give expression to a term which the parties intended to form part of the contract but failed to express)?"

[569] At p. 478 he reviewed these terms in the context of the whole contract, and found that the parties must have intended "supply" to impose some time limit consonant with what was reasonable in the light of the various undertakings and covenants in the contract. That requirement was held to be part of the express undertaking, since the contract had expressly negated the implication of terms (a clause not found in the present case).

[570] In construing the various clauses, I may have reference to the whole of the contract and the context in which it was created. As Virtue, J., explained in **Qualico Developments Ltd. v. Calgary (City)** (1987), 81 A.R. 161; 53 Alta. L.R.(2d) 129 (Q.B.), at p. 138:

> "The meaning of a document or of a particular part of it is to be sought from in the document itself. This does not mean that one must discover the meaning of a particular word or phrase from that word or the words of that phrase alone. The document must be read and interpreted as a whole in order to extract the meaning of any particular part or expression ... Further assistance as to what the parties intended by the words they used can be gained from 'the matrix of facts' in which they were set."

[571] In **Bank of British Columbia v. Turbo Resources Ltd.** (1983), 46 A.R. 22; 27 Alta. L.R.(2d) 17 (C.A.), Laycraft, J.A. (as he then was), considered the commercial setting in which a contract was made to assist him in ascertaining the intention of the parties from their language. He pointed out this consideration was different from parole evidence of the intention of the parties. He quoted with approval from Wilberforce, L., in **Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen**, [1976] 1 W.L.R. 989, at pp. 995-996:

> "'[T]he surrounding circumstances' ... can be illustrated but hardly defined. In a commercial contract ... the court should know the commercial purpose of the contract and this is turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

[572] More recently, Lieberman, J.A., said in **Amerada Minerals Corp. of Canada Ltd. v. Mesa Petroleum (N.A.) Co. et al.**, [1987] 1 W.W.R. 107; 73 A.R. 172 (C.A.), at p. 113:

> "In considering the evidence of the experts the learned trial judge reviewed the principles governing the interpretation of agreements. At p. 619 he refers to Odger's **Interpretation of Deeds and Other Instruments**, wherein the learned author writes at p. 36:

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'The plain ordinary meaning of the words is to be adopted in construing a document. The subject matter may show, however, that the words have a meaning different from their plain, ordinary or popular meaning, if they are used in connection with the usage of a trade or profession and have thus some special, technical meaning. They may even be used in a special or peculiar sense on a particular occasion if this construction would affect the intention of the parties as collected from the documents.'" (emphasis added)

[573] In ascertaining the intention of the parties, therefore, I must have regard to the wording used in the context of the whole contract and the surrounding circumstances, including the purpose for which the particular clause was inserted.

B. Breach Of Implied Terms

[574] The plaintiff seeks to imply the following two terms into the contract:

"18. In the further alternative, it was an implied term of the contract that there were no facts within the knowledge of the defendant or its agents which had not been disclosed to the plaintiff which were inconsistent with or contradicted the contractual warranties and representations of the fact made by the defendant, as described in paragraphs 7 and 9 herein.

"19. It was a further implied term of the contract that, in accordance with the covenant of good faith and fair dealing implied by law, the information provided by the defendant or its agents in the tender documents forming part of the contract had been furnished in good faith, in the honest and reasonable belief that the said information was complete and accurate and that all material information bearing upon performance of the contract within the possession of the defendant had been provided to the plaintiff."

[575] The plaintiff limits the application of paragraph 19 to a failure to disclose to the plaintiff the possession of material information which was inconsistent with or contradicted the information provided in the tender documents.

[576] The implication of terms into a contract entails a two-step analysis:

1. Is the term sought to be implied inconsistent with or in conflict with any express term or disclaimer clause in the contract: **Carman Construction Ltd. v. Canadian Pacific Railway Co. and C.P. Rail** (1982), 42 N.R. 147; 136 D.L.R.(2d) 193 (S.C.C.).

2. If there is no such conflict, then is the term properly implied into the contract under one of the following, from **Canadian Pacific Hotels Ltd. v. Bank of Montreal** (1987), 77 N.R. 161 (S.C.C.):

   a. established custom or usage which amounts to implication on the basis of presumed intention;

   b. necessity, to give business efficacy to a contract, or as otherwise meeting the "officious bystander" test as a term which the parties would say, if questioned, that they had obviously assumed; or

   c. necessity, as legal incidents of a particular class and kind of contract, the nature of which have to be largely determined by implication.

I will address each test in turn.

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(i) Is The Term Sought To Be Implied Inconsistent With Or In Conflict With An Express Contractual Term Or Exclusion Clause?

[577] I must first consider whether any clauses in the contract are a barrier to the terms pleaded in paragraphs 18 and 19 of the Amended Amended Statement of Claim. I will examine the wording of the exculpatory clauses in the contract in greater detail later in this judgment, but at this point I must consider whether they prohibit the implication of these terms.

[578] There are no clauses specifying that the written document constitutes the entire contract, or otherwise prohibiting the implication of terms.

[579] In **Catre Industries Ltd.**, supra, the Alberta Court of Appeal had to consider whether terms implied by the trial judge into a construction contract drafted by the Government of Alberta conflicted with certain exclusion clauses in favour of the government. One implied term was stated at p. 327 to be "to provide soils information of reasonable accuracy or at the very least, information which was not erroneous or misleading to prospective tenderers". The court found that the following two clauses, quoted at p. 325, were inconsistent with this implied term:

> "The information pertaining to the data as shown has been compiled for the use of the Department of Highways. No responsibility will be assumed by the department for the correctness or completeness of the data shown and should any such data be found incorrect or incomplete the contractor will have no claim on that account.
>
> "The bidder is required to investigate and satisfy himself of everything and of every condition affecting the works to be performed and the labour and material to be provided, and it is mutually agreed that submission of a tender shall be conclusive evidence that the bidder has made such investigation." (emphasis added)

[580] The court found at p. 331 that the first disclaimer clause "stated in plain language that the correctness of the information was not guaranteed and that the department was not responsible for its accuracy". There is no equivalent "use" clause in the contract in this case. The second clause was also "inconsistent, and indeed in direct conflict" with the implied term.

[581] Section 1.13 and section 6.3.3 of the contract in this case, and the portion of the Thurber Report entitled "Geotechnical Information for Contract Bidders", do not conflict with the two implied terms pleaded by the plaintiff. Unlike in **Catre Industries**, the implied terms in this case do not rely upon a guarantee of the accuracy of the information imparted, but merely that the representor does not possess any information contradicting the soils information imparted in the tender documentation. Furthermore, the terms sought to be implied in this case do not constitute a guarantee that the technical information in the contract is "reasonably accurate" (the term sought to be implied in **Catre Industries**).

[582] Further, no exemption clause addresses whether all of the relevant information in the defendant's possession has been disclosed, so the plaintiff can make its own assessment of the value of the information.

[583] The "investigation" clause quoted above, section 1-2.13, is similar to that in **Catre Industries**. In my view such a clause does not conflict with an obligation on the owner to disclose relevant information in its possession which contradicts its express representations. Thus section 1-2.13 does

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not prevent an implied term that such inconsistent information is provided to the plaintiff.

[584] I find, in light of the above, that the terms pleaded in paragraphs 18 and 19 are not inconsistent with or in conflict with any express term or disclaimer clause in the contract.

(ii) Are The Terms Properly Implied Into The Contract Under The Test Of Necessity, To Give Business Efficacy To The Contract?

[585] The Supreme Court of Canada recognized, in **Hydro-Québec**, supra, and **Edgeworth**, supra, that business efficacy and economic efficiency in the bidding of this type of construction project dictate that bidders be given critical information on the basis of which they can prepare their tenders in the short time usually afforded them. For this reason there is a general legal principle that, in the absence of a clause forbidding reliance, a bidder is entitled and expected to rely on the tender documents as conveying the best information the owner or its engineer can give.

[586] An implied term that the owner does not possess any information contradicting the information provided in the tender documents lies within the boundaries of this principle.

(iii) Are The Terms Properly Implied Into The Contract Due To Necessity, As Legal Incidents Of The Class Of Construction Contracts?

[587] The plaintiff argues that these implied terms are also a necessary legal incident of this class of contract. To permit an owner such as the government to disclose information which it knows is contradicted by other information in its possession, is to subvert the contract itself.

[588] In considering this argument, I note that these implied terms do not place upon the owner a general legal obligation to provide site information to prospective tenderers. Rather, they require an owner who has already embarked upon the exercise of supplying information to disclose all relevant information in its possession.

[589] Section 1.13 of the contract, section 4.2 of the Thurber Report, as well as the title "Summary of Site Soil Conditions Paddle River Dam - Geotechnical Information for Contract Bidders" and section 1, contrast with the clauses in **Catre Industries**, quoted above, which expressly state that the tender information had been compiled for the use of the Department of Highways, not the use of bidders, and that the department assumes no responsibility for the completeness or accuracy.

[590] Rather, the wording in these clauses in the contract in issue demonstrates that the defendant expected and intended bidders to rely upon the soil information it furnished for the purpose of preparing a tender. They are not inconsistent with the implied term that the owner did not possess any information which would assist the bidder in evaluating the operation.

[591] Looking at the law governing the interpretation of construction contracts and the express terms of the contract, I find that paragraphs 18 and 19 are implied terms of the contract.

C. Breach Of An Implied Covenant Of Good Faith

[592] Paragraph 19 pleads that a covenant of good faith and fair dealing was implied in

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the contract.

[593] Principles of good faith in contract law continue to emerge in Canadian cases, traced in both the common and the civil law. Recent pronouncements from the Supreme Court of Canada in cases originating in Quebec to an extent nourish the common law principles.

[594] The Supreme Court has sanctioned an implicit covenant of good faith and fair dealing between contracting parties, based on art. 1024 of the **Civil Code**:

> "1024 The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contact, according to its nature."

[595] The wording of art. 1024 does not extend any further than the common law rule that implied terms must be required by established custom or usage, business efficacy or necessity as legal incidents of the contract: **Canadian Pacific Hotels**, supra.

[596] In **Soucisse**, supra, the court at pp. 356-357 interpreted art. 1024 as being in keeping with the "axiomatic" principle that it is implied in every agreement that one party owes good faith to the other, both in the manner of stating the agreement and in its performance, "with all the consequences which equity may demand". The ruling that good faith is an implicit, necessary obligation in all contractual relationships was confirmed in **Houle v. Banque Nationale du Canada**, [1990] 3 S.C.R. 122; 114 N.R. 161; 35 Q.A.C. 161.

[597] In **Hydro-Québec**, supra, the Supreme Court took the analysis one step further, holding that the general obligation on a contracting party to act reasonably and in good faith implied by art. 1024 entails a secondary obligation of disclosure in "contracts of enterprise" such as major construction contracts. Gonthier, J., remarked at p. 587 that a delicate balance must be maintained between the right of a party to protect its own interests in respect of the contract, and the obligation not to withhold critical information which distorts the other party's evaluation of the contract's risks and benefits.

[598] Thus, the law must not be so protective as to allow contracting parties to relinquish responsibility for the risks they undertake; however, this concern is not seen by the Supreme Court as being inherently inimical to a duty of good faith.

[599] Recently there have been steps toward judicial recognition of an independent doctrine of good faith existing in the common law; for example, **International Corona Resources Ltd. v. LAC Minerals Ltd.** (1989), 101 N.R. 239; 36 O.A.C. 57; 61 D.L.R.(4th) 14 (S.C.C.); **LeMesurier v. Andrus** (1986), 12 O.A.C. 299; 54 O.R.(2d) 1 (C.A.); **Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd. (No. 3)** (1991), 106 N.S.R.(2d) 180; 288 A.P.R. 180 (T.D.).

[600] In **LAC Minerals**, the parties were negotiating a joint mining venture. In the course of these negotiations the plaintiff revealed to the defendant confidential information about test drilling results in property over which it owned the mining rights, which indicated that neighbouring properties were likely to be valuable. On the basis of this information, the defendant blocked the plaintiff's efforts to acquire the neighbouring property, acquired that property itself, and developed a mine on it. All five judges found a breach of confidence. Sopinka, Lamer and McIntyre, JJ., denied the existence of a fiduciary duty, while LaForest and Wilson, JJ., held that the defendant had

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violated this duty. LaForest, J., couched his finding of a fiduciary obligation upon evidence of "accepted business morality in the mining industry" about the exchange of confidential information. He stated at p. 47:

> "The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties."

[601] Hawkins, in **LAC and the Emerging Obligation to Bargain in Good Faith**, [1990] Queen's L.J. 65, discussed at p. 88 an implication of **LAC Minerals**:

> "After **LAC**, it will be impossible to say that the doctrine of good faith bargaining forms no part of Canadian law ... The Supreme Court's decision in **LAC** accords with a long series of cases which makes it clear that the content of the legal obligation to bargain in good faith can be appropriately defined by reference to the accepted moral norms of bargaining behaviour in the industry or circumstances in question. **LAC** confirms that there is a justifiable legal basis for intervening to protect good faith bargaining when negotiations are serious, when one of the negotiators is at fault, where the innocent party needs protection, and where the innocent negotiator has not assumed the risk of the negotiations failing."

[602] Since **LAC Minerals**, the doctrine of good faith in contractual relations has gained a firmer foothold, while departing from any starting premise of a fiduciary or quasi-fiduciary relationship.

[603] In **Gateway Realty** , supra, Kelly, J., of the Supreme Court held that the good faith requirement was applicable to the entire contractual process. An anchor store at Gateway shopping mall vacated, to lease space at a competitor mall owned by the defendants. The store assigned the remaining 17 years of the Gateway lease to the defendants. The lease did not require Gateway's consent to the assignment, but the assignee had to use its "best efforts" to sublease the premises. The defendant let the space remain vacant, refusing to negotiate with department stores that would create competition, and making insignificant efforts to lease to others. The defendants were found to have failed to use their "best efforts" to lease the space. The court held, inter alia, that the defendant had a duty to carry out its lease obligations in good faith, and that it breached that duty.

[604] Kelly, J., found on pp. 191-192 that a good faith obligation in performing a contract is embedded in the common law:

> "The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. 'Good faith' conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in 'bad faith' - a conduct that is contrary to community standards of honesty, reasonableness or fairness. The insistence on a good faith requirement in discretionary conduct in contractual formation, performance and enforcement is only the fulfilment of the obligation of the courts to do justice in the resolution of disputes between contending parties."

[605] Kelly, J., referred to **LeMesurier**, supra, where in an action for damages arising from the sale of residential property, Grange, J.A., stated that "[v]endors and

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purchasers owe a duty to each other to perform a contract honestly", and that this approach "may be merely an example of an independent doctrine of good faith in contract law based in the performance of contracts".

[606] What constitutes bad faith was discussed at p. 197:

> "What will constitute bad faith or breach of the conduct described above will depend on the terms of contract and the circumstances of each case. In most cases, bad faith can be said to occur when one party, without reasonable justification, acts in relation to the contracts in a manner where the result would be to substantially nullify the bargained objective or benefit contracted for by the other, or to cause significant harm to the other, contrary to the original purpose and expectation of the parties."

[607] **Gateway Realty** was extensively reviewed and adopted by Shannon, J., of the Court of Queen's Bench of Alberta in **Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.** (1992), 129 A.R. 177 (Q.B.). By agreement, Mesa agreed to sell all of its Canadian oil and gas properties to Dome. As part of the consideration for the sale of its nonproducing properties, Mesa reserved a royalty of 12½% of the gross proceeds realized upon the sale of all petroleum from these properties should they produce.

[608] On one of the properties acquired by Dome, the South Half Section (S½), Dome drilled a successful gas well. Dome purported to pool it with an adjoining property, the North Half Section (N½). It thereafter attributed half of the production from the S½ well to the N½ property. Mesa claimed that the reservoir from which the gas was produced was entirely or substantially under the S½ property sold by Mesa. By proceeding as it did, Mesa claimed that Dome effectively reduced the 12½% royalty to a 6¼% royalty.

[609] Mesa claimed that the S½ property was not properly pooled, or alternatively, was not pooled in good faith.

[610] The court first addressed Mesa's contention that Dome had a fiduciary duty to pool the S½ property with Mesa's interest in mind. Shannon, J., ruled that a fiduciary relationship did not arise, relying on **LAC Minerals**.

[611] Nevertheless, the absence of a fiduciary relationship did not necessarily absolve Dome from liability. The court addressed on pp. 217-218 whether a duty of good faith governs arm's length contracts:

> "Dome had an obligation to act in good faith towards Mesa, particularly because Dome was in the executory position and Mesa, as a gross royalty holder, was in a passive role relying on Dome for fair treatment.
>
> "In Canada, the test for deciding whether or not the parties have fulfilled the terms of the contract in a good faith manner does not include the need for the plaintiff to show that the defendant intentionally acted in bad faith. The Canadian test is laid out by the Nova Scotia Supreme Court in **Gateway Realty Ltd. v. Arton Holdings Ltd. et al.** (1991), 106 N.S.R.(2d) 180; 288 A.P.R. 180 (T.D.).
>
> "There the court enunciated the principal that there was an obligation on parties to a contract to act in good faith and that duty limits the exercise of discretion conferred on parties by an agreement. In that case it was held that the common law duty to perform in good faith is breached when a party acts in bad faith, that is, when a

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party acts in a manner that substantially nullifies the contractual objectives or causes significant harm to the other, contrary to the original purposes or expectations of the parties."

[612] The court concluded on p. 221 that:

"the knowledge that [Dome] possessed at the time of pooling should have alerted them to their good faith obligation to consult with Mesa. Only then would Mesa have had a reasonable opportunity to reach an equitable agreement with Dome, or alternatively, urge that an application be made ... to resolve the matter. The failure to proceed in that manner constituted a breach of the implied term of the contract obliging Dome to act in good faith."

Thus, Dome's liability rested on the good faith doctrine.

[613] These cases suggest that the control mechanism defining the content of the doctrine of good faith in contractual relations appears to be the reasonable expectations of the parties.

[614] It is clear that the obligation of good faith does not spring solely from a fiduciary or quasi-fiduciary relationship. In **LAC Minerals**, **Gateway Realty** and **Mesa**, the defendant could have unilaterally deprived the plaintiff of the benefits of the contract which the parties had contemplated would enure. Taking advantage of such a position without reasonable justification, and in defiance of the normal expectations of the particular commercial sector in such circumstances, constituted bad faith.

[615] I have already noted that in the construction industry, tenderers reasonably expect that the owner will not, having provided some information, withhold information which could materially affect the prospective tenderers' bids. It is not in the ultimate interests of either party for such information to be withheld, for the consequent delays and cost overruns in the completion of contracts where the other party labours in ignorance can be disastrous.

[616] I conclude that in the circumstances of this case there is a covenant implied by law that the parties will deal fairly and in good faith with one another in the exchange of information. It is reasonable, where the owner or its agents impart critical information in the tender documents which form part of the contract, that there is an implied covenant that such information has been furnished in good faith, in the honest and reasonable belief that it is complete and accurate, with all material information provided, in the sense that there is no inconsistent information within the owner's knowledge bearing upon the tender or the performance of the contract.

[617] In this respect, I find that the law does reflect the reasonable expectations of the parties to the tendering process. Thus, I find that Alberta Environment owed an obligation of good faith and fair dealing to the plaintiff to disclose that it possessed material geotechnical information which was inconsistent with or which contradicted the information which had been provided to the plaintiff in the tender documents.

D. Conclusions As To Liability For Breach Of Contract

[618] I need not inquire into the knowledge of truth or falsity of the representations, nor be concerned with the issue of reliance, when deciding whether a breach of contract has occurred.

[619] The liability of the defendant for

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breach of express terms of the contract must be determined for each of the three main areas of work. These findings are based on my determinations of fact expressed above.

[620] Concerning the downstream foundation, the existence of buried waste constitutes a breach of express contractual terms. Concerning the north abutment, the existence, nature and extent of the slide also constitutes a breach of express contractual terms. Concerning the upstream pervious borrow, the defendant breached the express warranties and representations regarding the distribution of gravel in this area.

[621] The defendant also breached the implied term as set out in paragraph 18 of the Amended Amended Statement of Claim, looking at the circumstances and information surrounding each of the areas of work. This is due to the facts I found to be within the knowledge of the defendant or its agents which were inconsistent with or which contradicted the contractual representations of fact made by the defendant.

[622] Paragraph 19 correctly claims a breach by the defendant, as the failure to disclose the various material information in its possession outlined above breached the obligation of good faith and fair dealing it owed to the plaintiff, with respect to each of the three areas of work.

III. Alternate Or Concurrent Liability In Tort

[623] Having satisfied myself that there have been actionable misrepresentations and nondisclosures by the defendant which were relied on by the plaintiff, I must consider whether these constitute fraud or negligence, or both, as I have defined those concepts legally. As the plaintiff is suing in both tort and contract, a review of the principles of concurrency is appropriate, before liability is determined.

A. The Principles Governing Concurrency

[624] The Supreme Court of Canada, in **Central Trust Co. v. Rafuse and Cordon**, [1986] 2 S.C.R. 147; 69 N.R. 321; 75 N.S.R.(2d) 109; 186 A.P.R. 109; 37 C.C.L.T. 117; 42 R.P.R. 161; 31 D.L.R.(4th) 481; 34 B.L.R. 187, unanimously recognized concurrency between contract and tort as a general rule, subject to some exceptions. The principles laid down at p. 149 have general applicability to duties of care created by contract or imposed by the common law:

> "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 ... must not depend on specific obligations or duties created by the express terms of the contract ... The distinction, insofar 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 [tort] claim cannot [depend] 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 the contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which would preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.
>
> "A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or

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escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort."

[625] In **BG Checo International Ltd. v. British Columbia Hydro and Power Authority**, [1993] 1 S.C.R. 12; 147 N.R. 81; 20 B.C.A.C. 241; 35 W.A.C. 241, the majority held that a plaintiff can sue in tort where the duty relied upon is also made a contractual duty by an express term of the contract. The court provided more detailed guidance for the application of the principle of concurrency.

"In our view, the general rule emerging from this court's decision in **Central Trust v. Rafuse** ... 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. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence ... The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on how they have dealt with it ...

"It is only to the extent that [the parties] private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue 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. Insofar as the tort duty is not contradicted by the contract, it remains intact and may be sued upon." (emphasis added)

[626] The majority described three situations at pp. 28-29 where contract and tort are applied to the same wrong. First, where the contract stipulates a more stringent obligation than the general law of tort would impose. Secondly, where the contract stipulates a lower duty than the law of tort would require in similar circumstances; the contract indicates that the usual liability imposed in tort is not intended to apply, through use of an exemption or exclusion clause. The Supreme Court observed at p. 29 that "[g]enerally, the duty imposed by the law of tort can be nullified only by clear terms".

[627] The third situation where contract and tort are applied to the same wrong is where the contract and tort duties are co-extensive, the contract may expressly or impliedly provide for the same duty as that imposed by common law. The court noted at p. 29 that the obligation under that contract is typically defined by implied terms, and went on to say:

"[T]here is no issue of private ordering as opposed to publicly imposed liability. Whether the action is styled in contract or tort, its source is an objective expectation defined by the courts, of the appropriate obligation and the correlative right."

B. The Tort Of Deceit

[628] The tort of deceit is proved when it is shown that:

(1) A false representation has been made;

(2) dishonestly, that is,

(a) knowingly,

(b) without belief in its truth, or

(c) recklessly, careless whether it be true

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or false;

(3) with the intention that the representee will rely on the representation; and

(4) the representee has in fact been induced to act upon the representation.

[629] In order to sustain an action in deceit, it is not enough to establish a misrepresentation; there must be proof of fraud: **Derry v. Peek** (1889), 14 App. Cas. 337 (H.L.). The standard of proof for fraud is the civil burden of proof on a balance of probabilities: **Scott v. Creswell**, [1975] 3 W.W.R. 193 (Alta. C.A.).

[630] **Derry**, supra, refined the mental element of knowledge required to establish deceit and expanded on the crucial element of dishonesty. Deceit requires the absence of honest belief by the representor at the material time that the statement was true. Herschell, L., noted at p. 374 that recklessness is an instance of lack of belief, "for one who makes a statement under such circumstances can have no real belief in the truth of what he states".

[631] The honesty of the belief in the truth of what is stated must be assessed on the basis of the subjective state of mind of the representor. In **Akerheim v. De Mare**, [1959] 3 All E.R. 485 (P.C.), the Privy Council held that the relevant question is not whether the defendant honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he or she honestly believed the representation to be true in the sense in which he or she understood it, albeit erroneously, when it was made. However, if the meaning placed by the defendant is so far removed from how it would be understood by a reasonable person, so as to make it impossible to believe that the defendant honestly understood it to have this meaning and honestly believed it to be true, then dishonesty is established.

(i) The Documents In Possession Doctrine

[632] The documents in possession doctrine holds that documents which are, or have been, in the possession of a party will generally be admissible against him or her as original evidence to show knowledge of their contents, a connection with or complicity in the transactions to which they relate, or a state of mind with reference thereto: **Phipson on Evidence** (13th Ed. 1982), para. 21-09.

[633] Mere possession creates a presumption that the possessor had knowledge of the contents, no matter how weak or tenuous the connection between the origin of the document and its possessor, such as unanswered letters - this goes to weight, not admissibility: Ewart, Lomer and Casey, **Documentary Evidence in Canada** (1984), at p. 233. There is no limit on the type of document which can be tendered under this doctrine.

[634] For possession to constitute the knowledge of a corporation, some responsible official, such as an officer or an employee acting in the course of employment, must be aware of the document's presence on the corporate premises: **R. v. Ash-Temple Co.** (1949), 93 C.C.C. 267 (Ont. C.A.).

[635] I conclude this doctrine is applicable in the circumstances. Those documents that the plaintiff alleges should have been disclosed must be presumed to have been in the possession, and hence within the knowledge, of the defendant.

(ii) Recklessness

[636] Ever since **Derry**, supra, courts have distinguished between fraudulent reckless-

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ness and negligence. As Fawcus, J., said at p. 200 in **K.R.M. Construction**, supra, "neither bungling, ineptitude nor gross negligence establishes fraud".

[637] However, being oblivious to the truth equates with fraud. **Chitty on Contracts** (25th Ed. 1983), vol. 1, at p. 227 states:

> "The requirement of proof of the absence of honest belief does not, however, mean that the plaintiff must prove the defendant's knowledge of the falsity of the statement. It is enough to establish that the latter suspected that his statement might be inaccurate, or that he neglected to inquire into its accuracy, without proving that he actually knew that it was false."

[638] Courts have frequently applied recklessness in deceit actions. In **Edgington**, supra, for example, Bowen, J., stated that to make a statement recklessly for the purpose of influencing another is dishonest.

[639] In **De Vall v. Gorman, Clancey & Grindley Ltd.** (1919), 58 S.C.R. 259, the Supreme Court held at p. 272 that the Alberta Appellate Division had misstated the law in holding that a finding of fact by the trial judge that misrepresentations were "at least made with reckless carelessness as to their truth" failed to meet the test of absence of honest belief necessary for fraud.

[640] In **Piggott v. Nesbitt, Thompson & Co.**, [1941] S.C.R. 520, the frame of mind of the representor of "indifference" as to whether his statements were true or false was sufficient for liability, when the facts were proven to be false.

[641] While the absence of reasonable grounds for the defendant's belief is not determinative of the question, it can provide some evidence of recklessness. In **Derry**, supra, Herschell, L., acknowledged the evidentiary utility of the absence of reasonable grounds, and said at p. 375:

> "The ground upon which an alleged belief is 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**, 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)

[642] Thus where a real estate agent after a visual inspection represented that land was flat and capable of being ploughed, when in fact it was hilly and unsuitable for cultivation, the court reversed the finding of honest intent based on the defendant's own avowal, holding that recklessness was an appropriate inference from the facts and circumstances, including the undoubtedly falsity of the representations, and the perfunctory inspection of the land by the agent. There were no reasonable grounds whatsoever for his assertions, and his means of knowledge were the best: **Davis v. Burt** (1910), 3 Sask. L.R. 446 (C.A.).

[643] **Rous v. Mitchell**, [1991] 1 All E.R. 676 (C.A.), is also helpful. The plaintiff served a notice to quit upon a farm tenant in 1988, the grounds being that the tenant had sublet several cottages on the farm without the plaintiff's permission, in breach of the lease agreement. In fact, in 1985 the plaintiff gave written permission to the defendant tenant to sublet those cottages. The plaintiff had recollected this permission as recently as

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1987, but testified that in preparing the notice to quit, he had forgotten. The plaintiff's indifference as to the accuracy of the grounds for the alleged breach of the lease, and the fact that he never bothered to read the notice prepared by his solicitors with sufficient care to form a view that it was correct, constituted fraud. It sufficed that he "shut his mind to the true situation" and "he never bothered to think; he impulsively went ahead with an intention to achieve his aims": **Rous**, supra, at pp. 697, 700.

[644] Therefore, the plaintiff need not prove that Alberta Environment's employees and agents who reviewed the tender package had in their minds, at the time the packages were sent out, their knowledge of other information that was inconsistent with that in the package. It is sufficient proof of recklessness that this other information was actively in their minds at some prior time, and that no steps were taken to review the accuracy and completeness of the tender package.

(iii) Requisite Intent For Fraud

[645] Intention to deceive is the inevitable conclusion where the representor knows the statement he or she is making is false, and expects the representee to rely on it. What is the intent where the representor makes the statement without any belief in its truth, or without caring whether it is false or true?

[646] With recklessness, proof of dishonesty is most likely dependent upon inferences from circumstances. If the evidence establishes dishonest belief respecting the truth of the statement, need the plaintiff also establish an active and deliberate intention to deceive? Or will mere proof of an intention to induce reliance by the representee suffice?

[647] There is ample authority that the motive of the representor is irrelevant; there need be no intention to cheat or injure the representee. Indeed, the representor might even honestly believe that the representee would benefit from the contract, but that would not save him or her from being fraudulent: **Derry**, supra; **Bradford Third Equitable Benefit Building Society v. Borders**, [1941] 2 All E.R. 205, at 211 (H.L.); **United Motor Finance Co. v. Addison & Co.**, [1937] 1 All E.R. 425 (P.C.).

[648] Spencer-Bower and Turner, supra, summarized the law on p. 118:

> "[A]lthough fraud necessarily involves an intention on the part of the representor that the representee shall act in the way in which he does eventually act, yet there is no necessity to prove any intention further or more remote than this - and certainly the *motive* of the representor is quite irrelevant. It is immaterial that the plaintiff may or may not be able to show, for instance, that the representation was made with the intention or motive of damaging the representee, or of benefiting himself, or a third person; or even that it is shown that his intention or motive was possibly even to benefit the representee, but that the scheme went awry. A false representation made without honest belief in its truth will be fraudulent if made with intention that the representee act upon it, even if it be made without any demonstrable motive or intention whatsoever." (emphasis added)

[649] The distinction is between the immediate intention to induce reliance and the ultimate purpose or motive of the defendant, as explained at pp. 481-482 by Bowen, L.J., in **Edgington**, supra:

> "[I]t is also clear that it is wholly immaterial with what object the lie was told ... but it is material that the defendant should intend that it should be relied on by the person to whom he makes it."

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[650] Redican, supra, dealt with whether the plaintiff must prove intention to deceive. The trial judge had instructed the jury that there must be "deliberate intention to defraud" shown, and refused counsel's request to put recklessness to the jury. The Supreme Court unanimously found a misdirection which warranted a new trial. Duff, J., discussed recklessness at p. 147:

> "The learned trial judge overlooked the settled doctrine ... that an affirmation of fact made for the purpose of influencing people in the transaction of business involves an affirmation of belief in the existence of the fact stated. If there is no belief, if the mind of the proponent has never been applied to the question and if he is in truth consciously ignorant upon the subject of his affirmation there is obviously a false statement and, if made with intent that it shall be acted upon in the way of business in a matter involving his own interests, a fraudulent statement." (emphasis added)

[651] Thus, the requisite intention is to induce reliance. Anglin, J., agreed, discussing at pp. 154, 155, 156 the inherent incompatibility of recklessness with an intention to deceive:

> "[A] new trial must be directed because the issue of fraud was not properly presented to the jury.
>
> "Had the jury been properly instructed upon the distinction between innocent and fraudulent misrepresentation their finding that the misrepresentations had been innocent would, no doubt, cover the ground. But how can that be said in view of the explicit instruction given them that 'the word innocent' is used in law to convey 'not knowingly' and that only a deliberate and intentional lie would justify a finding that the misrepresentations had been fraudulent? ...
>
> "The learned judge distinctly stated his view that intention to deceive was essential and impliedly that a false statement made with reckless carelessness as to its truth or falsehood would not be fraudulent.
>
> "The refusal to put to the jury the question whether Wing's statements were made without caring whether they were true or false coupled with the instruction that, although so made, they were innocent and not fraudulent, unless there was an intention to deceive - to tell a deliberate lie - was clearly misdirection and entitles the defendants to a new trial." (emphasis added)

[652] The above authorities show an intent to induce reliance by the representee is required for recklessness to constitute fraud, rather than an intent to deceive the representee. However, recent dicta suggests that the plaintiff must also establish an intention to deceive.

[653] The most significant case in this respect is **BG Checo**, supra. The trial judge had found the defendant liable for deceit, based on a false statement in the tender documents that the clearing of the right-of-way was done by others. He found that the evidence indicated that the defendant knew at the time of tendering that the clearing was incomplete, and was aware of the impact of this on the successful tenderer, yet deliberately withheld this information. The Court of Appeal reversed this finding on the basis that there was no evidence of an intention to deceive. The Supreme Court stated merely that the Court of Appeal's conclusion could not be seriously contested.

[654] The Alberta Appellate Division con-

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sidered this issue in **Whitney v. MacLean**, [1932] 1 W.W.R. 417. In an action for specific performance of an agreement for sale of land, the defendant pleaded that the vendor had represented that the land included 140 acres of irrigated land for which the vendor had water rights, when he knew that only 85 acres were entitled to be irrigated.

[655] The Court of Appeal found that the evidence showed that there was no intention to deceive. Harvey, C.J.A., writing for the majority noted the statement on p. 6 of Spencer-Bower, **The Law of Actionable Misrepresentation** (2nd Ed.), that "it is immaterial whether the representor in making the representation, had or had not any intention to deceive, defraud or injure the representee ..." and went on:

> "Now, if this means more than that the motive, including the intention involved in it, is immaterial, which it probably does not, it is clearly contrary to authority for the Judicial Committee in **Tackey v. McBain**, [1912] A.C. 186 ... [where it was] held that:
>
> > 'In an action in deceit the plaintiff must prove that the untrue statement ... was made with a fraudulent intent.'"

[656] The excerpt from Spencer-Bower was noted by Harvey, C.J.A., to relate to motive; other passages from that authority stating that intention to induce reliance rather than intention to deceive is vital are not cited. The court must be taken as meaning by "intention to deceive" that the evidence did not disclose fraudulent intent, in the sense of lack of honest belief in the truth of the statement.

[657] The same can be said of **BG Checo**, supra, as Iacobucci, J., stated:

> "In my view there was insufficient evidence to support a finding of deceit ... As Hinkson, J.A., noted (at pp. 161-162):
>
> > '... a committee of 12 prepared the specifications. The evidence does not reveal that any members of the committee were dishonest in the preparation of the specifications of this contract. Rather, it is possible to conclude that they mistakenly or negligently believed that the requirement that a tenderer should take a view of the site would remedy any shortcomings in the specifications included in the terms of the contract.'" (emphasis added)

[658] Iacobucci, J., also affirmed that the law as to deceit is set out in **Derry**, supra, that the person making the statement must either know the statement to be false, or be reckless as to its truth or falsehood. Therefore the Supreme Court cannot be seen to derogate from the concept of recklessness being intrinsically dishonest, as set out in **Redican**.

[659] Furthermore, recklessness is not compatible with an intention to deceive. For, if the defendant has no honest belief or is careless as to whether his or her statement is true, how can he or she have an ascertainable intention to deceive the representee? Wilful blindness to the truth, as described in **Derry**, supra, cannot be consistent with an intention to deceive.

[660] Neither **B.G. Checo** nor **Whitney** cited **Redican**, supra, where McGillivray, J., contended in his dissenting judgment that an intention to deceive is not compatible with recklessness. He stated at p. 453:

> "If the effect of the decision in **McLeod v. Hughes**, supra, is, as the Chief Justice and my brother Clarke appear to think it is, that a person to succeed on a claim of

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fraudulent misrepresentation must show an active intent to deceive on the part of his opponent, then in my view that decision is not in accord with the decision of the Supreme Court in the **Redican** case, supra, and must be ignored.

"It is not only that which is said that may constitute misrepresentation, but also that which is imported into what is said by what is left unsaid ... If the appellant made this representation even though at that moment he did not have in his mind the intent to deceive, which I greatly doubt, he still would be speaking recklessly and without a belief in the truth of his statements, which is fraud according to the Supreme Court's decision [in **Bickell & Co. v. Cutten**, [1926] S.C.R. 340]."

[661] Both **B.G. Checo** and **Whitney** can be reconciled with the Supreme Court's pronouncement in **Redican**, that fraudulent recklessness does not require proof of intention to deceive. The courts' view must be taken as being restricted to situations where recklessness is not in issue.

[662] I find support for this interpretation of the law in **K.R.M. Construction**, supra. Fawcus, J., held on p. 204:

"The defendant submits that fraud is not established unless there is an intent to mislead or deceive. However ... the required intent must be looked at according to the nature of the fraud allegation and ... in accordance with the facts. That is to say, where, as here, the representor has made misrepresentations without knowing whether they were true or false and without a genuine or honest belief in their truth, then, on my understanding of the law, the only intent which must be proved by the representee is that the representor intended that he act upon such misrepresentations in the manner in which he did act and thereby induced him to enter into the contract." (emphasis added)

This finding of law was not disturbed by the Court of Appeal, who upheld the finding of fraudulent misrepresentation.

[663] I conclude, therefore, that the law requires the plaintiff to establish that the defendant's employees or agents permitted the misstatements and nondisclosures to be made either knowingly, without entertaining any belief in their truth, or recklessly, without caring whether they were true or false. The statements must have been made and the information withheld with the intention to induce reliance, with the plaintiff actually relying to its detriment.

(iv) Fraud In Construction Cases

[664] I will now set out the principal construction law cases in which fraud is in issue, to assist me in the case at bar.

[665] The Supreme Court considered the issue of the fraudulent conduct of a public body in **Hydro-Québec**, supra. Although decided on the basis of the **Civil Code**, the court's consideration of conduct constituting fraud is useful for its illustrative and comparative value.

[666] Hydro-Québec concerned the duty of Hydro-Québec, as owner and principal, to disclose information in its possession concerning soil conditions to a subcontractor. Hydro-Québec called for tenders for the construction and engineering of a substation and access road. The documents available to bidders included a geotechnical report completed in 1974 by LIE, a firm retained by Hydro-Québec, which described the nature and condition of the soil at the site and made recommendations regarding the exca-

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vation work. During the tender period, Hydro-Québec requested that LIE conduct explorations of the proposed site of the buildings and the access road.

[667] Shortly after the contract was awarded, on the basis of LIE's investigations of the site, Hydro-Québec altered the plans for the access road. Soon after beginning construction of the access road, the subcontractor informed the contractor of atypical conditions in digging the foundation.

[668] Hydro-Québec received written notice from the contractor about the poor soil conditions and had LIE visit the site to verify these reports. LIE suggested to Hydro-Québec that the level of the substation be raised, noting that even then, the excavations may be difficult. Hydro-Québec did not disclose this letter or its contents to the contractor, but informed it that the level of the substation would be raised, and that "it is possible that poor sub-soil conditions may be encountered; in that case, corrective measures will be taken on the site".

[669] On the basis of their recent investigations, in 1977 LIE sent a geotechnical report to Hydro-Québec. This report was found to indicate much more difficult conditions than were indicated in the 1974 report. The 1977 report also listed ways to better deal with the conditions, which were found to be of the "utmost importance" if the requisite work was to be carried out. Neither the 1977 report nor its contents were disclosed. The contractor set up a meeting to discuss the problems encountered; Hydro-Québec agreed to design changes but refused to incur additional costs for them.

[670] The Bank of Montreal became involved when the subcontractor was put into bankruptcy. The bank commenced an action in contract against the contractor, who joined and impleaded Hydro-Québec as the owner. The bank also sued Hydro-Québec in tort, alleging that the 1977 report indicated Hydro-Québec's awareness of an error in selecting the site, which could have explained the difficulties.

[671] At trial, Martineau, J., inter alia, found Hydro-Québec fraudulent. He held that the tender documents were inadequate to allow the subcontractor to foresee the nature of the difficulties encountered in carrying out the excavation work. Further, continual alteration of the contract throughout its performance indicated that the tender package design was incorrect and not feasible. The judge found that through its discussions with LIE, Hydro-Québec became aware during the tender period that design changes would be required, and that the relevant aspects of the tender documents were incorrect.

[672] Martineau, J., found the 1977 report to be a necessary working document for the contractor to understand the nature and significance of the problems encountered. The suppression of the information in this report induced the contractor and subcontractor to continue their work on the basis of untenable designs. Hydro-Québec had conducted itself "in a secretive manner" and failed to fulfil its duties by not informing the other parties that the design was erroneous.

[673] The Quebec Court of Appeal allowed Hydro-Québec's appeal. However, Gonthier, J., speaking for a unanimous court, held that the trial judge had not committed palpable errors in arriving at his conclusions on the evidence.

[674] The court discussed at p. 602 Hydro-Québec's conduct:

> "By leaving Bail/Sotrim and Laprise completely in the dark about the quality of the information it had provided to them, by constantly shifting the blame onto the

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subcontractor's shoulders and by arguing urgency and its goodwill in agreeing to the changes to the work. Hydro-Québec was literally able to induce Bail/Sotrim and Laprise to carry out a design for which they had not tendered. The costs of doing the excavation nearly quintupled in relation to Laprise's original tender.

"Hydro-Québec knew that its design was erroneous. Nonetheless, it refused to admit this because the balance of power between the parties would have been radically altered, and it would probably have had to renegotiate the entire contract. It was this attitude on the part of Hydro-Québec, this refusal to yield to the claims of Laprise and Bail/Sotrim, when it knew that they were right and that it had an obligation to inform them, that so struck Martineau, J., and that led him to describe the operation as a 'conspiracy of silence'. While I have no wish to raise the ante on adjectives, I in fact find such an attitude to be shocking, particularly on the part of a major public body such as Hydro-Québec." (emphasis added)

[675] K.R.M. Construction, supra, involved contracts for grading, installation of culverts and some clearing for the extension of a railway line for the defendant Crown corporation. The tender documents included technical and engineering data and a schedule that purported to provide an approximate quantity for each type of material to be moved, which became part of the contract. The instructions to the bidders included a clause indicating that these quantities were estimates on the basis of preliminary surveys and projections of the line's location, and contained the following statement: "The quantities are not in any way guaranteed and are subject to revision."

[676] Using these quantities, the plaintiffs were awarded the contracts. Shortly after work commenced, it became obvious that the quantities to be moved were considerably greater than those estimated in the contract. This greatly increased the time required to complete the work, and the costs of completing the project escalated rapidly. As a result, the plaintiffs ceased their work under the contracts.

[677] In further negotiations, the plaintiffs proposed a means of reducing operating costs, to which the defendants agreed. On the basis of these discussions, an amending agreement, including a release of claims, was executed, under which the plaintiffs recommenced work. The defendants did not indicate that their own geotechnical investigation resulted in their considering major revisions of the proposed railway line. Soon after work commenced, the defendants indicated that the proposed line was to undergo a major revision. The plaintiffs thereafter had difficulty meeting the amending agreement, as the defendants required several changes in alignment and construction standards. When the plaintiffs ceased operations without completing the contracts, the quantities moved were 335 per cent greater than those estimated in the contract with much material yet to be removed. The plaintiffs commenced their action on the basis that the contracts and the amending agreement were induced by fraud.

[678] At trial it was held that fraud was proven with respect to the contracts and the amending agreement. The plaintiffs first pleaded a representation in the tender documents that the approximate quantities were estimated with sufficient and proper engineering procedures. These sufficient and proper engineering procedures were allegedly that the defendant used all relevant information available to it to calculate quantities. Further, unless expressly advised to the

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contrary, contractors have a right to expect the use of traditional procedures by railways generally in North America, and the tender quantities have been calculated by traditional procedures. Fawcus, J., accepted this, but added that the owner could give implied or inferential notice that traditional, sufficient and proper procedures had not been followed.

[679] Finding this representation, the court considered whether the defendant had used sufficient and proper engineering procedures in purporting to estimate the "approximate" quantities. The court found that notwithstanding that the defendant possessed the information necessary to make reasonably accurate estimates of quantities for the mountainous areas of the route, it estimated them by using the "flat earth" method, which assumed that the earth in the right-of-way was flat.

[680] This was not a sufficient or proper engineering procedure, and consequently this element of the representation of approximate quantities was untrue. The use of sufficient or proper engineering procedures was said to include using all available, relevant and material information.

[681] The second representation alleged was that the words "estimated" or "approximate" as used in the tender documents meant that the quantities to be moved were within plus or minus 20 per cent of the tender quantities. This understanding by the plaintiff contractors was found to be reasonable. As the actual quantities "ran horrendously beyond that limit", that representation was false.

[682] The defendant at p. 201 was said to exhibit a "cavalier attitude" towards the accuracy of the information in the tender package schedules, which sufficed for a finding of recklessness and hence fraud. It was noted that under **Derry**, supra, motive is irrelevant.

[683] The defendant's argument that terms of the contract limited or excluded liability for reliance on the accuracy of the figures was rejected, and it was noted that the circumstances surrounding a tender situation militate in favour of finding reliance on representations.

[684] The contractor's reliance upon the quantity estimates in the tender documents was found reasonable. Evidence indicated that the defendant expected prospective bidders to rely and act on the tender documents in preparing their bids. Regarding actual reliance by the plaintiffs, expert testimony was accepted that reliance by contractors on such quantity estimates is usual; contractors generally do not recalculate tender quantities.

[685] On the basis of the preceding analysis, Fawcus, J., found that the defendants had fraudulently misrepresented both the "approximate" quantities provided in the tender documents and the nature and scope of the revisions to the railway line contemplated at the time the amending agreement was made. The Court of Appeal, in its per curiam pronouncement, affirmed these findings with respect to both findings of fraud, but allowed in part the appeal as to damages.

(v) Conclusion

[686] Following my review of the law of deceit, I must determine whether the conduct of the defendant was deceitful. I will consider the plaintiff's claim in deceit as it applies to each affected area of work.

[687] I have found that the defendants made misrepresentations and nondisclosures regarding each of the three main areas of work to the plaintiff in the precontractual and contractual stages, outlined above. I am

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satisfied that the misrepresentations and nondisclosures made with respect to or pertaining to the upstream pervious borrow and the downstream foundation areas were fraudulent and that deceit was established.

[688] The defendant had actual knowledge of the misrepresentations and nondisclosures, or at least a lack of honest belief or recklessness, which is sufficient to establish fraud. The requisite intent, to induce reliance by the plaintiff on the contract documents as being all of the documentation necessary to enable the preparation of a proper estimate, has been proven with respect to these two areas. The evidence establishes actual reliance by the plaintiff on the misrepresentations of the defendant in calculating its bid and carrying out the contract.

[689] The elements of deceit have not been established in respect of the north abutment.

C. Negligent Misrepresentation

[690] As the facts surrounding the north abutment do not establish deceit, I must consider whether negligence is established. I will also see whether negligence is established for a claim surrounding the upstream pervious borrow and the downstream foundation, although this is not required as the defendants have already been found liable.

[691] The special relationship of proximity existing between an owner and tenderer gives rise to a duty of care. This legal duty is to exercise reasonable care in the preparation and presentation of the tender documents, and in the disclosure of information as to the state of work performed by others, the conditions expected to be encountered at the site, the nature of the work required to be performed and the nature and availability of construction materials.

[692] As McLachlin, J., observed in **Cognos**, supra, it is not enough that the owner believed what he said, he must have been non-negligent in having formed and expressed that belief. The owner must also not have been negligent in deciding what information to withhold, or in not properly inquiring as to the existence and relevance of other information affecting the work.

[693] The extent of the duty owed by an owner to a tenderer is measured by applying the standard of care expected from a reasonable owner. In **Cognos** it was stated at p. 121:

> "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 ..."

[694] He adopted the description in Klar, **Tort Law** (1991), at p. 160, of the standard by which the defendants' conduct should be measured:

> "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 circumstances 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."

[695] In determining the standard of care to

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be applied in this case, I observe the following general principles:

1. The tender documents must be prepared having in mind the average tenderer, not one who is unusually cautious, conservative or has special knowledge or experience: **Cardinal Construction**, supra.

2. A bidder is entitled and expected to rely on the tender documents as conveying the best information the owner can give. It is not good enough to provide information that is misleading, incomplete or inaccurate with the intention that the more experienced or knowledgeable bidders will ferret out the problems from clues: **Cardinal Construction**, supra.

3. Where an owner has special knowledge gained through years of investigation and then invites bids within a relatively short tender period, where it knows that reliance will necessarily be placed on the tender documents and independent verification of information is impractical, the owner must disclose all reasonably material facts which may have a bearing on the tenderers' bid: **Cardinal Construction**, supra; **Edgeworth Construction**, supra; **BG Checo**, supra.

4. If the owner has not verified information in the tender documents, it has a legal duty to inform tenderers in clear terms that they should not rely on this information, putting the tenderers on notice to undertake their own investigations and inquiries: **Carman Construction**, supra. For this to be practical, adequate time for independent investigations is required. The shorter the bid period, the stronger the inference that greater reliance will be placed on the contract documents, in the absence of a clearly worded "nonreliance" clause: **BG Checo**, supra.

5. If, after the tender documents are prepared and delivered, the owner learns they are inaccurate, it owes a legal duty to the tenderers to inform them of the true facts: **Cardinal Construction**, supra.

[696] The plaintiff asserts that necessary information in the possession of the defendant was not communicated, and that the information that was communicated misrepresented the actual conditions.

[697] In considering what standard of care to apply to the defendant I am guided by the referral by Klar, supra, on p. 217 to the decision of Learned Hand in **Conway v. O'Brien** (1940), 111 F.2d 611 (2nd Cir.), where it is stated at p. 612:

> "The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injury others, taken with the seriousness of the injury if it happens, balanced against the interest which he must sacrifice to avoid the risk."

[698] **Cognos**, supra involved the standard of care required of an employer to make full disclosure to an employee of relevant information about the nature and existence of the employment opportunity for which he had applied, so the plaintiff employee could assess the risk involved in leaving his employment and joining the defendant. The representation at issue concerned the risk of termination with the defendant occurring. The court considered when a person is deciding whether to enter a contract with terms governing termination: an assessment is made by the person as to the risk of such termination occurring, the more stringent terms being a possible deterrence to entering into the contract. A plaintiff must therefore assess the risk of entering a contract in the face of the contractual provisions, and in so doing is entitled to rely on what was represented in the contract.

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[699] Iacobucci, J., said at pp. 122-123:

> "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." (emphasis added)

[700] In **BG Checo**, supra, the defendants called for tenders to erect transmission towers and string transmission lines. The plaintiff's representative inspected the area by helicopter before its tender was submitted, noting that the right-of-way had been partially cleared and that there was evidence of ongoing clearing activity. There was no direct discussion between the plaintiff and defendant with respect to further clearing that would be done before the award of the contract. The plaintiff relied on a representation in the contract documents, which stated that "[c]learing of the right-of-way and foundation installation has been carried out by others and will not form part of this contract". In fact, no further clearing took place between those dates.

[701] The defendant asserted that at the time of tender it did not intend to perform any more clearing of the right-of-way and further, that the tender documents required that the tenderers inspect the site and observe for themselves the extent of the clearing, and bid accordingly. The defendant had contracted the clearing out to another company, and had knowledge that the work was not done adequately. This was not disclosed to the plaintiff, even though the evidence indicated that the defendant was aware it would affect the successful tenderer.

[702] The Supreme Court held that negligent misrepresentations induced the plaintiff to enter into the contract at a price less than if it had known the true facts. The representation in the clause was that by the contract date, the clearing would be completed. Neither the tender nor contract documents disclosed the fact that the defendant did not intend to do any further clearing. This nondisclosure of highly pertinent information was negligent.

[703] In **Cardinal Construction**, supra, the plaintiff entered into an agreement with the defendant city to reconstruct sewers and watermains. The tender documents on which the plaintiff successfully bid were prepared by a consulting engineer hired by the defendant. The documents showed an "Underground Bell Cable" which the plaintiff understood to be a two-inch plastic-covered cable, and on which their bid was based. The defendant became aware during the tender period that this cable was actually a concrete duct structure, but did not disclose this, resulting in a substantial increase in cost to the contractor. The plaintiff sued, one of the grounds being negligent misrepresentation of the nature of the cable which induced them to enter into the contract.

[704] Henry, J., found the city liable for negligent misrepresentation: the defendant intended the tender documents to induce bidders to become committed to a contract for a price in reliance on this. He said at p. 189:

> "In these circumstances there was a duty imposed upon the city to take care that the information positively presented was accurate, or to warn bidders that it required verification. That duty of care was breached."

The defendant also had a duty to inform the

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bidders upon learning that representations were not true.

[705] The Supreme Court of Canada in **Edgeworth Construction**, supra, recently affirmed the liability of an engineer by holding that an engineering firm owed a duty of care to an individual bidder on a construction contract and was liable for negligent misrepresentation. If those who prepare information for a tender package know that this information will be relied on, and negligently misrepresent the state of affairs, they will be liable in tort to the bidders.

[706] The vicarious liability of an owner for the actions of its agents and consulting engineer has been confirmed in **Pearson**, supra; **Davie Shipbuilding**, supra; **Mueller (Karl) Construction Ltd. v. Northwest Territories Commissioner**, [1991] N.W.T.R. 1 (C.A.).

[707] The misrepresentations and nondisclosures that the plaintiff has proven are set out above. I find that a duty of care arose out of the relationship between the parties. Applying the standard of care of the reasonable owner issuing an invitation for tenders, I find that the defendant has failed to meet this standard, constituting negligence.

[708] Thus, I am satisfied that the defendant was deceitful in its actions respecting the upstream pervious borrow and the downstream foundations areas, and negligent with respect to all three areas. Its tortious conduct was an inducing cause of the plaintiff entering this contract.

IV. Does The Contract Limit Or Negative The Liability Of The Defendant?

[709] I must now consider whether, having satisfied myself that the plaintiffs have established a prima facie case of liability for breach of contractual warranties and tortious misrepresentations, such liability is limited or negatived altogether by the express terms of the contract. I have set out in my summary of the facts above the disclaimer or exculpatory clauses which the defendant contends protect it from liability, and will only replicate them here if necessary.

A. General Principles Of Interpretation

[710] The wording of any clause purporting to limit or exclude liability for actionable misrepresentation or breach of contract must be carefully scrutinized. Such clauses, to be effective, must be drafted with complete clarity. As the Supreme Court of Canada stated at p. 428 of **Bauer v. Bank of Montreal** (1980), 32 N.R. 191; 110 D.L.R.(3d) 424 (S.C.C.), exemption clauses are subject to special rules of construction:

> "In construing such a clause, the court will see that the clause is expressed clearly and that it is limited in its effect to the narrow meaning of the words employed and it must clearly cover the exact circumstances which have arisen in order to afford protection to the party claiming benefit. It is generally construed against the party benefiting from the exemption." (emphasis added)

[711] Exculpatory clauses are thus subject to the contra proferentum canon of construction, being construed against the maker, as that party could have used whatever words he or she wished for protection.

B. Exculpatory Clauses And Fraud

[712] I have found that the defendant made misrepresentations and nondisclosures which are actionable in deceit with respect to the pervious borrow and downstream foundation

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areas.

[713] It has long been established that exculpatory or limitation clauses cannot excuse fraudulent misrepresentation. The leading authority is **Pearson**, supra. The court unanimously found that the defendant city could not escape liability for its fraudulent statements by inserting clauses providing that the contractor could not rely on them. Halsbury, L., stated at p. 356:

> "The action is based on the allegation of fraud, and no subtly [*sic*] of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury."

[714] Hereford, L.J., also rejected the defendant's arguments, saying at p. 362 that "fraud vitiates every contract and every clause in it".

[715] These passages were adopted in **K.R.M. Construction**, supra. The British Columbia Court of Appeal stated at pp. 284-285 that where a claim is based in deceit:

> "An owner who makes fraudulent misrepresentations as to the accuracy of quantities contained in the precontract documents cannot invoke the saving provisions in the contract as a defence to a charge of deceit."

[716] That exclusionary clauses avail a fraudulent representor was affirmed by the Alberta Court of Appeal in **TWT Enterprises**, supra.

[717] I therefore conclude that the clauses in the contract relied upon by the defendant have no effect upon the defendant's liability for deceit in the pervious borrow and downstream foundation areas.

[718] Had I reached a different conclusion regarding whether the defendants were deceitful, I would have had to consider whether the clauses effectively absolved the defendant's liability for negligent misrepresentation and breach of contract. I must also evaluate the clauses with respect to the north abutment area.

C. The "Inspection And Investigation" Clause: Section 1-2.13

[719] Section 1-2.13 of the Instructions to Tenderers states:

> "The tenderer is required to investigate and satisfy himself of everything and of every condition affecting the works to be performed and the labour and material to be provided, and it is mutually agreed that submission of a tender shall be conclusive evidence that the tenderer has made such investigation."

[720] I will refer to this and similar provisions purporting to shift to the bidder the risk of failing to detect adverse site conditions as "investigation clauses".

[721] The issue is whether contract provisions requiring the contractor to make its own inspections, investigations and conclusions, are sufficient to foist upon it the risk of site conditions being different from those represented in the tender documents.

[722] The tenor of the law from various jurisdictions is that a tenderer will have discharged the obligation to investigate and become satisfied of the conditions of the work if he or she becomes informed by accepting the basic information conveyed in the tender documents, where the clause:

(1) does not specify the sources of information to which the tenderer may have

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regard, and

(2) does not provide that in making the investigations the tenderer must not rely upon any material supplied by the owner or its engineer.

[723] The decision of the Australian High Court in **Morrison-Knudsen v. Commonwealth of Australia** (1972), 46 A.L.J.R. 265 (H.C.), is particularly instructive in this regard. The plaintiff contractors sued the Federal Government, alleging breach of a duty to take reasonable care to ensure that information in a tender package relating to the nature and content of soil underlying the proposed site was accurate. The plaintiff alleged this information was false, inaccurate and misleading. The issue was whether certain exculpatory provisions answered the plaintiff's claim.

[724] Several clauses were similar to those in the contract in issue. Clause 3(1) provided that:

"Plans, Specifications, Etc. (i) The Contractor shall be deemed to have examined the Plans, Specifications, Schedules, General and Special Conditions of Contract and all other contract documents carefully and also to have informed himself as to the site and local conditions affecting the carrying out of the Contract." (emphasis added)

Clause 04 provided that:

"Site Conditions: The Contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, including but not restricted to those bearing upon ... Any failure by the Contractor to acquaint himself with the available information will not relieve him from responsibility for estimating properly any difficulty or the cost of successfully performing the work. The Commonwealth assumes no responsibility for any conclusions or interpretations made by the Contractor on the basis of information made available by the Commonwealth." (emphasis added)

[725] The court unanimously held that these clauses do not absolve the defendant of liability. Barwick, C.J., stated at p. 267, with respect to clause 3(1):

"I did not read these words as limiting the 'information' to that which the contractor has discovered by his own independent endeavours. In my opinion, he will have relevantly informed himself by acceptance of the basic information conveyed by the defendant."

[726] With regard to clause 04 respecting the contractor's failure to acquaint himself with the "available information", it was held at p. 267:

"Again, the 'available information', must, in my opinion, include the information communicated by the defendant. That information certainly cannot be excluded by reading the word 'available' as meaning 'available as a result of or by reason of the plaintiffs' own efforts'."

[727] There is also a long line of American jurisprudence holding that investigation clauses in construction contracts do not necessarily preclude contractors from suing upon misrepresentations in the tender documents.

[728] The leading American authority is the United States Supreme Court's decision in **Hollerbach v. United States** (1914), 233 U.S. 165 (U.S.S.C.). A contract for the repair of a dam represented that the dam had been backed with broken stone, sawdust and sediment, when it was actually backed with

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a soft slushy sediment, making the work much more expensive. The court found at pp. 177-178 that the contractor was entitled to rely upon the express material representation in the specifications:

> "[T]he specifications spoke with certainty as to a part of the conditions to be encountered by the claimants ... [T]he specifications assured them of the character of the material, - a matter concerning which the government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding on the government, and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as a basis of the contract left in no doubt. If the government wished to leave the matter open to the independent investigation of the claimants, it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity." (emphasis added)

[729] **Hollerbach** was adopted in **Cardinal Construction**, supra, to support the conclusion that the contractor in that case was entitled to rely upon negligent misrepresentations in the tender documents notwithstanding an investigation clause.

[730] In **Bernard McMenamy Contractors Inc. v. Missouri State Highway Commission** (1979), 582 S.W.2d 305 (Miss. A.C.), the contractor sued for breach of warranty. The evidence disclosed that the Highway Commission had prepared a soil survey a year before the contract was put to tender, describing actual subsurface conditions which contradicted the description in the tender documents. This report was not disclosed to prospective bidders.

[731] The defendant argued that terms of the contract negatived any warranty regarding underground conditions, relying on very broad clauses, some of which were set out at p. 310:

> "The contractor further agrees that he is fully informed regarding all of the conditions affecting the work to be done, and labour and materials to be furnished for the completion of this contract, and that his information was secured by personal investigation and research and not from any estimates of the Commission; and that he will make no claim against the State or Commission by reason of any representation of any officer, agent, or employees of the Commission.
>
> "The ... bidder, declares ... that he has carefully examined the location of the proposed work, the plans, Standard Specifications, and special provisions heretofore mentioned ...
>
> "The conditions indicated on the plans and in the proposal represent information available from surveys and studies, but the submission of a bid shall be considered proof that the bidder has made his own examination and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of the plans, specifications, supplemental specifications, special provisions, and contract."

[732] The court found that such clauses did not preclude recovery where there was a

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positive misrepresentation in the specifications by the owner as to soil conditions, with knowledge of the actual conditions by the owner. The specifications had stated that the plans were based upon "information available from surveys and studies ..." However, the plans did not correctly indicate the character of the rock to be excavated, and the information available to the Commission in that regard was not provided to bidders.

[733] Another decision similar to this case is **Public Constructors Inc. v. State of New York** (1977), 390 N.Y.2d 481 (S.C.A.D.). The plaintiff contractor sued for breach of a highway construction contract, alleging that the defendant State had furnished inadequate and misleading information regarding site conditions. Further, the defendant did not disclose to bidders a series of studies commissioned from private consultants over the previous decade which presented a considerably different picture of the contract site.

[734] The defendant claimed that it was not liable because the bidder failed to conduct adequate pre-bid on-site investigations, and because a clause in the contract said that bidders could not rely upon the accuracy of the descriptions of subsurface conditions in the bidding documents. The court rejected these contentions, stating at p. 485 that such exculpatory clauses would not insulate the defendant from liability where site conditions are not as represented in the contract, and inspection by the contractor would not have revealed their incorrectness.

[735] In **Thomsen-Abott Construction Co. v. Wausau (City)**, 100 N.W.2d 921 (Wis. A.C.), the Appellate Court of Wisconsin held that if the only way the subsurface conditions can be ascertained by the bidder is to excavate the whole work site, then a contractor bidding on a public work project is entitled to rely on the express representations contained in the plans, even where a contractual clause places the duty of investigation upon the contractor.

[736] As I noted earlier, Canadian courts are sensitive to the realities of the tendering process. I am attracted to the American approach that a site investigation must be both practically feasible within the time allotted, and have been capable of disclosing that the representations were false, before an investigation clause can negative the effect of express representations in the tender documents as to site conditions.

[737] The Supreme Court of Canada analyzed an investigation clause with an express contractual warranty in **BG Checo**, supra. The majority applied the canon of construction that where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. The clauses giving the plaintiff the general obligation for misunderstandings and errors in the tender documents and for satisfying itself as to the site, the work and all contingencies, was construed as not having been intended to negate the specific obligation for clearing which the contract placed on the defendant. Thus the express contractual representation that the clearing work would be done by others was found to be actionable notwithstanding the site investigation clause.

[738] The above cases are premised upon the entitlement of a bidder to rely upon information conveyed by the owner in evaluating the project. However, as noted in **BG Checo**, an owner may negate the existence of a duty of care through a properly worded "nonreliance" clause, such as in **Carman Construction**, supra.

[739] A clause expressly forbidding reliance by a tenderer upon information conveyed in the tender package can thus shift full responsibility of detecting adverse site conditions to the contractor.

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[740] In this case, the investigation clause is in rather general terms. Section 1-2.13 merely requires the tenderer "to investigate and satisfy himself of everything and of every condition affecting the works to be performed and the labour and material to be provided"; it does not specify what information he may have regard to in conducting this investigation. In particular, neither this clause nor any other forbid the plaintiff from considering and relying on the soils information conveyed in the tender package. Far from forbidding reliance, this clause provides a licence to the bidder to use this information in preparing its tender.

[741] Furthermore, the evidence is clear that a visual site inspection could not have revealed the true subsurface conditions in the Paddle River valley respecting the pervious borrow, nor the buried waste in the downstream foundation, nor the concealed slide in the north abutment. Nor was it possible for the plaintiff to conduct its own intensive soils investigation, duplicating that of the defendant, in the time allotted for the preparation and submission of tenders.

[742] This section is not sufficient to give the plaintiff the entire risk of site conditions being different than those represented in the tender documents. I find that the plaintiff discharged the obligation placed upon it in this section by reviewing and accepting the basic information conveyed to it in the tender documents and by making a site visit.

D. Clauses Disclaiming Responsibility For Interpretations By The Contractor Of Information In The Tender Documents

[743] Several provisions in the contract purport to disclaim responsibility for interpretations made by the contractors from geotechnical information provided in the tender documents.

[744] Section 6.3.3 provides:

> "The boundaries of the pervious borrow area are shown on the drawings and the distribution of pervious borrow in the pervious borrow area is indicated by the strip logs shown on the drawings. The Contractor shall be responsible for any interpretations, deductions and conclusions which he, or others employed by him, make from this information." (emphasis added)

[745] The relevant part of section 1.13 provides:

> "The soil information for the pervious borrow area is shown on the drawings so that the Contractor can evaluate his operation for borrow excavation. Geotechnical cross sections of the impervious borrow area, and the south abutment area, are shown on the drawings. No geological interpretations of these cross sections have been provided and the Contractor is responsible for any interpretation he or others employed by him make from this information." (emphasis added)

[746] Section 8 of the Thurber Report provides:

> "Two cross sections of the south abutment have been prepared, and are included in the drawings, to show representative borehole logs along the dam centreline and along the spillway centreline. These cross sections show information which is available for a more detailed review on the borehole logs in Schedule 'F'. No geological interpretation has been provided on these cross sections.
>
> "Neither Thurber consultants nor the Alberta Government take any responsibility for interpretations made by others from this or any geotechnical information provided to Tenderers. If there is any conflict

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of information between that contained in this report and that detailed in Schedule 'C' of the Specifications, the Specifications shall take precedence." (emphasis added)

[747] **Morrison-Knudsen**, supra, contained similar clauses disclaiming responsibility for interpretations made by the contractor from information supplied. A document setting out the results of site investigations carried out on behalf of the Government provided, was set out at p. 269:

"This Document Does Not Form Part Of The Contract Documents. It shall be clearly understood by Tenderers that the Commonwealth will not be responsible for any interpretation or conclusions drawn by the Tenderer in regard to site conditions based on the information contained herein."

[748] In construing this clause as not precluding an action for misrepresentation in the site information, Barwick, C.J., stated:

"This document quite clearly conveyed to the plaintiffs essential basic information as to soil content of significant portions of the site. The defendant sought to protect itself against responsibility for any interpretation or conclusion drawn in regard to site conditions based on the information thus conveyed. To my mind the very form of this reservation suggests a recognition that the basic information is likely if not, indeed, expected to be accepted for what it is, and also as a basis for inferences or conclusions as to site conditions. There are, in my opinion, no words in this quotation from the site information document which would convey to the plaintiffs that no responsibility was accepted for the basic information ... [The Solicitor-General] would have the quotation read as if it expressly provided 'This information is furnished for the convenience of bidders and is not part of the contract. The information is not guaranteed and any bids submitted must be based on the bidders' own investigations and determinations' [citation omitted]. But in my opinion the words purporting to limit responsibility .. are much more limited in their scope; they are confined to such inferences or conclusions as the tenderer might make for itself by reason of or upon them." (emphasis added)

[749] Turning to the case at bar, section 6.3.3 is itself recognition by the owner that this indispensable basic information is expected to be accepted by the contractor for what it is, and as a basis for inferences or conclusions as to site conditions. The clause does not disclaim responsibility by the owner for the information in the contract, but only for the inferences which the contractor draws from that information. Liability is not excluded for reliance on the basic information provided, or its accuracy.

[750] Section 1.13 expressly relates only to the geotechnical cross sections of the south abutment and the impervious borrow areas. There is no exculpatory clause applying to the statement in the first paragraph, that all boreholes and test pits within the area of the dam site are included in the drawings and the logs in schedule F.

[751] Finally, section 8 of the Thurber Report does not exclude liability for interpretations made by others from this or any geotechnical information provided to tenderers. There is no exclusion of liability for interpretations made by Thurber Consultants or Alberta Environment, and that is what is in issue here.

C. Clauses Disclaiming The Accuracy Of The Information Provided In The Tender Documents

[752] The only disclaimer of responsibility

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for the accuracy of any information included in the tender documents is in section 1.13. It is important to construe this clause in the context of the entire section, to ascertain precisely to what it relates. The section is set out below:

> "The Engineer has obtained certain information regarding soil conditions in the area covered by the Contract. The approximate locations of all boreholes and test pits within the area of the dam site are shown on the drawings and the logs of these holes are given in Schedule F.
>
> "The soil information for the pervious borrow area is shown on the drawings so that the Contractor can evaluate his operation for Borrow Excavation. Geotechnical cross sections of the impervious borrow area, and the south abutment area, are shown on the drawings. No geological interpretations of these cross sections have been provided and the Contractor is responsible for any interpretation he or others employed by him make from this information.
>
> "Included in Schedule E is a reported entitled 'Geotechnical Information for Contract Bidders'. Other technical reports, photographs and information may be viewed by Tenderers, by arranging a meeting with Alberta Environment.
>
> "The accuracy of this information is not guaranteed and in no circumstances whatever shall the Engineer be held responsible or liable to the Contractor for any consequences resulting from the strata, groundwater and/or conditions as actually encountered being different from those implied in this information. Additional payments on such grounds will not be made under any circumstances." (emphasis added)

[753] I interpret the portion of section 1.13 which states that "[t]he accuracy of this information is not guaranteed" as meaning only that the engineer is not the insurer or guarantor of the accuracy of the information. It does not displace or negate the representation implicit in this section and in the geotechnical information in schedule E that the technical studies were prepared in accordance with sufficient and proper engineering standards and procedures, nor for that matter that all relevant geotechnical information in the possession of the defendant was disclosed in the tender package.

[754] It was the same representation respecting the standard of engineering used in gathering disclosed information which grounded liability in **K.R.M. Construction**, supra. In that case, the Instructions to Bidders said: "[The quantities] are not in any way guaranteed and are subject to revision." The Court of Appeal held that the question to be answered was whether the defendant owner made a proper estimate in the first place.

[755] Also, the contract stated: "The information upon which this proposal is based was obtained by the proposer through his own sources of knowledge and was not derived from any officer or agent of the railway company."

[756] The trial judge made the undisturbed finding that if taken literally, that bidder's proposals were not based on the tender packages, then bidders could not obtain from the tender documents such basic information as the identity of the owner, the nature of the contracts and the location of the work.

[757] At p. 206 a further portion of the contract was set out:

> "This contract is made and entered into by

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the Contractor and the Company on the distinct understanding that ... the execution of this contract by the Contractor is founded and based upon his own examination, knowledge, information and judgment and not upon any statement, representation, or information made or given by, or upon any information derived from any quantities, dimensions, tests, specifications, plans, maps, or profiles made, given or furnished by the Company and that any statement, representation or information if so made, given or furnished, was made, given or furnished merely for the general information of bidders and not in anywise warranted or guaranteed by or on behalf of the Company ..."

[758] It was held that this clause could not apply to the tender package itself, since that was and indeed had to be provided to bidders, but only to any additional information which might be furnished by the owner.

[759] The Court of Appeal held at pp. 284-285 that the owner could rely upon the saving provisions in the contract documents as to the accuracy of the quantities stated therein when the claim was based on breach of contract, but not where it was based on deceit.

[760] Clause 43 was of the "non-reliance" variety enforced in **Carman Construction**, supra. The provision clearly stated that the contract was entered into on the distinct understanding that the contractor did not rely upon any information provided by the owner. I noted earlier that section 1.13 does not prohibit any such reliance by the plaintiff, but on the contrary expressly invites it. I distinguish the dictum in **K.R.M. Construction** on this basis.

[761] I note that the defendant has not protected itself by an exculpatory clause such as that which the same Government employed in **Catre Industries**, supra, part of which states: "The information pertaining to the data as shown has been compiled for the use of the Department of Highways. No responsibility will be assumed by the Department for the correctness or completeness of the data shown ..."

[762] In my view, section 1.13 merely indicates that the engineer, and not the department itself, does not assume responsibility for the information; the section refers only to the "Engineer", and so is directed solely at the individual persons acting within the scope of their employment under the defendant. No attempt was made in section 1.13 to shield the engineer's employer from liability. The contract in **Catre Industries**, in contrast, provided that no responsibility shall be assumed by the Department.

[763] The Supreme Court has severed the issue of the liability of the employer from that of its employees, as the two do not necessarily operate in tandem, each issue determined independently by the wording of the exclusion clause and the circumstances of the case: **London Drugs Ltd. v. Brassart and Vanwinkel Ltd.**, [1992] 3 S.C.R. 299; 143 N.R. 1; 18 B.C.A.C. 1; 31 W.A.C. 1, and **Edgeworth**, supra. Therefore there is no incongruity in my construing section 1.13 as being intended to prevent individual employees of the defendant from being personally sued by bidders for misrepresentations, whilst not affording the same protection to their employer. Thus, to paraphrase **Edgeworth**, supra, finding the defendant liable will not circumvent any contractual promise, since there was no promise that the defendant is not responsible for negligent misrepresentations in the tender documents.

[764] Also, the wording of section 1.13 must be closely scrutinized to ascertain precisely from what liabilities the engineer is to be absolved. To reiterate, it provides that: the

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engineer will not be held responsible or liable for any consequences "different from those implied in this information." (emphasis added)

[765] The defendant has not protected itself from liability for negligence in the compilation and disclosure of express information in the tender documents which is incorrect or misleading, merely disclaiming responsibility for conditions implied by that information. In determining the application of such a clause, and what is express or implied, I am guided further by the decision of Bayda, J.A., in **Fischback**, supra.

[766] This clause does not seek to exclude liability for any implied terms including those requiring full disclosure and good faith, since those terms do not arise implicitly from the "information" referred to in section 1.13, but rather from operation of law out of the circumstances and relationship of the parties.

F. Conclusion

[767] In conclusion, applying the rules of strict construction to the contractual exclusion clauses relied on by the defendant, I find that the liability of the defendant for breach of contract and tortious misrepresentation is not limited or excluded in any way, by the exclusionary clauses referred to above, or, by any other exclusionary clauses set out in the contract documents.

Adverse Inferences

[768] As the trial wound to a close, counsel for the plaintiff on a number of occasions alleged that adverse inferences ought to be drawn from the failure of the defence to call a host of witnesses that the plaintiff, in its wisdom, deemed the defendant ought to have called. Those witnesses ranged from representatives of TCL to various of the defendant's former employees and also included a variety of the defendant's present employees. The doctrine of adverse inference is in fact a very narrow one. It arises when someone has an evidentiary burden to establish an issue and does not call evidence in respect of that issue. It arises most often when a plaintiff fails to call someone intimately involved - and whom only they could call - on a particular point (for example a plaintiff is injured, sees a doctor, fails to call that doctor at trial in respect of those alleged injuries). It can however also arise where a prima facie case has been made out against a defendant which now requires the defendant to provide a response, again, with evidence which was only open to the defendant to raise. If that situation does not arise, or if a technical or legal defence is available to a defendant, the defendant is entitled to require the plaintiff to prove its case with its witnesses. I am not prepared to make any adverse inferences against the defendant for its failure to call witnesses.

[769] I am not prepared to draw adverse inferences arising out of the defendant's decision not to call certain potential witnesses.

Is Opron Construction Ltd. The Proper Plaintiff

[770] The defendant argues that Opron Construction Co. Ltd. is not entitled to recover any damages as it has not suffered a loss. The defendant says that only Opron Inc., the plaintiff's mother company, has suffered a loss since Opron Inc. incurred all costs and gained all revenues relating to the PRD project.

[771] This contention is not logical, nor is it consistent with the common law principles relating to agency law and contract law. It

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will be recalled that Opron Construction Co. Ltd. is the party to the contract, made under seal, and it is in the name of this party that the action is brought.

[772] The "agreement" between Opron Inc. and Opron Construction Co. Ltd. explicitly creates an agency relationship between the parties. Pursuant to this agreement, Opron Construction Co. Ltd. is to act as the "Prête-Nom" for Opron Inc. in the solicitation and obtaining of contracts in the western provinces of Canada. Article 3.00 of the agreement states:

> "Alberta (Opron Construction Co. Ltd.) shall have the authority and power to present bids and enter into contracts with respect to construction projects located in the western provinces of Canada, in its own name, for and on behalf of and as Prête-Nom for Opron." (emphasis added)

[773] In the statement of claim, as amended, the plaintiff pleads at paragraph 51:

> "The plaintiff brings this action on its own behalf and as agent for and on behalf of Opron Inc., a corporation incorporated under the provisions of the Quebec **Companies Act**."

[774] Although this reference to Opron Inc. was added in the first amendment to the statement of claim, it will become apparent that according to the principles of agency law and contract law this addition was not even necessary in order for the plaintiff, Opron Construction Co. Ltd., to claim damages for breach of contract or tort.

[775] An agent who signs in his own name is deemed to have contracted personally unless a contrary intention appears from the documents. It is clear in the case at bar that Opron Construction Co. Ltd. has contracted personally with the defendant. (**Alberta Alarm Division v. Rescom Development Group Ltd.** (1985), 15 C.L.R. 284 (Alta. Master)).

[776] When an agent, having authority to contract on behalf of another, makes a contract in his own name, the fact that he is a mere representative undisclosed brings the doctrine of the undisclosed principal into play. By this doctrine either the agent, or the principal when disclosed, may be sued; and either the agent or the principal may sue the other party to the contract. (Cheshire and Fifoot's **Law of Contract** (1986) (11th Ed.) pp. 473-476; Fridman's **Law of Agency** (6th Ed.) pp. 228 to 241; **Pople v. Evans**, [1968] 2 All E.R. 743, at 746-747 (Ch. D.) and **Chitty on Contracts** (25th Ed.) vol. 2 (1983) Sweet & Maxwell pp. 53-54).

[777] Fridman states that, just as there are some instances in which the agent may be personally liable on the contract made for his principal, so too there are instances in which the agent may personally sue the third party. At p. 224, Fridman states:

> "Agent personally liable. The most important instance is where the agent is personally liable on the contract, for it is only reasonable and just that an agent from whom a remedy for breach of contract can be sought by the third party should himself be able reciprocally to enforce the contract." Fridman's **Law of Agency** (6th Ed.), at pp. 207-218

[778] Fridman further discusses the liability of an agent of an undisclosed principal, in his article **Recent Developments in Canadian Law: Commercial Law** discussing **Owl Construction Co. v. McKee & Finnegan's Ltd.** (1987), 62 Nfld. & P.E.I.R. 162; 190 A.P.R. 162 (Nfld. C.A.).

> "... This is more frequently the case where the agent has acted for an undisclosed

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principal, as seen in the **Owl Construction** case. The agent in such situations may sue on or enforce the contract as well as be made liable under it.

"**Clark (W) Land Services Ltd. v. Roxy-Clarion Petroleum Ltd.** (1986), 47 Sask.R. 31 (Q.B.); **Toners Garage Ltd. v. Brentwood Motors Ltd.** (1988), 91 N.B.R.(2d) 239; 232 A.P.R. 239 (Q.B.); **Alberta Alarm Division v. Rescom Development Group Ltd.** (1985), 15 C.L.R. 284 (Alta. Master)." (emphasis added)

[779] Halsbury also supports the proposition that an agent of an undisclosed principal has the right to enforce the contract and to sue upon it:

"Any person who makes a contract in his own name without disclosing the existence of a principal, or who, though disclosing the fact that he is acting as an agent on behalf of a principal, renders himself personally liable on the contract, is entitled to enforce it against the other contracting party, notwithstanding that the principal has renounced the contract. **Allen v. F. O'Hearn and Company**, [1937] A.C. 213." **Halsbury's Laws of England** (4th Ed.), volume 1(2), at para. 179

[780] Further at para. 181 of **Halsbury's**, the learned author states:

"An agent who has paid money on behalf of his principal to a third person under such circumstances that the principal, if the payment had been made by him, would have been entitled to recover the money, may bring an action in his own name for money had and received against the third person."

[781] In **Smith v. Lasko et al.**, [1986] 5 W.W.R. 716; 41 Man.R.(2d) 86 (Q.B.), at p. 726, De Graves, J., quoted, with approval, the principles stated in **Bowstead on Agency** (15th Ed. 1985), at p. 432:

"Undisclosed principal. Where the principal is undisclosed at the time of contracting, the contract is made with the agent, and he is personally liable and entitled on it. The principal also may intervene to sue, and may be sued, but the latter only subject to the general rule that nothing must prejudice the right of the third party to sue the agent if he so wishes. This is therefore a case where both agent and principal are liable and entitled." (emphasis added)

[782] As far as the extent of damages and loss that Opron Construction Co. Ltd. has suffered, it is of no accord or relevance to the defendant that there is an agreement between the plaintiff and Opron Inc. which makes Opron Inc. liable to cover the costs and obtain the revenues of the contracts entered into by its agent, Opron Construction Co. Ltd. The Prête-Nom Agreement between Opron Construction Co. Ltd. and Opron Inc. is governed by Quebec law so far as it concerns their rights and obligations inter se. That agreement and the law which governs it cannot, in the ordinary case, affect relationships between Opron Construction Co. Ltd. and the defendant that are governed by Alberta law. (Fridman's **Law of Agency** (6th Ed.), pp. 346 to 351).

[783] In **Bowstead on Agency**, the learned author states at p. 431:

"The case of the contract made by the agent of an undisclosed principal acting for his principal, however, requires special treatment in this context, for here the contract is that of the agent and it is clear that the agent must be able to sue on it just as he is liable upon it, even though he may be eventually liable to transfer the

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proceeds of the action to his principal." (emphasis added)

[784] Bowstead further states at p. 432 that even if the agent is reimbursed by the principal for his loss, there is case authority that the agent may nevertheless recover in such cases.

"The situation may be likened to that of an injured plaintiff to whose rights the insurer who has payed him is subrogated. Equally, it is submitted that a buyer of goods which prove to be shoddy may recover the difference in value even though he resold them under a contract which effectively excluded his liability, or gave them away as a gift.

"This is not a case where the agent recovers the principal's loss; rather it is one where the agent seems to recover the contemplatable loss arising out of the breach of contract, and it is held no defence to the party in breach to prove that by virtue of the plaintiff's dealings with someone else the incidence of the actual loss may be different. Hence, it does not follow that the proceeds of the action are necessarily held on trust: the agent may be under an obligation to adjust the position on an in personam basis." (emphasis added)

[785] Support for this proposition is also found in **Allen v. F. O'Hearn and Co.**, [1966] All E.R. 828, at p. 830 (P.C.), where the Privy Council said:

"The supposed agent's rights would be to recover the damage suffered by him on the footing that he had been principal ... What happens to the proceeds of a successful claim by such an agent is another matter. By virtue of his fiduciary relation to his principals, he may have to account to them for what he receives; but this is not the concern of the other party."

[786] The defendant does not point to any case law or authorities to support their contention that the plaintiff has no right to recover any damages for breach of contract.

[787] The only authority the defendant mentions is **Vancouver Equipment Corp. v. Sun Valley Contracting Ltd.** (1979), 16 B.C.L.R. 362, as authority for the proposition that Opron Inc., as principal, cannot be substituted for the plaintiff in this action, Opron Construction Co. Ltd. The plaintiff does not argue that Opron Inc. should be substituted as plaintiff.

[788] The defendant also cannot contend under the law of torts, that Opron Construction Co. Ltd. has not suffered damages. Support for this view is found in **Morley v. Moore**, [1936] 2 All E.R. 79 (C.A.), which held that an insured is not obliged to refrain from suing a third party for damage caused by the third party's negligence merely because he (the insured) has been paid in full by his own insurers, pursuant to an agreement between them and the insurers of the third party by which each insurance company paid for damage to its own insured (a "knock-for-knock agreement"), and that the insured, if he sued and was successful must account to his insurers for any sum received in respect of a matter in which they have paid him. Essentially, the Court of Appeal decided that a wrongdoer could not escape paying damages to an insured simply because the insured had been paid his loss by his own insurance company.

[789] Basic contract law principles also support the proposition that an agent has a right to sue in its own name and recover damages.

(a) Opron Construction Co. Ltd. is a principal party as concerns the defendant as it

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signed on its own behalf and under seal and therefore is entitled to exercise the rights and remedies arising from the contract.

(b) Opron Construction Co. Ltd. is actually pleading for itself as concerns the defendant since it is the owner of the rights in the dispute.

(c) Opron Construction Co. Ltd. is the sole party capable of releasing the defendant.

(d) Opron Construction Co. Ltd. is liable to the defendant for the proper execution of the contract and is also entitled to enforce the execution of the contract in his own name.

(e) Opron Construction Co. Ltd.'s standing as an agent (Prête-Nom) resides in its own apparent title of ownership of the rights vested in it pursuant to the Prête-Nom Agreement.

[790] Applying the principles enunciated in the authorities referred to above to the facts of this case, it is clear that the defendant cannot successfully contend that Opron Construction Co. Ltd. cannot sue, both in contract and tort, in its own name and claim damages incurred for and on behalf of its principal, Opron Inc. The damages recovered by the agent and this adjustment has no relevance to the defendant with respect to the contract made with the agent. Therefore, it is not necessary for Opron Construction Co. Ltd. to assign its cause of action and right to damages to its principal, Opron Inc., nor is Opron Construction Co. Ltd.'s loss limited to the terms of its revenue entitlement stipulated in the agreement with its principal, Opron Inc. As between the defendant and Opron Construction Co. Ltd., revenues and expenses and consequent losses are determined by the construction contract and not by the agreement between the agent and the principal.

Quantum Assessment

Introduction

[791] Since the Crown is liable it is then necessary to quantify Opron's claim. The Crown proposes a "modified total cost approach" which uses total costs and total revenues, with some slight variations, to arrive at a starting point for the damage claim. Elton suggested this approach because the documents and information generated by Opron do not allow a more detailed breakdown of the claim.

[792] Opron has proposed a "claim item v. nonclaim item approach" as outlined in exhibit 651. Opron's approach relies upon the reallocation of costs outlined in the Weekly Cost Reports. This reallocation of costs was done after the fact and done without detailed source documents. A similar reallocation of revenues has not been done by Opron. As a result, Opron's approach does not compare costs with the appropriate revenues, thereby distorting the claim.

[793] Opron's method of damage calculation was summarized by Copeland in exhibit 769. The first objective of the damage calculation method was to determine which items of work were affected by the breaches of the contract and which items of work were not affected. This determination created two broad classes of work, referred to generally as the affected work and the unaffected work. By virtue of the manner of presentation of the damage calculation in Schedule I of Copeland's report, exhibit 651, these classifications were also referred to at trial as items "above the line" (affected items of work for which a claim is made) and items "below the line" (unaffected items of work

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for which no claim is made). Those two broad classifications were then further subdivided into various work items.

[794] The first step was to determine Opron's total cost for the construction of the Paddle River dam. Opron's costs for the Paddle River project were recorded in its general ledger. The general ledger documents were reviewed by both Cameron and Copeland. The purpose of the review was to confirm that the amounts recorded in the general ledger were in fact spent at Paddle River. Where necessary, adjustments were made to remove from the total cost shown in the general ledger any amounts which did not relate to Paddle River.

[795] The general ledger was created and maintained for accounting purposes. The general ledger did not allocate and record costs on a work item by work item basis for each job, it only recorded total costs for each project, broken down into five accounts. For the purposes of the damage calculation, the general ledger was used only to determine the total cost incurred by Opron on the Paddle River project. The supporting and source documentation underlying the general ledger, such as invoices, was then used to reconcile various areas of the costs recorded.

[796] Opron maintained a set of records at the job site entitled Weekly Cost Reports. The Weekly Cost Reports (exhibits 618A and 618B) were a management tool employed by Opron to provide a record of the costs expended on the project. Those costs were broken down and allocated to individual items of work. The Weekly Cost Reports were set up so that there was generally at least one work item listed on the report for each pay item identified in the contract. The Weekly Cost Report also separated costs in two major categories, direct costs and indirect costs. Direct costs are the costs of the labour, equipment, fuel, material or subcontractors required to complete a given item of work. Indirect costs are costs for the job as a whole, or costs that apply to several work items. Indirect costs include items such as superintendents, surveying, the costs associated with the camp, equipment repairs and equipment servicing.

[797] Opron also tracked the amount of work performed in each of the individual items shown on the Weekly Cost Reports. By comparing the cost to the work performed to the amount of the work completed, Opron was able to use the Weekly Cost Reports to track its financial progress on the project. The Weekly Cost Reports were prepared by Opron's field staff, based upon the daily time sheet estimates of various other costs such as equipment and fuel. The Weekly Cost Reports were not formal accounting documents nor were they a direct part of the accounting system employed by Opron.

[798] The starting point for the allocation of costs into the various work items shown on the Weekly Cost Reports was Opron's time sheets. The time sheets were completed daily. The time sheets recorded the description of the work performed that day and the labour and equipment hours employed on that work. The man-hours and equipment hours for the various types of equipment were cumulated to the described item of work. The costs of the various items of work were determined by multiplying the equipment and labour hours by the estimated hourly costs for labour, equipment and fuel. Other costs such as those arising from subcontracts were allocated on the basis of the amount of work performed multiplied by the full cost to Opron of that work as defined by the various subcontract agreements. Similarly, purchases of various supplies and material made for the project were allocated to the work item to which the purchase applied.

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[799] The Weekly Cost Reports were not intended to record the total costs of the PRD project, with the accuracy required for formal accounting purposes. The Weekly Cost Reports were prepared using, in part, estimates of various costs. The actual costs, as recorded on invoices and other records, were generally not available until weeks or even months after the Weekly Cost Reports were prepared. These actual costs were, as stated above, recorded in the general ledger.

[800] However, the Weekly Cost Reports do provide a basis upon which to allocate the actual costs from the general ledger to the various items of work performed. The Weekly Cost Reports were used in the damage calculation as the basis upon which the total cost, from the adjusted general ledger, was allocated between the items of work.

[801] Step 3 of the damage calculation was simply a comparison of the costs recorded by partially reconciled Weekly Cost Reports to the total cost recorded in the general ledger.

[802] Step 4 of the damage calculation was to group the direct costs for the numerous work items as recorded on the Weekly Cost Reports into the 15 items which appear on the Schedule I of the damage calculation, exhibit 651. This step involved a review of the various work items listed in the Weekly Cost Reports to determine into which damage calculation item those Weekly Cost Report items should be placed. The costs recorded on the partially reconciled (following Step 2) Weekly Cost Reports for the various work items were then cumulated so that an interim total cost for each of the various work items was determined.

[803] Step 5 was the allocation of the difference between the partially reconciled Weekly Cost Reports and the actual total cost expended at Paddle River as recorded by the general ledger for the various items of work identified in Step 4. The purpose of this step was to ensure that the total direct cost, from the general ledger for the Paddle River project was included in the work items contained in the damage calculation.

[804] Steps 4 and 5 dealt only with the direct costs as shown on the Weekly Cost Reports and the difference between the partially reconciled Weekly Cost Reports and the general ledger.

[805] Step 6 was the allocation of the indirect costs as recorded in the Weekly Cost Reports to the various damage calculation items.

[806] Step 7 was the allocation of the revenues received by Opron from Alberta Environment into the same damage calculation items as had been identified in Step 4. The total revenue received is recorded in Alberta Environment's Progress Estimate 21, included in exhibit 617. Three of Opron's submitted unit rates, mobilization and demobilization, grubbing and impervious borrow, had been, to a limited extent, unbalanced. The method of the allocation of the revenues removed and eliminated the effects of the slight imbalance in the submitted unit rates. It was important that the revenues allocated to the items match with the costs allocated, so that an appropriate comparison could be made.

[807] Step 8 was the comparison of the costs, plus a margin, to the revenue received to determine the amount of the damages suffered by Opron. Certain of the damage calculation items were calculated on the basis that those items were extra work. In those cases the value of the extra work was determined by reference to the hours worked, multiplied by the appropriate hourly

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rate as defined by the contract and deducting the amount of the revenue received to determine the amount of the damages suffered by Opron with respect to those items.

[808] The analysis of Opron's approach which follows will consider what assumptions are made by Opron when proposing its approach. Then, there will be a review of these assumptions to determine whether there is a factual basis, as presented in the evidence, to support the assumptions. Some of the assumptions are:

(a) all cost overruns are the responsibility of the defendant;

(b) costs as recorded in the general ledger are accurate;

(c) the cost collection system implemented by Opron is accurate and can be used to allocate costs in the claim format proposed by Opron;

(d) costs and related revenues have been consistently allocated to the various claim and nonclaim items;

(e) the work done by the subcontractors in the pervious and impervious areas can, for the purpose of the claim, be separated from the work done by Opron's forces; and

(f) it is possible, given Opron's records, to accurately allocate costs and revenues.

[809] After one gets past Opron's assumptions and the validity of these assumptions, one is faced with the inherent weaknesses in Opron's approach and the calculation of its claim. In this regard, the following matters will be considered:

(a) impact of Opron's unbalanced bid on the claim as presented by Opron;

(b) impact of the treatment of certain costs as indirect costs during the bid and then treating these same costs as direct costs during the costing of the actual job;

(c) impact of Opron's failure to account for the use of an average unit price for the pervious and impervious aspects of the job when presenting its claim (hard work v. easy work);

(d) impact of Opron treating a portion of its claim as extra work even though the work in question is not extra work as defined by the contract;

(e) impact of the Weekly Cost Reports not being in the same format as Opron's proposed claim; and

(f) impact of Opron's failure to successfully reconcile the costs as recorded in the general ledger with the costs as recorded in the Weekly Cost Reports and the treatment of the resulting "unallocated costs".

[810] In addition to the above, Opron's claim as outlined in exhibit 651 will be considered. Also, Opron's allocation of costs and revenues relating to Mobilization and Demobilization and Care of Water along with Opron's proposal with respect to margin will be considered.

[811] Before proceeding any further it is important to note that whichever approach is used to calculate damages, the calculation quantifies the total cost overrun. This cost overrun is the starting point for the quantification of damages. Cost overruns which have no relationship to the alleged breaches or actions of the defendant such as bid errors, unbalancing the bid, errors in production, errors in supervision, errors in labour and equipment utilization, errors in scheduling, errors in subcontracting and errors relating to the plaintiff's misinterpre-

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tation of the weather conditions must be deducted. When these deductions are made, the cost overrun which can be attributed to the claim advanced by Opron is left.

[812] The calculation of damages is a question of fact, using broad principles to guide the assessment. (**Penvidic Contracting Co. v. International Nickel Co. of Canada Ltd.** (1975), 4 N.R. 1; 53 D.L.R.(3d) 748, at 758 (S.C.C.)). In addition to keeping the broad principles in mind, it is necessary to look at each step of the assessment process to ensure its validity. Then it is necessary to look at the entire picture to ensure the assessment makes sense. As Elton stated in his evidence, it is essential to step back and look at the end result.

[813] In terms of the broad principles, the general rule is that the plaintiff is entitled to be put into the same position, as far as money can do it, as he would have been in had the wrong not been committed. (**McGregor on Damages** (15th Ed. 1988), at p. 469). This general proposition is further clarified in that the measure of damages for breach of contract and tort is:

> A. Breach of Contract - the plaintiff is to be put in the position it would have been in had the contract been performed as agreed.
>
> B. Tort - the plaintiff is to be put in the position it would have been in had the misrepresentation not been made.

[814] As set out in **McGregor on Damages** (15th Ed. 1988), at p. 469, para. 727:

> "... In contract, however, the wrong consists not in the making but in the breaking of the contract and therefore the plaintiff is entitled to be put into the position he would have been in if the contract had never been broken, or in other words, if the contract had been performed. The plaintiff is entitled to recover damages for the loss of his bargain. In tort, on the other hand, no question of loss of bargain can arise: the plaintiff is not complaining of failure to implement a promise but of failure to leave him alone. The measure of damages in tort is therefore to be assessed on the basis of restoring as far as possible the status quo ante."

[815] Thus, in contract, the plaintiff is entitled to recover his loss of bargain and in tort the plaintiff is entitled to be restored to the position he would have been had the representation not been made - put the money back into the plaintiff's pocket which the plaintiff spent because of the misrepresentation. Simply put, the tortious measure of damages does not include loss of bargain or profit. Further, the tortious measure of damages is used when calculating damages based on fraudulent misrepresentation or the tort of deceit or fraud. (S.M. Waddams **The Law of Damages** (2nd Ed. 1992), p. 5-19). Thus, depending on how the action is framed and decided, the plaintiff may or may not be entitled to recover its loss of bargain or profit.

[816] A second general principle is that the plaintiff is only entitled to recover losses which can be tied to the breach or tortious act complained of. Briefly, the plaintiff is calculating its damages by totalling its cost and adding a sizeable component for margin and then deducting revenues. As will be discussed later, this approach is inappropriate because it fails to deal with items which affect the plaintiff's loss but which have no relationship to the alleged breach of contract or the alleged tortious act. The losses or cost overruns which can be attributed to the plaintiff and which are independent of the allegations presently being considered, must

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be deducted from the claim. This was set out by the British Columbia Court of Appeal in the decision **Morrison-Knudsen Co. Inc. et al. v. British Columbia Hydro and Power Authority** (1978), 85 D.L.R.(3d) 186 (B.C.C.A.), at p. 248:

> "If the respondents are given the full contract price, including the price for extra work, the full compensation for any damage flowing from breaches, we do not consider that the result would be unfair or unequitable or unjust. It may be that they will lose money on the job, but there is nothing inherently unjust, inequitable or unfair about that. Their bid may have been low or they might not have worked efficiently."

[817] These broad principles should be kept in mind when considering the calculation of damages which follows.

[818] In order to properly quantify the plaintiff's claim, it is essential that the costs and revenues are properly identified and then set off against the other. The revenues are determined during the bid as set out in the unit prices. Thus, if as the plaintiff suggests the costs and revenues should be subdivided, there must be a rational basis for the proposed claim items and evidence to support the allocation of both costs and revenues to the claim or nonclaim item. One can not do as the plaintiff has done and say that they have identified costs for certain nonclaim items and accordingly the remaining costs must be claim items. There must be proof on a balance of probabilities that the costs in question should be allocated to the claim item in question.

[819] After identifying the costs and completing the proper allocation of the costs to various items, there must be a corresponding allocation of the appropriate revenue to the various items. The plaintiff has not allocated revenues so that revenue follows the appropriate costs and, as a result, certain nonclaim items have inflated profits while certain claim items have greater losses.

Modified Total Cost Approach - Crown's Proposal

[820] The Crown proposes the use of the modified total cost approach as the appropriate method of quantifying the plaintiff's claim. The modified total cost approach starts with total costs, adds margin, if appropriate, and then deducts total revenues, leaving the total cost overrun. It has been agreed by Elton, the defendant's witness, the Extra Work as defined in the contract and identified by the plaintiff as Extra Work in nonclaim Item 15 in Schedule 1 of exhibit 651 can be separated from the remaining items. This separation is possible because of the nature of the "Extra Work", in that it has been paid on a force account basis and the costs and revenues have been recorded separately and it is not interrelated with the other work. This is the only item which is clearly not interrelated with the remaining costs and revenues, and accordingly is the only item which can be separated from the claim calculation.

[821] An outline of the defendant's proposed modified total cost approach is attached as Schedule "A". Using this approach, the total cost overrun or the starting point of the plaintiff's total claim is $2,212,111. This amount includes margin calculated at 9.88%. It should be noted that the defendant's calculation in Schedule "A" has used the total costs as indicated in the Weekly Cost Reports and has not included the unallocated costs of $280,472, being the difference between the general ledger and the Weekly Cost Reports. (The general ledger being $280,472 more than the Weekly Cost Reports.) The rationale for not including the unallocated costs in the total costs is that the

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plaintiff has not provided any conclusive evidence to indicate where the alleged costs of $280,472 were incurred. Further, evidence has been given that these costs may not even relate to the project.

[822] The defendant's use of the modified total cost approach calculates the total cost overrun for the entire project to be $2,212,111. No attempt has been made at this point to determine if this amount relates to the claim of the plaintiff or relates to actions of the plaintiff totally independent of the claim. As discussed earlier, the $2,212,111 is a starting point from which errors made by the plaintiff with respect to the plaintiff's bid, scheduling, planning, equipment selection and utilization, efficiency, losses due to weather and other inefficiencies related to the plaintiff's operation must be deducted.

[823] It should be noted that the plaintiff's claim relating to the impervious aspect of the work is essentially two claims; one, relating to the alleged scope changes in the foundation work and the other relating to impact costs from the pervious work. On an arbitrary basis, the Crown proposes that one-half of the impervious claim arises out of the alleged scope changes in the foundation and the other half of the impervious claim arises out of the impact claim from the pervious work. This proposed split is based on the amount of time the plaintiff is alleged to have experienced problems in the foundation work versus the amount of time the plaintiff is alleged to have experienced problems because of the pervious work in the 1982 season. Basically, Opron alleges that it encountered problems in the foundation area in August and September, 1982, and that problems were encountered with the supply of pervious material in October and November, 1982.

[824] As Opron has failed to breakdown this claim, the split proposed is a best guess based on the timing of cost overruns.

(A) Total Cost Approach, Pervious Alone

[825] Schedule "B" outlines the total cost overruns in the pervious operation using a modified total cost approach and using the items as identified by the plaintiff as relating to the pervious aspect of the project. The identified items in this calculation are taken from Copeland's report (Schedule 1, exhibit 651). The items from Schedule 1 of exhibit 651 are:

(a) Item 3 - Pervious Borrow Impacts, 1982/83.

(b) Item 5 - Downstream Channels, Extra Work. The costs included are the costs identified in the Weekly Cost Reports. The costs proposed by the plaintiff, being the equipment hour costs as based on Alberta Transportation rates, have not been used. The Alberta Transportation rates are for extra work items and merely inflate the plaintiff's costs from the actual costs recorded in the Weekly Cost Reports. This work is not extra work as defined by the contract.

(c) Item 11 - Gravel Items and Riprap, Sub to Maio - this item has been included as it relates directly to the pervious operation as set out in the bid and estimate. Item 11 is included in the calculation in order to ensure a complete and accurate picture of the total costs and revenues relating to the pervious operation.

(d) Item 13 - Riprap, Subcontracted to Harico and Schafer - this item relates directly to the pervious operation as calculated and quantified in the bid and esti-

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mate. The same rationale applies as discussed in Item 11 above and will be discussed in more detail later.

(e) Item 1 - Maio Public Works Act, if this item is to be included anywhere it should be included in the calculations relating to the pervious aspect of the claim as it relates to Maio's operation.

[826] As discussed above, part of the impervious claim is an impact claim arising out of problems encountered with the supply of pervious material. This impact claim should not be included in the impervious claim as it relates directly to the pervious aspect of the work. Thus, the impact claim which has been deducted from the impervious claim (being 50% of the impervious claim as calculated in Schedule "C") should be added to the pervious claim as calculated in Schedule "B". By doing this, all aspects of the pervious claim will be grouped together.

[827] Again, the cost overruns relating to the pervious work, in the amount of $1,921,050, as outlined in Schedule "B", is a starting point. From this amount any losses or costs resulting from the inefficiencies of the plaintiff or its subcontractors and losses due to bid inefficiencies must be deducted.

(B) Total Cost Approach - Impervious Alone

[828] Schedule "C" outlines the total cost overrun in the impervious operation using a modified total cost approach. As in the pervious calculation, the items used to determine the cost overruns in the impervious operation are the items identified by the plaintiff as relating to the impervious aspect of the project. The identified items in this calculation are taken from Copeland's Report (Schedule 1 of exhibit 651). The items included are:

(a) Item 2 - Impervious Impacts re: Pervious Borrow and Costs Relating to Scope Changes, 1982/83.

(b) Item 4 - Downstream Foundation - Extra Work. As with the pervious claim, Downstream Channels - Extra Work, the costs included are the actual costs as recorded by the plaintiff, not the costs as calculated pursuant to the Alberta Transportation rates as the Alberta Transportation rates have no relation to the plaintiff's costs. Again, the work related to the downstream foundation is not extra work as contemplated by the contract and no attempt was made by the plaintiff during the period of the work to treat these costs as an extra work item.

(c) Item 10 - Dirt Items, Subcontracted to Kidco - These costs have been included in order to present the total picture of costs relating to the impervious aspect of the job. Again, the rationale for the inclusion of these costs has been briefly considered above and will be dealt with in more detail later.

[829] Costs for certain items as outlined in Schedule 1 of exhibit 651 have not been included in either Schedule "B" or Schedule "C" as the attempt was to isolate costs only relating to the pervious and impervious aspects of the job. The items not included are:

(a) Item 6 - Stilling Basin Slope Failure, Extra Work (actual costs $26,495).

(b) Item 8 - Legal and Consulting.

(c) Item 12 - Drain Pipe, Geotextile.

(d) Item 14 - Concrete Work, Subcontract to Triumph.

(e) Item 15 - Extra Work.

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(f) Item 16 - Taxable and other costs included in general ledger.

[830] The modified total cost approach, as outlined in Schedule "A", groups related items in such a fashion that revenues, as determined during the bid and estimate, follow the appropriate costs. This approach avoids the pitfalls inherent in the plaintiff's approach whereby costs, often indirect costs, are applied to claim items while the corresponding revenues are not applied to the same claim items, thereby increasing the claim. The total cost approach ensures that appropriate revenues are set off against the related costs, thus avoiding the situation of revenues being allocated to nonclaim items while the related costs are allocated to claim items thereby eliminating an illusion of profits for certain nonclaim items.

Claim Item v. Nonclaim Item - Critique Of Opron's Proposal

(A) General

[831] The plaintiff's approach, as outlined in Copeland's Report allocates costs and revenues into claim items (above the line) and nonclaim items (below the line). This allocation of costs was done by Opron personnel and not by Copeland. This approach assumes the accurate and proper allocation of both costs and revenues among the various items. Further, this approach assumes that the revenues are allocated to offset the related costs. However, this has not been achieved.

[832] The allocation undertaken by the plaintiff is subjective as it is not based upon nor supported by documents that were prepared at the time the costs were incurred. The process undertaken by the plaintiff was done after the fact and based on memory or intuition as to what allocation was appropriate. The plaintiff's main on-site document, the Weekly Cost Reports, even with all of its pitfalls, is not structured in such a way as to lend credence to the allocation of costs suggested by the plaintiff. Further, Copeland, the plaintiff's witness, must rely on the representations of the plaintiff's employees when assessing the allocation. He neither has the expertise nor the source documents to test the proposed allocation of costs. Thus, although the allocation of costs is part of Copeland's Report, these allocations are done by others with Copeland having very little input.

[833] The format of the plaintiff's claim ignores the plaintiff's estimate. The plaintiff used an average unit price when costing the bulk of the pervious and impervious aspects of the work. Yet, not all of the work was the same degree of difficulty. As a single unit price has been used for aspects of the work, it would be expected that the easier, more productive work done at the average unit price would offset the harder, more costly work done by the average unit price. However, the plaintiff's approach fails to take this into account. The plaintiff's approach does not allow the work done by Kidco, by and large the easier, more productive work paid at the average unit price, to be offset against the harder, less productive work done by the plaintiff's own forces at the average unit price. Opron's approach fails to set off the hard work against the easy work, creating the illusion of a profit in Item 10, Dirt Items, subcontracted to Kidco, a nonclaim item below the line and conversely creating the illusion of a sizeable loss in Item 2, Impervious Impacts re: Pervious Borrow and Costs relating to scope changes, 1982/83, a claim item above the line (reference to exhibit 651 - Schedule 1).

[834] The plaintiff's approach also ignores the composition of the revenues. The revenues or unit prices were determined during

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the bid stage and are the sum of the direct costs for a particular item, a portion of the indirect costs (or general conditions) and markup. Thus, the revenue for each item, is to recover the related direct costs, a portion of the indirect costs and markup. If, for some reason, costs are treated as indirect costs at the bid or estimate stage and then are treated as direct costs during the actual costing of the project, the result is the revenue will not be set off against the anticipated costs. Again, the result is to create an apparent loss in a particular item and an apparent corresponding profit in another item.

[835] The evidence is that the plaintiff treated some items as indirect costs during the bid stage but treated these costs in the Weekly Cost Reports as direct costs. These costs were allocated to the impervious items. As a result, the costs allocated to the impervious items have been increased without a corresponding increase of the unit price or revenue. This results in an apparent loss when the claim is structured as it is in exhibit 651. Conversely, indirect costs in other items have been reduced yet the revenues remain the same. This creates the impression of a profit in these items. This will be dealt with in greater detail later.

[836] The claim presented by the plaintiff treats Item 4, Downstream Foundation, Extra Work; Item 5, Downstream Channels, Extra Work; and Item 6, Stilling Basin Slope Failure, Extra Work as extra work and calculates the costs using Alberta Transportation rates. The effect of such treatment is to add costs to the items in question, thereby increasing the claim. This work does not fall within the definition or description of extra work as defined in the contract (exhibit 613). Nor has the plaintiff complied with the notice provisions or taken the appropriate steps to determine how the work was to be paid. Clearly, this work should not be treated as extra work for the purpose of quantifying the claim.

[837] Further, the claim as presented by the plaintiff, does not reflect any reduction for bid errors, scheduling and production inefficiencies, supervision inefficiencies, subcontractors' inefficiencies, ineffective utilization of equipment and labour, weather problems and other matters relating to the plaintiff's operation. These losses which arise from errors by the plaintiff, its employees and subcontractors, must be deducted from the total claim by whatever method the claim is calculated.

[838] In conclusion, the format of the plaintiff's claim is artificial and unduly inflates the plaintiff's claim. There are no source documents to substantiate the allocation of costs. The allocation of costs is subjective and result oriented. The claim, as presented by the plaintiff, does not follow the structure or format of the Weekly Cost Reports or general ledger nor does it follow the format of the bid. The claim does not allow revenues to be set off against the appropriate costs, thus creating the illusion of profits in nonclaim items and losses in claim items. Finally, the format ignores the fact that the plaintiff's bid was largely based on an average unit price. Again, by ignoring this there is an illusion of profits in nonclaim items and losses in claim items. These inherent weaknesses artificially increase the plaintiff's claim and accordingly the claim format proposed by the plaintiff should be rejected in favour of the defendant's modified total cost approach.

(B) Plaintiff's Claim Format - Assumptions

[839] The plaintiff has presented a claim format which divides costs and revenues into claim and nonclaim items. This approach requires certain assumptions to be made. Without these assumptions, the format as

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presented by the plaintiff breaks down. I propose to consider and comment on some of the assumptions made in the claim presented by the plaintiff.

(a) All cost overruns are the responsibility of the defendant.

[840] The plaintiff has presented a claim which assumes that all cost overruns were caused by the defendant. This assumption ignores the realities of the job. It ignores any errors made by the plaintiff during its bid and estimate through to the implementation and completion of the work. The evidence presented indicates errors from the bid stage to and throughout the work stages and these cost overruns or errors must be deducted from the claim.

[841] Assuming liability on the part of the defendant and regardless of what approach is used to calculate damages, the cost overruns and errors or inefficiencies caused by the plaintiff must be deducted from the claim as calculated.

(b) Costs as recorded in the general ledger are accurate.

[842] As proof for its claim, the plaintiff has attempted a reconciliation of the costs recorded in the general ledger and the costs recorded in the Weekly Cost Reports. The plaintiff has referred to this step as a partial reconciliation. However, it is in fact a failed reconciliation. The plaintiff can not account for the difference between the costs recorded in the general ledger and the costs recorded in the Weekly Cost Reports. The costs recorded in general ledger are $280,472 more than the costs recorded in the Weekly Cost Report. The difference of $280,472 has been referred to as the "unallocated costs".

[843] The first issue is whether these "unallocated costs" should be included in Opron's costs when calculating the claim. Elton gave evidence that the "unallocated costs" can relate to anything, including something other than the Paddle River Dam. Even though these costs are uncertain, the plaintiff has taken these unallocated costs and allocated them to various claim and nonclaim items. As the origin of these costs can not be determined, these unallocated costs should not be included in Opron's claim.

[844] Secondly, even if I find that these unallocated costs should form part of Opron's costs on this job, the plaintiff assumes its allocation of these costs is proper. The plaintiff's allocation of these "unallocated costs" among the various items is set out in Schedule IV of exhibit 651.

[845] The plaintiff has allocated $277,119, or approximately 98.8% of the "unallocated costs" to claim items, thereby increasing the claim. In support of its allocation of the "unallocated costs" the plaintiff points to its attempted reconciliation. However, Elton gave evidence that such reconciliation is not complete nor can it be relied upon. A reconciliation is only effective if it is a complete reconciliation, if all cost centres have been considered and reconciled. The plaintiff is taking its partial reconciliation of third party costs and nonclaim items, and saying these costs do not belong here so they must belong in the claim items. The plaintiff can not attempt to reconcile one area and then use this to justify an allocation of costs to the remaining areas. One can not allocate costs using a process of elimination.

(c) The cost collection system implemented by Opron is accurate and can be used to allocate costs in the claim format proposed by Opron.

[846] Although the format of the Weekly Cost Reports is not structured as the plaintiff's claim is presented, there is an assump-

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tion that the costs incurred on site have been properly identified and recorded in the Weekly Cost Reports. Elton's evidence is that the Weekly Cost Reports contained many arithmetic errors. In addition, there are several versions of Weekly Cost Reports for the same period and several times where the Weekly Cost Reports were not prepared in a timely fashion. The Weekly Cost Reports were not providing the timely or accurate information that was expected of them.

[847] Coupled with the above, there were no ongoing successful attempts to reconcile the Weekly Cost Reports to the general ledger. Given these errors and shortcomings, the Weekly Cost Reports do not provide the necessary information to assist in the allocation of costs as has been done by the plaintiff.

[848] In conclusion, the Weekly Cost Reports were not always prepared in a timely fashion and second versions for certain periods were prepared. As Elton stated, the different version of Weekly Cost Reports for the same period shows different cumulative costs for certain bid items. There does not appear to be any explanation except that there was an error. This casts doubt on the validity of the allocation of costs among the various items.

(d) Revenues follow costs - costs and related revenues have been consistently allocated to the various claim and nonclaim items.

[849] Although this will be dealt with in more detail later, it is important to remember that it is not only necessary to properly allocate costs to the various claim and nonclaim items proposed by the plaintiff, but it is also necessary to allocate the corresponding revenues. When allocating costs among the various claim and nonclaim items, the plaintiff has virtually ignored the costs as structured in the bid and estimate. The plaintiff has reworked the costs in order to develop the present format of the claim. However, no similar step has been taken with respect to the allocation of revenues.

[850] The plaintiff has applied the revenues as determined in the estimate. The plaintiff has for example, taken costs relating to impervious items and divided these costs into nonclaim items and claim items but the revenues have not been determined and divided beyond the average unit price as established in the bid.

[851] By failing to break down the revenues in a similar fashion as was done for costs, the plaintiff has not ensured that the revenues relating to a particular cost have followed those costs into the item where the costs were allocated. Thus, the claim as presently structured does not give a true picture of where profits and losses occurred.

(e) The work done by the subcontractors in the pervious and impervious areas can, for the purpose of the claim, be separated from the work done by Opron's forces.

[852] One must recall, when Opron bid this job, they bid the job on the basis that their company would be the contractor for the entire job, not just parts of it. It follows then, when one is determining the plaintiff's profit or loss on the job, the entire job must be considered and not just selected parts.

[853] In the impervious and pervious work, the plaintiff's revenues are determined by average unit prices. During the bid stage, the plaintiff completed a series of assessments and came to an average unit price for the impervious aspect of the job (except for total unit price for impervious borrow excavation). The plaintiff has not increased the unit price for the harder, less productive work

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nor reduced the unit price for the easier, highly productive work. In order to properly assess the cost of the impervious work, the easier high productive work must be set off against the harder less productive work. Without setting off these aspects of the job, the harder less productive work, done at an average unit price, will result in a loss or smaller profit than the corresponding easier high production work. Thus, in order to properly and completely analyze the profit and loss picture for impervious work, one must look at the entire job and not just one aspect of the work.

[854] The claim format used by Opron does not treat any of the work differently. The revenue for work done by Opron and work done by Kidco, Opron's subcontractor, are calculated using the average unit price as initially calculated in the estimate. In order to use the approach suggested by the plaintiff, there must be an assumption that both Opron and Kidco are doing an equal share of the harder less productive work, otherwise the use of an average unit price distorts the profit or losses. Although the format proposed by Opron requires this assumption, it is clear from the evidence that Opron did the bulk of the foundation work, which was the harder, less productive work, while Kidco did the bulk of the slope work which was the easier, more productive work.

[855] Given the above, the work done by Opron, being the harder, less productive work and paid at the average unit price will tend to result in an apparent loss while the easier, more productive work done by Kidco at the same average unit price will tend to result in an apparent greater profit. Thus, by dividing the impervious work into work done by Kidco (nonclaim item) and work done by Opron (claim item) the profit and loss picture is distorted. For this reason, the claim format presented by the plaintiff is invalid as all the work related to the impervious aspect of the job must be considered together.

[856] A similar situation occurs in the pervious aspect of the job. Again, for revenue purposes we are dealing with an average unit price. However, the work done by Maio was done closer to the embankment resulting in a shorter haul. The work done by Opron's forces was farther from the embankment, resulting in a longer haul which would be more costly. Although Opron's costs would be greater than Maio's corresponding costs, there has been no attempt to adjust the revenues as determined by the average unit price. Thus, again there appears to be a cost overrun incurred by Opron and a corresponding gain by Maio simply because of the use of an average unit price.

(f) It is possible, given Opron's records, to accurately allocate costs and revenues.

[857] The plaintiff's approach uses a basic assumption that it is possible to accurately allocate costs and revenues. This allocation is particularly important given the format of the plaintiff's claim, allocating costs between claim items and nonclaim items. If costs, which are properly costs related to nonclaim items, are applied to claim items, the claim is increased. The same problem applies with respect to revenues, if revenues relating to claim items are applied to nonclaim items, the total claim increases. Thus, given the plaintiff's claim format, it is imperative that costs and revenues are accurately allocated to the various claim and nonclaim items.

[858] The plaintiff's allocation of costs and revenues is very subjective and lacks documentary support. The claim as presented does not have its origin in any earlier documents. Neither the bid documents nor the Weekly Cost Reports isolate work done by

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subcontractors. However, the plaintiff has used the Weekly Cost Reports, along with time sheets, as a basis for allocating costs in its claim even though the Weekly Cost Reports do not divide the cost of impervious work and pervious work between Opron's forces and Opron's subcontractors.

[859] Because of the lack of cost reporting documents prepared contemporaneously with the work and because there are no documents which are set up in a similar format as the claim presented by Opron, Opron personnel have, after the fact, allocated costs among the claim items and nonclaim items. This allocation is based partially on memory, intuition and what appears proper. Given the necessity of an accurate allocation of costs and revenue among the various claim and nonclaim items and the lack of financial documents to support the allocation, the accuracy of the allocation is very suspect. The evidence presented does not support the assumption that costs and revenues were accurately allocated and accordingly the plaintiff's claim format is invalid.

[860] If the plaintiff's claim format is to be used, the plaintiff must do a detailed analysis of revenues, so as to ensure that the appropriate revenues are following the appropriate costs. The plaintiff must do more than simply calculate and allocate revenues as determined in the bid. The plaintiff must ensure revenues have been allocated on the same basis as the costs have been allocated. No such exercise has been undertaken.

[861] In conclusion, the above assumptions must be made in order to rationalize the approach used by Opron to present its claim. As the facts to support these assumptions are not present then on this basis alone, the approach used by Opron to present its claim is not appropriate.

(C) Review Of Plaintiff's Calculation Of Damages

(a) The impact of Opron's unbalanced bid on the claims as presented by Opron.

[862] There is evidence that the bid prepared by the plaintiff is an unbalanced bid. By itself, there is nothing improper with unbalancing a bid. However, the contractor gambles by moving costs in the bid from a particular item to another item.

[863] In Opron's case, it is apparent that the unit price bid for the impervious borrow excavation has been reduced in relation to the other impervious items. When working through Opron's Cost and Estimate Summary (exhibit 193), it is clear that Item 4 Foundation and Abutment Excavation, Item 5 Conduct Exit Excavation, Item 6 Spillway Excavation and Item 7 Impervious Borrow Excavation have been priced by using the same average total direct costs of $\$1.02/m^3$. However, the unbalancing occurs when adding the indirect costs and markup to arrive at the unit price as bid. Item 4, Foundation and Abutment Excavation; Item 5, Conduit Exit Excavation; and Item 6, Spillway Excavation all have the same amount of indirect costs and markup applied to arrive at a common unit price of $\$1.34/m^3$. However, the bid price for Item 7, Impervious Borrow Excavation is $\$1.13/m^3$. (Exhibit 613, vol. 1, p. 15, item 2-2, Tender Form Schedule "A"), of which $\$1.02/m^3$ represents direct costs. Thus, the same extension, regarding indirect costs and markup, was not used when arriving at the unit price for impervious borrow excavation as was used when arriving at the final unit price of the other impervious items (Item 4 Foundation and Abutment Excavation, Item 5 Conduit Exit Excavation and Item 6 Spillway Excavation). Based on this

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review and keeping in mind that the plaintiff was bidding the impervious work on an average unit price, the unit price for impervious borrow excavation has been reduced in relation to the other impervious items.

[864] There has been evidence that the bid price for the lump sum items, Item 1 Mobilization and Demobilization and Item 2 Clearing and Grubbing, have been increased so as to ensure money up front for the project.

[865] As suggested earlier, there is nothing improper with this approach but a contractor must accept the dangers and outcome of unbalancing the bid. As in the present case, when an item is underbid, as was done by the plaintiff, the contractor is anticipating that there will not be production overruns in the bid item which has a reduced bid price. In the present case the contract quantity for impervious borrow excavation was 1,165,000m^3 yet the actual quantity excavated was 1,277,524m^3 (or 112,524m^3 more than the estimated quantity). Thus, because the plaintiff's bid approach, the plaintiff excavated 112,524m^3 more of impervious borrow excavation at a reduced unit price, a price that would recover the plaintiff's direct costs as bid and only a portion of the indirect costs and/or markup. This gamble by the plaintiff resulted in a loss in terms of this particular item, a loss which is the responsibility of the plaintiff yet which has been claimed from the defendant in the plaintiff's present claim. This loss should be deducted from the plaintiff's claim when calculating the plaintiff's damages.

(b) Impact of the treatment of certain costs as indirect costs during the bid stage and then treating these same costs as direct costs during the costing of the job.

[866] The plaintiff has altered its treatment of some indirect costs from the bid stage to the time these costs were allocated in the Weekly Cost Reports. The bid price, as set out in exhibit 193, Cost and Estimate Summary, or the Tender Form Schedule in the contract documents, is based on a totalling of the appropriate direct costs, a share of the indirect costs and mark up. This calculation results in a unit price, which is the revenue to be earned for each facet of the work. Thus, the unit price, which sets the revenues, determines how the costs for the job are to be recovered. It is the intention when allocating the indirect costs to all bid items that the revenue earned in all these items will offset a portion of the indirect costs. Thus the indirect costs are to be recovered from revenue earned for each and every bid item.

[867] The problem occurs when the costs which are treated as indirect costs during the bid, being the time when the revenues are set, are later treated as direct costs in the Weekly Cost Reports and allocated to specific items. Examples of costs which have been treated in this fashion are foreman ($243,200) and grademan ($46,800). These costs were indirect costs during the preparation of the bid, but then were treated as direct costs when costing the job. Thus, for the purpose of determining the unit price in the bid (revenue), a portion of the costs for foreman and grademan were allocated to all items identified in the bid. However, for costing purposes (in the Weekly Cost Reports and the claim) all the costs relating

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to foremen and grademen were costed or allocated to the impervious items. Thus, the costing or treatment of the costs is not consistent with how the revenues were determined. As a result, the revenue for some items, which during the bid included a portion of the indirect costs for foreman and grademan, do not now have any of these costs applied against the revenue earned resulting in an apparent profit. Conversely, the revenue for the impervious items, which in the bid was only to recover a portion of the indirect costs for foreman and grademan, is as a result of the costing approach implemented in the Weekly Cost Reports required to recover all costs for foreman and grademan. The result being the appearance of a cost overrun or a loss. The apparent profit in some items and the apparent loss in other items is nothing more than a paper profit or loss resulting from a change in the treatment of the indirect costs (foreman and grademan) between the bid stage and the costing stage in the Weekly Cost Reports.

[868] The problem with direct and indirect costs is further emphasized when one considers the claim format presented by the plaintiff. The format provides for certain nonclaim items and claim items. These nonclaim items, are based on bid prices which are the sum of the appropriate direct costs, a share of indirect costs and markup. As reviewed earlier, included in the indirect costs is $290,000 for foreman and grademen. Thus, the revenue for each nonclaim item is intended to capture a portion of these indirect costs. However, because foreman and grademan have been costed in the impervious items as direct costs in the Weekly Cost Reports, none of these costs were applied to the nonclaim items (except Item 10, Dirt Items Subcontracted to Kidco). Thus, as revenue to offset these costs has been calculated in the unit price and as these costs have not been charged against these nonclaim items, it is clear that an apparent paper profit will be created in the nonclaim items. Conversely, there is an apparent cost overrun in the plaintiff's impervious claim items in that all the costs relating to foremen and grademen have been charged to the impervious items yet only a portion of these costs were attributed to the impervious items when determining the unit price (revenue). Thus, there will be cost overruns in the impervious items as the revenues as bid were never intended to recover all of the costs, as costed.

[869] The impact of changing the treatment of costs from indirect costs at the bid stage to direct costs in the Weekly Cost Reports (costing stage) does not affect the total revenues and costs, or the total profit or loss. However, when dealing with these changes in the claim format as presented by the plaintiff there is an impact from item to item. Some items, generally the nonclaim items will show a paper profit while the impervious claim items will show a paper loss. Thus, the plaintiff's claim format, dividing costs and revenues between nonclaim items and claim items is flawed when costs are treated differently between the bid stage and the costing stage without a corresponding change being made for revenues. As stated earlier, the plaintiff has not taken any steps to recalculate or reallocate revenue among the various items. Therefore, the claim approach adopted by the plaintiff is misleading. To use this approach will result in an overstatement of the claim and will reward the plaintiff for losses which in fact have not occurred.

[870] In addition to the above, the Weekly Cost Reports also indicate that costs were recorded as indirect costs in 1982 but there is no reference to related costs in 1983. A

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breakdown of these costs, as indicated in the year end Weekly Cost Reports are as follows:

	1982	1983
Mechanic and Truck	80,658	N/R*
Serviceman	45,034	N/R
Gen. Site Labour	18,083	N/R
Site Lighting	58,900	N/R
Fuel Tanks & Pumps	14,530	N/R
Fuel Trucks	22,517	N/R
Equipment Repair	134,514	N/R

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*No Reference in 1983 Weekly Cost Reports

It should be noted that in the 1983 Weekly Cost Reports the portion dealing with "2A gravel - 1983" including Servicing with total recorded direct costs of $101,463. However, there is no reference to any of the indirect costs, as recorded in 1982, being treated as indirect costs in 1983. Thus again we are dealing with costs which were bid as indirect costs and were to be offset against revenue earned in all items but later being treated as direct costs somewhere in the Weekly Cost Reports.

[871] As with the earlier discussion, the costs have been treated differently from the bid stage to the 1983 construction season but there has been no attempt to make a corresponding reallocation of revenue. The plaintiff's approach has "loaded up" indirect costs in a claim item, without allocating the corresponding revenues and this results in a cost overrun in that item and ultimately an increased claim. The problem associated with this internal allocation of costs can be remedied by looking at the costs and revenues from a global perspective by using the approach suggested by the defendant.

[872] This concern is further illustrated when one considers several nonclaim items, as outlined by the plaintiff in Schedule 1 of exhibit 651, including Item 13 Riprap, Subcontracted to Harico and Schafer and Item 14 Concrete Work, Subcontracted to Triumph. When bid, the unit price for these items was the sum of the appropriate direct costs, a portion of the indirect costs and markup. As with the earlier discussion involving the treatment of foremen and grademen, the revenue for Items 13 and 14 is calculated on the basis of recovering a portion of the indirect costs. The revenue earned in these items is intended to offset a portion of the indirect costs. However, Schedule V

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of exhibit 651 indicates that no indirect costs have been allocated to nonclaim items 13 and 14. Thus, costs as bid have not been set off against revenues as earned, creating an apparent profit in the nonclaim items 13 and 14 and a corresponding loss in the other items. This concern also applies to the other nonclaim items where, for whatever reason, only a small portion of the indirect costs have been costed to an item compared to the allocation of indirect costs when determining the unit price (revenue) during the bid phase. Thus again there is a change in the treatment of indirect costs from the bid stage to the costing stage. The result is the loading of indirect costs in items, generally claim items, that were never intended to be able to recover these costs.

[873] Because of the format used by the plaintiff to present its claim, the loss is being overstated. The plaintiff may respond by arguing that the change in the indirect costs from nonclaim items to claim items was to reflect where in fact those costs were actually incurred. This argument is fine as long as revenues have been allocated to reflect this "reality". However, if the revenues are allocated on the basis of the bid, without any attempt to change the allocation as was done with the costs, then there still is distortion as the revenues have not been set up to follow the costs. If the plaintiff is to change the allocation of the costs there must be a corresponding change of the allocation of the revenues. The plaintiff must either change the allocation of both revenues and costs or leave the allocation of costs as in the bid. The plaintiff cannot change the allocation of costs without changing the allocation of revenues. By doing this, the cost overruns or profits have been distorted.

[874] The only true indication of loss is the modified total cost approach as this approach is not affected by the change in treatment of indirect costs as the change is within a closed system. No longer are there claim and nonclaim items and a concern that revenues are being applied against the appropriate costs. No longer is there a creation of apparent cost overruns in claim items and apparent profits in nonclaim items. If the modified total cost approach is not used, the plaintiff must take the next step and reallocate revenues, a step which has not been taken but a step which must be taken to accurately reflect the alleged loss incurred on the job.

(c) Impact of Opron's failure to account for the use of an average unit price for the pervious and impervious aspects of the job when presenting its claim (hard work v. easy work).

[875] The plaintiff's claim format assumes that impervious and pervious work can be divided into claim and nonclaim items. The plaintiff divides the work based on work done by subcontractors versus work done by Opron's forces. However, again we return to the issue of "easy work v. hard work" and the average unit price. As reviewed earlier, the impervious work, except for the unbalancing of impervious borrow excavation, was bid on an average unit price for both excavation and compaction. Also, the pervious work is based on a single unit price, even though some excavation involves a longer haul which is more expensive. When preparing its bid Opron assumed that the hard work would be offset against the easy work and hoped that when the job was completed it would realize a profit in both the impervious and pervious aspects of the job.

[876] Using an average unit price is proper as long as there is no attempt to break down the impervious and pervious aspects of the

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job into claim and nonclaim items. If there is such an attempt, and the nonclaim item involves the easier more productive work at the average unit price there is bound to be a profit and if the claim item involves the more difficult, less productive work at the average unit price there more likely will be a cost overrun because no longer is there an opportunity to set off the hard work against the easy work. Thus, in order for the claim format advanced by the plaintiff to be proper, there must be an analysis of the type of work being done in the claim items versus the nonclaim items and then there must be a change in the unit price (revenue) to reflect whether the work is hard work or easy work. If this is done, one will have a better understanding as to whether there is a profit or cost overrun and its degree. However, this exercise has not been done, nor is it probably possible to complete the analysis. Thus, the plaintiff's claim format leaves an artificial and inaccurate picture of profit and loss, which has the effect of inflating the claim advanced by the plaintiff.

[877] In order to avoid this inaccurate view of the plaintiff's claim it is necessary to group together all the impervious work as a single item and the pervious work as another single item. The modified total cost approach gives an accurate picture of the cost overruns by allowing hard work to be offset against easy work which avoids the pitfalls of not applying the appropriate revenue against the appropriate costs. Again, the plaintiff's approach to the damage calculation distorts the assessment by not treating costs and revenues in a similar fashion and this can only be rectified by using the modified total cost approach.

(d) Impact of Opron treating a portion of its claim as extra work even though the work in question is not extra work as defined by the contract.

[878] The plaintiff's claim format creates three stand alone claims, being Claim Item 4, Downstream Foundation, Extra Work; Claim Item 5, Downstream Channels, Extra Work; and Claim Item 6, Stilling Basin Slope Failure, Extra Work. Again the problem goes back to the earlier discussion with respect to allocation of costs, the costs cannot be allocated from the existing documents available and there is no basis for advancing a separate claim.

[879] With respect to the downstream foundation claim, there is no separate item in the Weekly Cost Reports to identify the costs relating to the claim item. The allocation was done by Opron personnel well after the fact using time sheets, which describe the areas in question differently, along with intuition and what was alleged to appear reasonable. The effect of this allocation has been to identify the equipment and labour hours involved, treat this work as extra work as defined in the contract and then complete the extensions to determine the claim using Alberta Transportation rates. Once one gets past the problems of allocation, one notes that the effect of using this approach is to claim a sizeable profit in terms of total costs. The profit in terms of costs is as follows:

1. Downstream Foundation - 21.55%
2. Downstream Channels - 34.84%
3. Stilling Basin - 28.10%

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(e) Impact of the Weekly Cost Reports not being in the same format as Opron's proposed claim.

[880] In addition to the problems outlined earlier with respect to the treatment of costs and revenues, if the plaintiff's claim format is to be utilized, the plaintiff must ensure that the costs have been properly allocated among the various items. First, the plaintiff must establish the accuracy of the Weekly Cost Reports, which were the main on-site documents relating to cost allocation. Contrary to the plaintiff's suggestion, the Weekly Cost Reports were not a particularly useful tool. The Weekly Cost Reports contained many arithmetic errors.

[881] Even if the Weekly Cost Reports are accepted as being accurate, they are not in the same format as the claim. The nonclaim and claim items are not, by and large, recorded as such in the Weekly Cost Reports. The Weekly Cost Reports use the job descriptions as found in the bid. However, the claim format used by the plaintiff largely ignores these descriptions by creating new items and then allocating the costs. The allocation from the Weekly Cost Reports to the claim as structured is a subjective allocation which is not precise. This again sheds doubt on the accuracy of the plaintiff's claim format as it is essential to be able to divide costs between nonclaim items and claim items. This allocation is particularly difficult in that costs relating to both impervious and pervious work are allocated to both nonclaim items and claim items, even though there is no such allocation in the Weekly Cost Reports. Again, this illustrates the artificiality of the claim.

(f) Impact of Opron's failure to successfully reconcile the costs as recorded in the general ledger with the costs as recorded in the Weekly Cost Reports and the treatment of the resulting "unallocated costs".

[882] Indicative of the weakness of the Weekly Cost Reports are the costs in the amount of $280,472, which have been referred to as the "unallocated costs". As discussed earlier, these costs arise out of Opron's failure to reconcile the Weekly Cost Reports to the general ledger; the costs recorded in the general ledger being $280,472 more than the costs recorded in the Weekly Cost Reports. The plaintiff suggests that the general ledger total is accurate and thereby acknowledges the inaccuracies of the Weekly Cost Reports.

[883] To further illustrate this weakness, one must only refer to exhibit 881, which indicates a variance between the general ledger and Weekly Cost Reports in excess of $1,500,000 in October, 1982 (where the costs in the Weekly Cost Reports exceeded the costs recorded in the general ledger) to a variance in December, 1983, of over $500,000 (where the costs in the general ledger exceeded the costs in the Weekly Cost Reports). Elton's evidence is that such a variance is not normal and again illustrates the inherent weakness in the Weekly Cost Reports as an accurate tool for allocating costs.

[884] The plaintiff suggests that the $280,472 is not material and should be expected on a job of this nature. However, Elton's evidence is that this amount is material and falls squarely within the materiality guidelines of the Canadian Institute of Chartered Accountants (see exhibit 883). Coupled with the above, the unallocated costs of $280,472 is in excess of 33% of the total profit as bid on this project. In these terms, it is submitted, the unallocated

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costs of $280,472 is material and a loss of this amount to any contractor would cause the contractor a great deal of concern.

[885] Once one gets past the significance of the $280,472 of unallocated costs, one is faced with the plaintiff's treatment of these costs. As discussed earlier, the plaintiff has allocated these costs, whatever they are, back into the nonclaim and claim items. However, 98.8% of these costs have been allocated to the claim items, which effectively increases the claim by $277,119, plus the profit component which the plaintiff claims.

[886] Elton gave evidence that the unallocated costs of $280,472 can not be identified and may not even relate to this job. Given this uncertainty, Elton's approach of deducting the $280,472 from the total costs as indicated in the general ledger is the preferred approach. Thus, as illustrated in Elton's Restated Claim (exhibit 879), the appropriate starting point for total costs is $12,300,333, being the total costs as recorded in the Weekly Cost Reports minus $122,334 which is the net errors located to date in the Weekly Cost Reports. (See exhibit 822).

[887] The modified total cost approach proposed by the defendant (Schedule "A") is calculated on the basis of Elton's evidence, whereby the starting point for total costs is $12,300,333, which is the plaintiff's suggestion for total costs minus the $280,472 of unallocated undetermined costs.

(D) Plaintiff's Claim Items - As Structured In Exhibit 651

[888] Next, specific comments will be made with respect to the claim as proposed by the plaintiff.

(a) Item 1 - Maio Public Works Act.

[889] If I allow this item, the costs claimed relate to the work done by Maio. The plaintiff's claim format has separated the work subcontracted to Maio as a nonclaim item and using the plaintiff's allocations of costs and revenues the plaintiff is suggesting that revenues exceed costs by $344,191. The weakness of the plaintiff's claim format is again illustrated by the failure to set off costs related to Maio against the "money realized" on the Maio subcontract. If the format proposed by the plaintiff is utilized, then the costs identified as Maio Public Works Act, if recoverable, should be set off against the revenue over cost which apparently was achieved in Item 11, Gravel Items and Riprap, Sub to Maio.

(b) Item 4 - Downstream Foundation, Extra Work;

Item 5 - Downstream Channels, Extra Work;

Item 6 - Stilling Basin Slope Failure, Extra Work.

[890] As discussed earlier, these items are not extra work as defined in the "Contract" nor did the plaintiff comply with the procedural requirements relating to extra work as defined in the contract. Assuming these items are claimable and the approach used to calculate this claim is acceptable, the plaintiff used an improper rate for the 773 rock truck when calculating its costs. Exhibit 665, Schedule for Rental Rates for Construction Equipment 1982 - 1983 (Alberta Transportation Rates) outlines what procedure the claimant should use to determine the hourly

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rate for equipment not listed in exhibit 665. The plaintiff did not take the appropriate steps to determine the unit cost of the 773 rock trucks (which is not listed in exhibit 665). Instead the plaintiff has compared the 773 rock truck to a 631D scraper and arrived at an hourly rate of $215.12. If one uses the 1982 Alberta Road Builders Association Rental Rates (exhibit 693) and compares the relative rental rates for a 631D, 637D and a 773B rock truck, to the Alberta Transportation rental rates, the hourly rate for a 773B rock truck would be either 103.87 or 113.05. The calculation is as follows:

	Alberta Road Builders	Alberta Transportation
631D scraper	$201.00/hour Alberta Transportation rate is 66.5% of Alberta Road Builders rate	$133.70/hour
637D scraper	$259.00/hour Alberta Transportation rate is 61.90% of Alberta Road Builders rate	$158.45/hour
773B rock truck	$170.00/hour	to be determined

[891] The rate for a 773B rock truck based on a comparison of hourly rates for 631D scraper, 637D scraper and 773B rock truck is as follows:

$170/hour x 66.5% = 113.05 (compared to a 631D)

$170/hour x 61.1% = 103.87 (compared to a 637A)

[892] Another approach to determine the hourly rental rate of a 773 rock truck is comparing the capacity and rental rate of a tandem with a 773B rock truck. This comparison is more accurate than comparing a 773 rock truck to a 631D scraper, as the scraper performs more functions than just hauling. Assuming that a tandem has a capacity of $8m^3$/load and a 773B rock truck has a capacity of $24m^3$/load, if one uses a factor of 3 times, with an hourly rate of $35 for a tandem, an hourly rate of $105 for a 773B rock truck is appropriate. Thus, the defendant submits that the appropriate hourly rental rate for a 773B rock truck is at the most $113 per hour which is $102 per hour less than the plaintiff's calculation. The plaintiff's total hour claim for 773 rock trucks is:

Downstream Foundation	60.0 hours
Downstream Channels	433.5 hours
Total	493.5 hours

Thus, if the plaintiff's approach is used for Item 4 Downstream Foundation, Extra Works and Item 5, Downstream Channels, Extra Works, then the contract value of extra work, as indicated in Schedule 1 of exhibit 651, should be reduced as follows:

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Item 4, Downstream Foundation

60 hours x $102 = $6,120

Item 5, Downstream Channels

433.5 hours x $102 = $44,217

(c) Mobilization/Demobilization

[893] The plaintiff has treated the lump sum items, Mobilization and Demobilization and Care of Water as items where the costs and revenues are to be allocated among the various nonclaim and claim items. Although Copeland is not sure how Opron's bid was unbalanced, he stated that the revenues of mobilization/demobilization and care of water should be spread among the nonclaim and claim items to undo the unbalancing of the bid. However, a pro rata distribution of the revenues will not serve that purpose as one must have reference to how the bid was unbalanced. The bulk of the unbalancing of the bid involves money moving from Item 7, Impervious Borrow Excavation, to the lump sum items, and accordingly any redistribution of revenues should reflect this.

[894] Again, the end result of the plaintiff's allocation of costs and revenues from mobilization and demobilization and care of water is to increase the claim, for no apparent reason. By referring to Appendix 7 and 9 of exhibit 651, one is left with the following:

[895] Appendix 7 - of exhibit 651, indicates that costs relating to Mobilization and Demobilization and Care of Water have been allocated as follows:

Total costs	$148,721
Allocation to claim items	138,231
Allocation to nonclaim items	10,490

[896] Appendix 9 of exhibit 651 indicates that revenues related to Mobilization and Demobilization and Care of Water have been allocated as follows:

Total Revenues	$475,351.10
Allocation to claim items	285,619.05
Allocation to nonclaim items	189,732.38

[897] The allocation outlined above results in 92.9% of the costs being allocated to claim items, thereby increasing the claim. Conversely, only 60% of the revenues are applied to claim items. In absolute figures, $10,490 of costs are applied to nonclaim items while $189,732.38 of revenues are applied to nonclaim items. (See exhibit 888) This allocation effectively increases the revenues of nonclaim items and puts the bulk of the costs in the claim items. If one accepts the plaintiff's rationale for the allocation of these costs and revenues as undoing the unbalancing of the bid, the revenues should be weighted towards the impervious borrow excavation which was the main source of unbalancing. Alternatively, those items should be treated as distinct items in the claim format. Again, the modified total cost approach proposed by the defendant deals with the problems of improper allocation of costs and revenues by treating the costs and revenues on a global basis.

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(d) Kidco Pumping Claim.

[898] The Kidco pumping claim is a claim advanced by the plaintiff on behalf of Kidco. There is no clear evidence what this claim is, how the claim has been calculated or the basis of the defendant's obligation to Kidco. As there is no evidence to support the foundation of the claim, no award should be made.

[899] Further, no award should be made as the plaintiff does not have standing to advance the claim on behalf of Kidco. The law is that a bare cause of action in tort is not assignable and to advance such a claim on behalf of another offends the rules against maintenance and champerty. (**Fredrickson v. I.C.B.C.** (1986), 3 B.C.L.R.(2d) 145, at p. 152 (B.C.C.A.)). Further, because there is no evidence of the arrangement between the plaintiff and Kidco with respect to this claim, there can be no consideration as to whether the exceptions to the above stated general principle apply to this case.

(E) Margin

[900] As discussed earlier, the tortious measure of damages is that the plaintiff is to be put in the position it would have been in had the misrepresentation not been made. Simply put, the plaintiff is to be compensated for money lost, which does not include loss of bargain. This measure of damages is appropriate for all tortious acts including fraudulent misrepresentation and the tort of deceit or fraud. Thus, any award under these headings should not include compensation for loss of bargain or profit. (**B.G. Checo International Ltd. v. British Columbia Hydro and Power Authority**, [1993] 1 S.C.R. 12; 147 N.R. 81; 20 B.C.A.C. 241; 35 W.A.C. 241, at p. 26 (S.C.C.)). I allow an award under this heading.

[901] The measure of damages for breach of contract, is that the plaintiff is to be put in the position it would have been in had the contract been performed as agreed. Thus, the plaintiff is entitled to recover for loss of bargain or profit. I find there was a breach of contract and I allow an award under this heading.

[902] The issue that remains is how the profit or markup should be calculated, including the percentage markup to be used and what costs should be marked up for profit.

[903] The plaintiff has proposed a margin of 20% with respect to Items 2 and 3. As discussed earlier, the effective margin in relation to costs of the other claim items are:

Item 4 -	Downstream Foundation	21.55%
Item 5 -	Downstream Channels	34.84%
Item 6 -	Stilling Basing Slope Failure	28.10%

[904] As rationalization for claiming this margin, the plaintiff points to the profit apparently realized on the nonclaim items. However, as discussed earlier, the apparent profit on the nonclaim items is based on the improper allocation of costs and revenues. This apparent profit is artificial and has been enhanced by the allocation of revenues from mobilization and demobilization and care of water to the nonclaim items. In addition, revenues in the nonclaim items have not been required to offset costs which were identified in the bid to be offset by these revenues. Coupled with this, there has been a movement of costs away from the nonclaim items to the claim items which has the effect of enhancing profits for the nonclaim items. As these matters have been

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discussed in more detail earlier, a passing reference has been made here. The apparent profit of the nonclaim items is fraught with problems and is not an accurate statement of profit potential.

[905] Secondly, to provide support for its claim of a margin of 20%, the plaintiff points to its experience on other jobs during the same time period. However, the issue simply becomes what jobs are included and which ones are not included. The plaintiff has presented two exhibits outlining a calculation based on Opron's experience in other jobs during the same period. Exhibit 758 indicates a margin of 21.5% and exhibit 763 indicates a margin of 16.54%. In exhibit 890, the defendant indicated that, based on other jobs, excluding the Kakwa River Highway job, the margin is 15.47% and if the Kakwa job is included, the margin is 10.51%. The importance of this exercise is to illustrate that one can manipulate the rate of margin by excluding or including different jobs and the issue merely becomes what jobs should be included in the calculation.

[906] Exhibit 890 provides a breakdown of the margin realized on other contracts based on the size of the contract. Opron appears to be very successful with respect to the smaller contracts, contracts of less than $1,000,000. However, Opron only realized a margin of 6.9% on contracts with costs between $1,000,000 and $5,000,000 and 3.6% on contracts with costs over $5,000,000. This is the telling story, Opron is effective when doing small contracts involving site preparation but when Opron deals with larger, more complex work, like the PRD job, Opron's margin drops dramatically. Whatever the explanation is, it indicates that Opron's claim for a margin of 20% or more is not reasonable given Opron's record.

[907] If Opron is entitled to any margin, at most that margin should be 9.88%, Opron's margin as bid. Opron is attempting to ignore its bid by suggesting that "contingencies" form part of the margin and accordingly the margin as bid was greater than 9.88%. However, there is no indication in any of the bid documents that contingencies, akin to margin, were included in the bid. The plaintiff clearly did not bid all aspects of the work and these unbid aspects of the work would have to be covered by whatever positive bid errors the plaintiff included in its bid. Given the plaintiff's lack of treatment of the alleged contingencies in the bid, before any thought of this issue arose, the plaintiff can not now say that all positive bid errors are contingencies and hence profit while all negative bid errors are damages and accordingly form part of the plaintiff's claim.

[908] The best evidence of the plaintiff's intention or mind set is to look at exhibit 193, Cost and Estimate Summary, where the plaintiff bid 9.88% for margin. This was done before litigation was contemplated. It is difficult to accept a plaintiff coming back 10 years after the bid and saying, see here is a contingency, this is really profit, but I can't point to any document to say this.

[909] Further, in exhibit 493, Appendix 11, enclosures with a letter dated April 4, 1983, the plaintiff calculates profit at 10%.

[910] Further, exhibit 493, Appendix 8 makes reference to a profit allowance of 10%. It must be remembered that these documents relate to the claim which Opron was advancing and reflects Opron's view of

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the matter.

[911] Again, these documents, along with exhibit 193, clearly support at most a margin calculated at 9.88%.

[912] Further, the margin of 9.88% should be applied against the costs as bid. The bargain between the plaintiff and the defendant was a markup of 9.88% of cost as bid, or $831,000. This figure was in contemplation of the parties when the contract was finalized.

[913] If the plaintiff has incurred cost overruns which are the responsibility of the defendant, then the plaintiff should be reimbursed for those overruns. However, there is no mutual intention that the plaintiff should realize margin or profit on the cost overruns. To include a margin or profit on the cost overruns is to put the plaintiff in a better position than the plaintiff would have been in had the breach not occurred, supra, pp. 25-26. This flies in the face of the stated intention of the measure of damages for breach of contract. As the plaintiff bargained for a markup of 9.88% or $831,000, to award more than $831,000 would effectively put the plaintiff in a better position than it would have been had the breach not occurred.

Summary

[914] To this point the flaws of the approach used by Opron to present its damage claim have been considered. One cannot separate the costs and revenues into claim and nonclaim items without doing a complete reallocation of revenues, which has not been done. The plaintiff has subjectively reallocated the costs, without source documents, but the plaintiff has not done the same thing for revenues. The revenues have been applied as bid but the costs have been applied as restructured. In addition to the above, the plaintiff's allocation of costs has directed costs to claim items and thus magnified the claim. The plaintiff's approach also ignores the reality of the contract and the bid. The claim ignores that the impervious and pervious items were bid on an average unit price and that easy work was to be set off against hard work.

[915] The effect of Opron's approach is to move costs and revenues from claim item to nonclaim item and vice versa. The potential effect of each move is to increase the claim.

[916] As discussed earlier, Mr. Elton gave evidence that one can not only consider the validity of each step in the calculation of damages but one must also step back and look at the entire picture to ensure that it makes sense. To this point, the weaknesses of the various steps have been considered. However, it is now necessary to consider the plaintiff's approach and the entire claim and determine whether in fact it makes sense. The absurdity of the plaintiff's format can best be seen by considering the claim for cost overruns and the claim for markup. The following list outlines the markup for profit included in the various items in Schedule 1 of exhibit 651:

Item 2	$652,452
Item 3	$606,295
Item 4	$ 81,865
Item 5	$ 53,525
Item 6	$ 7,447
Item 10	$608,102

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Item 11	$344,191
Item 12	($11,098) loss
Item 13	$212,649
Item 14	$ 66,879
Item 15	$114,347

Total - including Item 15, Extra Work $2,736,654

Total - excluding Item 15, Extra Work $2,622,307

[917] Thus, if Item 15, Extra Work, is excluded, the plaintiff's claim format has resulted in a recovery for markup or profit of $2,622,307. Against this it must be noted that the plaintiff's margin as bid was $831,800 and the plaintiff's entire claim is $4,527,878. Thus, the plaintiff's margin or profit as claimed coupled with the margin or profit in the nonclaim items, is over three times the amount bid by the plaintiff. This confirms the necessity of standing back and looking at the end result to determine if it is reasonable. As Mr. Elton stated in his evidence, it is not reasonable.

[918] In order to avoid those pitfalls, it is necessary to treat the costs and revenues in a single closed system. In a single closed system, the claim cannot be increased by simply misallocating costs or not allowing revenues to properly follow related costs. In order to prevent this the defendant proposes a modified total cost approach, an approach which proposes as a starting point for the calculation of damages Total Costs - Total Revenues = Starting Point. From this starting point the losses due to bid inefficiencies, unbalancing the bid, errors in production, errors in supervision, errors in labour and equipment utilization, errors in scheduling, and weather errors relating to the plaintiff's misinterpretation of the conditions must be deducted.

[919] The strength of this system is that it is not open to manipulation, whether intentional or not.

[920] Attached as Schedule "A" is the defendant's calculation of the plaintiff's damages, as a starting point, based on the modified total cost approach. Schedule "A" is similar to exhibit 879, except that the costs and revenues relating to extra work allowance have been excluded. Mr. Elton acknowledged that as the extra work allowance is based on an entirely different system for costing and recording revenues and is not tied into the bid or the Weekly Cost Reports, it can be separated from the remaining costs and revenues.

[921] As the plaintiff's claim involves two major components, impervious and pervious, attached as Schedules "B" and "C" are the defendant's proposals for the calculation of damages arising out of the impervious and pervious claim. The intention has been to group relevant items together under either the heading pervious or impervious. Schedules "B" and "C" do not include Items 6, 7, 8, 12, 14 or 15 as outlined in Schedule 1 of exhibit 651. These items have not been included as they do not relate to the impervious or pervious claim. Schedules "B" and "C", because of the exclusion of certain items are, like the plaintiff's format, dependent upon Mr. Cameron's allocation of costs and revenues and are subject to the inherent difficulties. Therefore, when considering Schedules "B" and "C" it is necessary to keep in mind that the calculations are subject to the weaknesses, albeit not as drastic, as were discussed when considering the plaintiff's claim.

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[Table continued on page 405]

Schedule "A" - Modified Total Cost Approach

Total Costs		$12,300,333.00
Less: Maio Public Works Act	$152,473.00	
Legal And Consulting	60,298.00	
Extra Work	508,078.00	
Taxable & Other Costs	249,864.00	
		970,713.00
		$11,329,620.00
Margin	831,000.00	
		$12,160,620.00
Revenue		$10,570,934.00
Less: Extra Work	622,425.00	622,425.00
		$9,948,509.00
Cost Overrun		$12,160,620.00
		9,948,509.00
		$ 2,212,111.00

Schedule "B" - Pervious

Total Costs		
Item 3	$2,893,107.00	
Item 5	147,348.00	
Item 11	1,618,731.00	
Item 13	401,674.00	
Item 1	152,473.00	
	$5,213,333.00	$5,213,333.00
Margin		
(9.88% of $5,213,333.00 - $152,473.00)	500,013.00	
		$5,713,346.00

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Total Revenue		
Item 3	1,943,686.00	
Item 5	6,940.00	
Item 11	1,963,957.00	
Item 13	614,323.00	
Item 1	.00	
	4,528,906.00	4,528,906.00
Cost Overrun		$1,184,440.00
Impact Claim Relating To The Impervious Claim		736,610.00
Total		$1,921,050.00

Schedule "C" - Impervious Claim

Total Costs		
Item 2	$3,129,768.00	
Item 4	379,842.00	
Item 10	2,547,658.00	
	$6,057,268.00	$6,057,268.00
Margin (9.88% of $6,057,268.00)		598,458.00
		$6,655,726.00
Total Revenue		
Item 2	1,918,034.00	
Item 4	102,712.00	
Item 10	3,155,760.00	
	5,176,506.00	5,176,506.00
Total Cost Overrun		$1,479,220.00
Cost Overrun Relating To The Impervious Operation	1,479,220.00/2	$736,610.00

[922] I accept the Crown's modified total cost approach and I reject the approach used by Opron. I find that the total cost overall or the starting point of the plaintiff's total claim is $2,212,111. I accept the margin calculated at 9.88 percent. I accept the Crown's rationale for not including the unallocated costs in the total costs.

[923] Having made that determination I must now determine how much of the loss was Opron's own fault. In this judgment I have

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severely criticized Opron in the following categories:

a) Their estimate

b) Their mobilization

c) Their schedules

d) Their bidding errors

e) And I have found fault with their site visit and the fact that they did not study the additional information that was available although other information was concealed.

[924] Counsel recognized how difficult it would be to fix the final damage or figure; that is evident because they provided little in assistance to the court to arrive at a precise number. Nor are they to be blamed. They obviously recognize that the task was an impossible one.

[925] I am convinced that Opron was the author of the majority of its loss. To put a figure on each of these causes of loss is impossible. Any attempt to calculate the plaintiff's claimable loss is so fraught with pitfalls that I would be foolish to attempt it. Small things and minor decisions become major elements. There are so many contingencies that no matter how often I attack the problem, the final figures vary. I cannot put an exact figure on how much the plaintiff harmed itself with bid errors, unbalancing the bid, errors in production, errors in supervision, errors in labour and equipment utilization, errors in scheduling, errors in subcontracting, and errors relating to the plaintiff's misinterpretation of the weather conditions, as well as many other actions or lack thereof which caused the plaintiff to lose money. I know that Opron's claimable loss is under one million dollars ($1,000,000). I know that it is somewhere above $750,000. I know that I will have to use round figures and approximates. I set Opron's claimable loss at $875,000.

[926] Opron, at paragraph 47 of its Statement of Claim specifically alleged that the defendant improperly withheld certain sums of money from Opron after the time when those sums became due and owing. Alberta Environment did withhold from Opron, both in the final payment for work Opron performed under the contract and a large portion of the 15 percent holdback. I reject this claim. The defendant was faced with lawsuits from subcontractors to Opron and they had no idea what the final outcome would be. Furthermore, the contract made it clear that many things had to be done before final payment could be made. Not all things were done to the satisfaction of the owner and as a result they had the right to hold back final payments as they did.

[927] The plaintiff will have judgment in the amount of $875,000 plus interest from October 1, 1983, as set out in the **Judgment Interest Act**.

[928] The parties may approach me concerning costs.

Judgment for plaintiff.

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BOA COMPEER001835

In the Court of Appeal of Alberta

Citation: Color Your World, Inc. v. Robert F. Avery Holdings Ltd., 1987 ABCA 216

Date: 19871104
Docket: 8703 0317AC
Registry: Edmonton

1987 ABCA 216 (CanLII)

Between:

Color Your World, Inc.

Appellant
(Plaintiff)
(Defendant by Counterclaim)

- and -

Robert F. Avery Holdings Ltd. and Robert F. Avery

Respondents
(Defendants)
(Plaintiffs by Counterclaim)

The Court:

The Honourable Mr. Justice Harradence
The Honourable Mr. Justice Stevenson
The Honourable Mr. Justice Foisy

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

J.G. Friesen, Esq., for the Appellant (Plaintiff) (Defendant by Counterclaim)

T.M. Engel, Esq., for the Respondents (Defendants) (Plaintiffs by Counterclaim)

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

FOISY, J.A. (for the Court):

[1] After six weeks of trial stretched over a number of months (restricted to the question of liability), after each side had closed its case, and after written argument had been filed by the plaintiff, the defence applied for and was granted some thirteen amendments to the pleadings.

[2] It should be noted that as a result of a pre-trial conference counsel had agreed to all issues that were to be considered alive for the purposes of the trial. The defence sought and obtained further amendments before the trial and sought and obtained further amendments during the trial.

[3] After the additional amendments had been granted to the defence, defence counsel, when challenged on some questions that would serve to enlarge the issues, gave assurances both to the court and to counsel for the plaintiff that the questioning was not for the purpose of enlarging the issues but for some other purpose.

[4] It is clear that this line of questioning was and is relied on at least in part to obtain results which counsel for the defendant assured was not his intention. This may not have been by design but the assurances had the obvious effect of influencing the whole conduct of the trial. It should be added in reference to some of the amendments that counsel for the defendant knew for some weeks and months of the existence of evidence that might give rise to his tardy application to amend.

[5] Some of the amendments allowed by the trial judge give rise to new and different causes of action. That much is admitted by counsel for the defendant in his factum. The order granting the amendments provides for and may well involve re-opening examinations for discovery, calling new witnesses or recalling witnesses for cross-examination. Costs relating to the amendments were to be paid by the respondent.

[6] We agree with the statement in *McDonald and McDonald v. Fellows et al* that amendments such as these granted after the evidence has been heard will virtually inevitably result in prejudice. The trial judge acknowledged this by stating that much inconvenience, expense and delay would be the inevitable result of allowing the amendments. He obviously concluded that costs would be adequate compensation. With respect we are of the view that he was in error.

[7] Costs may compensate some or perhaps all of the expenses but it will not compensate for the delay, the inconvenience and indeed the complexity involved in now

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trying to sort out what might in effect be a whole new trial interwoven with a previous six week trial. To allow the amendments would be prejudicial and unfair to the plaintiff. The defendant has indicated that he is prepared to submit argument without calling any additional evidence. The plaintiff is not in the same position as the defendant. The plaintiff conducted the trial on the basis of agreed issues as amended before trial and as amended during the trial.

[8] One of the thirteen amendments relates to increasing the claim for quantum. Since that part of the trial is still to be heard we would leave that amendment intact subject to the plaintiff's right to further discoveries.

[9] Subject to the above we would allow the appeal, strike out the amendments ordered by the learned trial judge after the trial on the issue of liability was concluded and remit the matter back to the trial judge to allow him to complete the matter.

[10] The appellant will have costs of the appeal as well as costs of the related applications launched by the respondent.

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Klewchuk v. Switzer, 2001 ABQB 316

Date: 20010419
Action No. 9601-17433

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

ROBERT KLEWCHUK, ARKAY FINANCIAL HOLDINGS LTD. and ARKAY CASINO MANAGEMENT and EQUIPMENT (1985) LTD.

Plaintiffs/Defendants by Counterclaim

- and -

KATHY KLEWCHUK

Plaintiff

- and -

SAMUEL SWITZER

Defendant/Plaintiff by Counterclaim

- and -

SWITZER'S INVESTMENTS LTD.

Defendant

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE J. S. MOORE

APPEARANCES:

Mr. K. E. Staroszik
for the Plaintiffs

Mr. B. C. Yorke-Slader
for the Defendants

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INTRODUCTION

[1] For fourteen years, Robert Klewchuk (“Klewchuk”) and Samuel Switzer (“Switzer”) owned and operated an underground shaft gold mine. Each year the gold was distributed to Klewchuk and Switzer - not always distributed equally, but almost equally.

[2] In October of 1996, Switzer got the mine and Klewchuk got the shaft.

[3] In October 1996, Switzer suddenly and swiftly swooped. Within minutes, he scooped all of the assets of the “gold mine”. He then owned and controlled all; Klewchuk was left with nothing.

[4] The “gold mine” that Klewchuk and Switzer owned and operated was a gambling casino in Calgary - the Elbow River Inn and Casino (“the Elbow Casino”). Its predecessor was the casino at the Summit Hotel. Each year, the Elbow Casino produced large revenues.

FACTS

Background to Relationship

[5] At times, I often refer to Switzer and his corporations as “Switzer”. I often refer to Robert Klewchuk, Kathy Klewchuk and their corporations (including Arkay Casino Management and Equipment (1985) Ltd. (“Arkay”)) as “Klewchuk”.

[6] The Alberta casino industry began in the 1970s, and Klewchuk was there at the very beginning. Casinos were first permitted at agricultural fairs, like the Calgary Stampede. Klewchuk got a part-time job as a card dealer at the Calgary Stampede. After several years as a dealer, Klewchuk received promotions to become a pit supervisor.

[7] In the early 1970s, the Federal Government lifted the restrictions (criminal law) on casino gambling, provided that the profits from gambling were used for a charitable or religious purpose.

[8] Klewchuk predicted that he could begin a successful business by providing the charities with the professional management and the professional staff the charities needed to operate their own casinos. The first charity casino organized by Klewchuk was for the Chinook Lions Club during Grey Cup Week in 1976. From such a humble start an industry was born.

[9] The industry started slowly. Casinos were held in community centres and in the basements of church halls. They used portable gaming equipment and temporary cash cages.

[10] Switzer was active in Calgary real estate. He was the owner of apartment buildings and commercial strip malls. Since 1964, Switzer owned a hotel on the east side of downtown

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Calgary, the Summit. The Summit had a banquet room in the basement. Switzer rented this banquet room for charity casino events.

[11] In 1978 Klewchuk was one of the first operators to use the Summit for a casino. Switzer also rented out the banquet room to other operators. The operators used portable equipment which they moved in and out for each casino event.

[12] In 1979 and 1980, Klewchuk was a regular user of the Summit banquet room for charity casinos. In 1982, Klewchuk contacted Switzer about setting up a permanent casino at the Summit. Switzer agreed.

[13] Klewchuk and Switzer operated out of the Summit for seven years — from 1982 to 1989. During those seven years, there were a limited number of charity casino licenses available. Therefore, the competition among operators to attract casinos was fierce. By the end of that seven year period, Klewchuk and Switzer had become the most successful casino operators in Calgary. They had garnered more operating casino days than any of their competitors.

[14] The relationship between Klewchuk and Switzer was unique. Each had separate areas of responsibility, and each had separate contracts with the charities. Klewchuk provided the professional management, professional staff, gaming tables and other equipment. Switzer provided the big room, money delivery, hold-up insurance and advertising.

[15] Klewchuk and Switzer operated on a high level of trust. They had no written agreement for the first seven years they operated. They became the best of friends.

[16] Switzer sold the Summit in 1984, but he leased back the entire hotel until 1989. In about 1987, Switzer and Klewchuk started looking for other locations in Calgary to continue their operation. Eventually, Switzer suggested that they set up at the Elbow River Inn, a hotel across from the Stampede grounds. Switzer had bought the hotel in 1984.

[17] Switzer agreed to build a separate facility for the casino operation adjacent to the hotel. Switzer bought enough land for the new building and for customer parking. The land and the new building cost over $3 million in the late 1980s. Switzer invested over $3 million in this new venture based only on a handshake with Klewchuk.

[18] After operating the Elbow Casino for six months, Switzer and Klewchuk made a written contract (dated November 1st, 1989), which covered some of the elements of their relationship. Essentially, they carried on at the Elbow Casino the same way they had at the Summit.

Critical Events

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[19] For each two-day casino, Switzer sent his invoice to the charity for the services he provided and Klewchuk sent his invoice to the charity for the services he provided. On July 1st 1996, the Government of Alberta Gaming Commission ("Gaming") changed some rules for the operation of casinos in Alberta. The new rules had been discussed for a long time before July 1st 1996, so the Alberta casino operators were not taken by surprise. The new rules affected the way Switzer and Klewchuk could operate the Elbow Casino.

[20] After July 1st 1996, the new rules indicated that only one invoice would be sent to the charity for all of the things specified in clause 2.1.6. That clause states:

> 2.1.6 Casino facility licensees shall provide:
>
> a) Casino facility as per standards set out in Section 4.
>
> b) All required casino gaming equipment.
>
> c) Operating floats to be used by the charity licensee.
>
> d) Chip inventory appropriate to the casino gaming volume. Chips shall be clearly labelled as to denomination and shall be unique for each facility.
>
> e) Registered gaming workers as required in Section 6.
>
> f) Playing cards as set out in Section 9.7.
>
> g) Surveillance equipment as detailed in Section 5.
>
> h) A cash counting machine for both the cash cage and count room.
>
> i) Armoured car service.
>
> j) Insurance
>
> k) Advertising and promotions
>
> l) Administration services.
>
> m) All other equipment or services deemed necessary by the Licensing Division.
>
> (see Exhibit One, Tab 19)

[21] By October 25th 1996, Gaming had not taken any steps to enforce the new rules against Klewchuk and Switzer at the Elbow Casino.

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[22] Between July 1st and October 25th 1996, Switzer and Klewchuk could have mediated or arbitrated a new method of operation between themselves. Switzer and Klewchuk also could have come to Court to resolve their legal problems. If Switzer feared that he would suffer any financial loss, he could have come to Court seeking protection, but Switzer stayed away from Court.

[23] Instead, Switzer planned a stealthy attack. On the pretext that Klewchuk was Switzer's tenant, Switzer prepared a Landlord's Distress for Rent on September 4th 1996. However, before he could execute the Distress for Rent, Switzer discovered that he did not have a licence from Gaming. He immediately applied to Gaming for his licence, and waited. Switzer wanted far more than a simple seizure of chattels. He wanted to "expropriate" a total business, and give no compensation to the owner of the business.

[24] Switzer used his September 4th 1996 Landlord's Distress Warrant on October 11th 1996. Switzer swooped down and seized all of Klewchuk's gaming equipment and supplies. He hired a civil enforcement agency (Shortridge) to make the seizure.

[25] On October 25th 1996, Switzer evicted Klewchuk from the Elbow Casino. Switzer threatened Klewchuk that he would have him arrested as a trespasser if he ever stepped inside the Elbow Casino. Switzer took all the cash in Klewchuk's office and from the slot machines in the Elbow Casino. The cash in Klewchuk's office was $23,422.00, and Klewchuk's share of the cash in the slot machines was $14,195.91. The total cash was $37,617.91,

[26] On October 25th 1996, Gaming gave Switzer a temporary licence to conduct casino operations. Switzer had a meeting with Klewchuk's staff. He told them that Klewchuk was "out" and that he was their new boss. Switzer told the staff that he would pay them, and he did pay them. He used the cash from Klewchuk to pay the staff. He paid the staff $17,407.82.

[27] On October 25th 1996, the Elbow Casino did business as usual, except for a two-hour delay in start-up. Switzer had everything, and Klewchuk was left with nothing.

Other Facts

No-Loss Warranty

[28] The no-loss warranty was simply a marketing tool developed by Klewchuk and Switzer. It was not required by Gaming.

[29] In late 1988, there was considerable competition among the three Calgary casino operators to secure contracts with the charities to operate casinos. The operators had more event days available than there were charity casino licenses.

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[30] To convince the charities to hold their casinos with them, Klewchuk and Switzer decided to provide each charity with a warranty that the charity would not lose money at the two-day event. This no-loss warranty helped each charity to obtain from its bank a $100,000 cash float to operate the two-day casino. With the no-loss warranty, the directors of the charity did not have to sign personal guarantees at the bank.

[31] Along with good marketing and promotion with the charities and good performance at the casinos, the no-loss warranty was another tool to help to keep the Klewchuk/Switzer operation fully booked.

[32] Switzer provided the no-loss warranty. He was the first one in Calgary to do so. Initially, Switzer charged each charity a $500.00 fee (per two-day casino) for the no-loss warranty. He increased the fee to $800.00 per casino when he and Klewchuk set up at the Elbow Casino. The no-loss warranty is addressed in Article 8 of the November 1st 1989 contract.

[33] Switzer had made a profit of $136,000.00 on the no-loss warranties. However, in the summer of 1993, Switzer predicted that the no-loss warranties would no longer be a money maker. This arose from a number of factors including the higher betting limits permitted by Gaming on table games (particularly blackjack), and the growing sophistication of players. “Sophistication” includes method playing, card counting, and cheating.

[34] By 1993, the no-loss warranty was copied and adopted by the other two casino operators in Calgary. In August 1993, Switzer stormed into Klewchuk’s office and demanded that the no-loss fee be moved up from $800 per event to $1,500 per event, an increase of almost 90%.

[35] Klewchuk felt that a 90% increase of fee would spoil the business’ competitive advantage. Therefore, in September 1993 Klewchuk took over the no-loss warranty contracts with the charities, and Switzer was released from that responsibility. Klewchuk increased the fee from $800 to $1,000 per two-day event. The Calgary competitors made the same increase of fee.

[36] Klewchuk started suffering significant losses on his no-loss warranties. In April 1995, he raised his fee from $1,000 to $1,500 per two-day event. The no-loss warranty became a casino industry problem in Alberta, not just a problem that hurt Klewchuk. Under the new regulations, Gaming ended the no-loss warranty procedure in Alberta on July 1st 1996.

[37] Klewchuk’s major losses were during the last six months of the no-loss warranty procedure, the period from January 1st 1996 to July 1st 1996. By July 1st 1996, Klewchuk had accumulated a net cash shortfall from his operation of the no-loss warranty of $280,504.

[38] Klewchuk was saddled with a burden of $280,504, and Switzer obtained a benefit. The first part of the benefit was that Switzer did not have to pay out of his pocket any part of the

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$280,504. The second part of the benefit was that the charities were given $280,504 of Klewchuk's cash so that the charities could pay Switzer his invoices for the rent, money delivery, hold-up insurance, and the advertising.

[39] In August and September of 1993 (and later), the no-loss warranty matter could have been mediated. It could have been arbitrated.

[40] Klewchuk claims $280,504 damages from Switzer regarding the no-loss warranty. Switzer had the original responsibility for the no-loss warranty contracts, and Klewchuk did not have to assume that responsibility. Klewchuk has not proven that there was a wrong committed. I therefore do not award damages with respect to the no-loss warranty.

Negotiations

[41] Another matter that consumed trial time was evidence of negotiations which Switzer claims are significant with respect to the outcome of this trial. I heard evidence of negotiations conducted in August and September 1996 between Switzer and Klewchuk and with third parties. No contract was concluded. A written contract requires all parties to the contract to sign the same contract, and all of the conditions precedent must then be satisfied. A contract is binding upon the parties to the contract. Contract negotiations are not binding upon anyone.

[42] Even less useful than searching for tangible meaning in the negotiations, is selectively relying on portions of those negotiations. Switzer suggested that the total value of Klewchuk's casino business was disclosed in a suggested negotiation of sale price. That completely ignores other factors, such as the suggested employment contract for Klewchuk of an unknown dollar amount and a suggested $300,000 bonus to Klewchuk if the Elbow Casino lands sold within one year.

[43] Negotiations are not binding upon anyone, so they should be ignored. These negotiations are not relevant for the assessment of general damages.

Summer Doldrums

[44] Klewchuk frankly admitted that he had a cashflow problem in the summer of 1996. Klewchuk was wounded by the $280,504 hit from the no-loss warranties. Cash was required for running the casino business. Robert Klewchuk and Kathy Klewchuk had to give up their lavish lifestyle (big house, expensive cars, etc.). They sold chattels and they mortgaged property to obtain ready cash; and they injected the cash into the business.

[45] July and August are always slow months for the casino industry in Calgary — except for the Frontier Casino at the Stampede grounds. Except for Frontier, Gaming forced the other casinos to close down for the ten days of Stampede in July. Gamblers have other things to enjoy during summer, so the gambling business is always slack in July and August. Business picks up in September, and business gets back to normal in October.

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[46] After July 1st 1996, Klewchuk no longer had to worry about the huge cash drain of payouts to charities on no-loss warranties; but the first six months of 1996 had financially weakened Klewchuk. It would take a number of months to regain calm financial stability.

[47] Not all of the new Gaming regulations came into force on the same day. On July 1st 1996, the 50/50 split of revenue between the charity and the casino operation came into force. That immediately reduced the revenue to the casino operators in the short term. But in the near future, the casino operators knew that Gaming would bring into force the remaining regulations which would increase the revenue to the casino operator.

[48] Meanwhile, Klewchuk got behind in payments to, for example, Worker's Compensation and Revenue Canada. One of Klewchuk's payments on a Switzer/Klewchuk bank loan went N.S.F. Klewchuk got behind in salary payments to his staff, but by October 25th 1996 he was "current" with salary payments. The staff came into work each day. The staff all came to work for Klewchuk on the morning of October 25th 1996 — the morning that Switzer expropriated Klewchuk's business.

[49] Everyone knew that the remaining Gaming regulations (soon to be put into effect) would give a boost to the casino industry in Alberta. It happened. The number of slot machines per casino were increased. The operator's profit margin per slot machine was increased. The number of casino events per year was increased. The hours that each casino could be open were extended. Good times were just around the corner.

[50] Klewchuk borrowed $20,000 from Switzer on September 11th 1996, and he gave Switzer a promissory note of $20,000 and a general security agreement. For Switzer, the sum of $20,000 is inconsequential. For Switzer, $20,000 is like "walking around money". Switzer forgot to even make a demand on the promissory note until February 9th 1997, a long time after he expropriated Klewchuk's business on October 25th 1996.

[51] The summer of 1996 was not good for Klewchuk, but by October 25th 1996, his financial position was improving. Klewchuk was not insolvent, and Switzer should not pretend that he was immediately facing financial ruin unless he expropriated Klewchuk's business.

ISSUES

[52]
1. What is the nature of the relationship between Switzer and Klewchuk?
2. Should Klewchuk be compensated?
3. If Klewchuk should be compensated, what are the damages?

ANALYSIS

1. Nature of the Relationship

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a) Landlord - Tenant

[53] Switzer is a big landlord in Calgary. In his lifetime, he has owned and leased thousands of residential units in numerous apartment buildings. He has also owned and leased hundreds of commercial spaces in strip malls, in his hotels and in his commercial buildings.

[54] In the world of leasing, Switzer is a professional. Switzer knows when he has a lease and when he does not have a lease. Switzer knows that he first must be a landlord before he can legally commence a landlord's distress for rent.

[55] Switzer has the onus to prove that he had the right to effect a landlord's distress for rent to seize all of Klewchuk's chattels located in the Elbow Casino. I find that Switzer did not prove that he made a legal seizure, primarily because he did not prove a landlord-tenant relationship.

[56] As stated previously, Gaming amended the rules for casinos on July 1st 1996. On July 2nd 1996 Switzer delivered the following letter to Klewchuk:

> Switzer's Investments Ltd.
> Offices at 220, 1212 1st Street S.E. and 118, 328 Centre Street S.E.
> Calgary, Alberta
>
> July 2, 1996
>
> Arkay Casino Management and Equipment (1985) Ltd.
> Box 984, Station "M",
> Calgary, Alberta T2P 2K4
>
> Attention: Mr. R. Klewchuk
>
> Dear Bob, HAND DELIVERED
>
> Re: Casino Premises at Elbow River Inn & Casino, 1919 Macleod Trail S.E.
>
> In the absence of a Lease, the existing agreement dated November 1, 1989 remains in effect and Elbow River Inn is due payment at the current rate of $4,528.35 (G.S.T. being $303.35 of that amount) for each two day casino.
>
> At the close of each casino, please submit a cheque to the Front Desk at the Elbow River Inn until such time as negotiations may result in an executed Agreement to Lease. As per the established policy, we anticipate payment for the July 1 / 2, 1996 casino sponsored by

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> Huntington's Society at the close of the casino today, no later than Wednesday July 3, 1996.
>
> Yours truly,
> SWITZER'S INVESTMENTS LTD.
>
> SAM SWITZER
> President

[57] In that letter, Switzer stated there was no lease as at July 2nd 1996. Therefore, he must prove there was some form of landlord-tenant relationship **prior** to July 2nd 1996 or **subsequent** to July 2nd 1996. He has not done so.

[58] Regarding an alleged lease prior to July 2nd 1996, Switzer wrote " . . . the existing agreement dated November 1, 1989 remains in effect . . . ". That agreement is Exhibit One, Tab 1. There is no landlord - tenant contract between Switzer and Klewchuk in the November 1st 1989 written agreement. There was no landlord-tenant contract between Switzer and Klewchuk during the previous seven years that they operated a casino at the Summit Hotel between 1982 and 1989.

[59] On December 15th 1995, Switzer's lawyer wrote to Klewchuk's lawyer:

> Under the Agreement, Arkay and its staff have no more than a non-exclusive licence to use the casino facility in order to manage and administer casinos for charitable organizations. Neither Klewchuk nor Arkay have any proprietary interest in the casino facility and certainly do not have any right to make alterations to the casino facility.
>
> (See Exhibit One, Tab 6)

[60] On December 15th 1995, Klewchuk was not a tenant, but had only a non-exclusive licence. Klewchuk was merely a licencee under the Agreement. The above letter from Switzer's lawyer confirms that Switzer realized this.

[61] Regarding an alleged lease subsequent to July 2nd 1996, no written lease was ever signed. There is no evidence that Switzer ever delivered to Klewchuk a draft of a proposed lease for discussion. There is evidence that Klewchuk tried to have business meetings with Switzer during July and early August of 1996, but Switzer was "not available".

[62] On August 26th 1996, Switzer sent to Klewchuk his first invoice. Switzer revised that invoice on August 29th. Also on August 29th, Switzer sent a letter to Gaming, saying that Switzer's Investment Ltd. ("SIL") was not prepared to lease the casino to **anyone**. The letter says: "SIL would operate the facility under its own name. We understand that SIL is a licenced

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facility operator". That letter is Exhibit One, Tab 27. That letter and other dealings Switzer had with Gaming were not disclosed to Klewchuk. Those dealings were part of Switzer's secret plan.

[63] On August 30th 1996, Gaming advised SIL that it was not a licenced facility operator (Exhibit One, Tab 29). Switzer's September 4th 1996 Distress for Rent had to be postponed. Switzer quickly applied to Gaming for a Casino Facility Licence, but Gaming refused to issue a license to Switzer. On September 19th 1996, Gaming wrote to Switzer: "Further to our conversation of today's date, your application will not be processed. I am enclosing the original of your application package and your cheque for $5,000.00" (Exhibit 48).

[64] Prior to August 29th 1996, Switzer contacted the Calgary Stampede, owners of the Frontier Casino, to obtain gaming chips. On August 29th, the Calgary Stampede wrote to Gaming: "It is our understanding that Mr. Sam Switzer will be taking over the operation of the Elbow River Casino in Calgary, Alberta, with Gaming permission" (Exhibit 41). Switzer's dealings with the Calgary Stampede were not disclosed to Klewchuk, because those dealings were part of Switzer's secret plan.

[65] To run a casino business, Switzer needed a **licenced** casino operation. In the Summer of 1996, Gaming permitted only four charity casino licences in Calgary; all four licences were allocated. Switzer had only a huge room, but to qualify for a Gaming licence, he needed trained personnel, gaming equipment and operating systems. He could not realistically obtain these from scratch.

[66] Switzer needed to acquire an ongoing casino business. Klewchuk had an ongoing casino business. Klewchuk had trained staff and gaming equipment. Switzer had to either negotiate for the purchase of Klewchuk's operation, or to grab it; he chose to grab it.

[67] Switzer charged for holdup insurance, money delivery, and advertising. These were not **rent**. The only way such things could even be defined as "rent" is in a written lease. There was no written lease between Switzer and Klewchuk, but Switzer pretended that these items were "rent" in his invoices to Klewchuk listing $4,528.35 for each two-day casino. He also pretended that these items were rent arrears in his Landlord's Distress for Rent.

[68] Switzer did not make himself available to meet with Klewchuk in July 1996. Klewchuk began paying Switzer $2,140.00 for each two-day casino (rather than $4,528.35). As intended, this got Switzer's attention. Switzer came to Klewchuk's office to chat. Klewchuk told Switzer that the most he would pay him was $2,000.00 (plus GST of $140.00). Switzer asked Klewchuk if he could bring the payment up to $2,500.00 plus GST (for each two-day casino).

[69] Klewchuk said that he would pay $2,500.00 plus GST (for each two-day casino) starting in early August. It was agreed that amount would be paid while Switzer and Klewchuk were negotiating some sort of a new arrangement.

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[70] In cross-examination, Switzer was asked whether the meeting occurred in which Switzer agreed to let Klewchuk pay $2,500.00 plus GST (for each two-day casino) while they negotiated. Switzer answered: “I don’t recall.” (Transcripts, page 1154, lines 3-8).

[71] On this important point in particular, I find that Klewchuk is telling the truth and that Switzer is suffering from massive memory failure. On significant points generally, I accept Klewchuk’s credibility and do not accept Switzer’s credibility.

[72] Did Switzer create a new lease with Klewchuk subsequent to July 2nd 1996? Or did Klewchuk still merely have a licence of occupation?

[73] The fundamental difference between a lease and a licence is that under a lease an interest in land passes to the tenant. Tenancy is generally characterized as a grant of exclusive possession for a term certain in consideration for the payment of a certain rent: ***Street* v. *Mountford***, [1985] 2 All E.R. 289 (H.L.) at 294. A licence, on the other hand, does not confer a grant of exclusive possession: ***Southern Music Ltd.* v. *Warsigmaga*** (1980), 31 A.R. 441 (Q.B.). In ***Baker and Baker* v. *Gee***, [1945] 3 W.W.R. 555 (Alta. S.C.A.D.), at 556, MacDonald, J.A. stated:

> A licence does not create any estate or interest in the property to which it relates. It merely conveys a privilege in the use of the property and makes an act lawful which without it would be unlawful.

[74] In ***Street* v. *Mountford***, *supra*, Templeman, L.J. observed at 297 that exclusive possession is not the only hallmark of tenancy. The document as a whole must be considered and the intention of the parties must be examined.

[75] In ***Booker* v. *Palmer***, [1942] 2 All E.R. 674 (C.A.) at 677 Lord Greene M.R. says:

> To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind. It seems to me that this is a clear example of the application of that rule.

[76] In ***Errington* v. *Errington***, [1952] 1 All E.R. 149 (C.A.) at 155 Lord Denning says:

> The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was

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> intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee.
>
> [emphasis added]

[77] The reverse of the highlighted passage is also true. Switzer cannot turn a licence into a tenancy merely by calling it a tenancy. In Switzer's October 11th 1996 instruction letter to Shortridge to execute the so-called Distress for Rent, Switzer alleged that Klewchuk was Switzer's tenant, stating "The arrears with respect to the verbal tenancy at will agreement are . . . ". (See Exhibit One, Tab 36).

[78] Switzer again alleged that Klewchuk was his tenant on October 16th 1996. This was five days after Switzer seized all of Klewchuk's casino assets. Switzer's lawyer wrote to Klewchuk's lawyer:

> Further to our instructions, we are hereby advising you that Arkay is, at best, using the Elbow River Inn Casino as a tenant-at-will and that he has no lease of the premises.
>
> (See Exhibit One, Tab 40)

[79] In ***Traders Finance Corporation Ltd.* v. *Primerano,*** [1955] O.W.N. 553 (H.C.), the court found that the company against which the distress was levied was in possession of the premises without a lease, without a subsisting landlord-tenant relationship and without any reservation of rents. It therefore had an obligation to pay for use and occupation as a licencee, and not as a tenant. Without the requisite tenancy, the landlord had no right of distress.

[80] Of course, any money owing under the licence as at October 11th 1996 was not the amount of $61,447.20 specified in Exhibit One, Tab 36. Switzer's arithmetic does not embrace the oral agreement Switzer made with Klewchuk that Klewchuk was entitled to pay $2,500.00 plus GST for each two-day casino until Klewchuk and Switzer negotiated a new deal. It is uncertain what money, **if any money**, was owing on October 11th 1996 by Klewchuk to Switzer under the licence.

[81] On October 25th 1996, Switzer expropriated Klewchuk's business. Switzer terminated **whatever** there was to terminate, regardless of whether it could be characterized as a lease, a tenancy-at-will or a licence. Switzer first executed a Landlord's Distress for Rent and then terminated the relationship, however that relationship is characterized.

[82] However, a landlord cannot both distrain for rent and terminate the tenancy. In ***Able Oil & Gas Installations Ltd.* v. *Ethnicorp. Foods International Inc.*** (1989), 96 A.R. 152 (Q.B. Master) at 154, Master Funduk stated:

> Where a tenant defaults in paying rent when due the landlord cannot levy distress of the unpaid rent and also terminate the lease for <u>that</u> unpaid rent.

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> The right to distrain for unpaid rent exists only so long as the landlord-tenant relationship exists. By distraining the landlord has elected not to terminate for that breach and so cannot then, after distraining, purport to terminate for nonpayment of the rent distrained for: ***Hallbauer* v. *Shipowick***, 38 Alta L.R. (2d) 351 (Master).
>
> Because the applicant distrained for the rent due January 1st it cannot then turn around and use that default as a ground for termination.
>
> [emphasis in the original]

[83] Switzer did not have any right to distrain for rent. But he did distrain. After distraining for rent, Switzer certainly did not have any right to terminate. Assuming for the sake of argument that a tenancy existed, a landlord can elect either to distrain under a lease or, alternatively, to terminate the lease and commence an action for arrears. The remedies are mutually exclusive: Bennett, "Creditors' and Debtors' Rights, 1987-1988" in *The Law Society of Upper Canada Bar Admission Course Materials* (Calgary: Carswell, 1988) at 60.

[84] Further, even assuming a tenancy was created, a landlord may only levy a distress for unpaid rent where the rent payable is certain: ***Traders Finance Corporation Ltd.* v. *Primerano***, *supra*. As the foregoing indicates, Switzer was maintaining that Klewchuk owed substantially more than the interim amount of $2,500 that had been agreed to. This does not indicate a sum certain.

[85] If rent is not payable or is not in arrears, the distress is illegal, the distrainer is a trespasser *ab initio* and a suit for conversion will lie against the person in possession of the goods: Williams and Rhodes, *Canadian Law of Landlord and Tenant* 6th ed. (Toronto: Carswell, 1988) at 8-85; also see ***Seibel* v. *Dwyer Elevator Company Ltd.***, [1923] 2 W.W.R. 1051 (Sask.C.A.); aff'd [1924] S.C.R. 530.

[86] I find that there was no landlord-tenant relationship between Switzer and Klewchuk at any time. The distress effected by Switzer was therefore illegal and Klewchuk's business was converted by Switzer.

b) Joint Venturers and Partnership

[87] I find that this relationship was a joint venture.

[88] While Klewchuk and Switzer did not share profits, each was dependent on the other to have a successful business. It was truly a joint venture. There is no document saying that this was a joint venture — but it was a joint venture.

[89] Of the two, it was Klewchuk who was indispensable for success. Klewchuk had the expertise to operate the casinos and to attract the charities to hold their events with him. Switzer had the big room, but this was not critical. At that time, any big room would do.

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Klewchuk's important role in the joint venture was acknowledged by Switzer in their written contract dated November 1st 1989.

[90] From Switzer's profit perspective, important elements such as Switzer's sole right to provide the additional services of holdup insurance, money delivery and advertising were not even written in the November 1st 1989 contract. These joint venture elements were established by a course of conduct. Switzer made large profits (from the charities) on his charges for holdup insurance, money delivery, and advertising.

[91] The joint venture of Switzer and Klewchuk may also have been a partnership. *The Alberta Partnership Act*, R.S.A. 1980, c. P-2 in section 1(d) defines partnership:

> (d) "partnership" means the relationship that subsists between persons carrying on a business in common with a view to profit;

However, it is not necessary for me to determine whether or not the joint venture was a partnership. I do note, however, that if something walks like a duck and it quacks like a duck — then it is a duck; or a bird that closely resembles a duck.

[92] Regardless of how I characterize the relationship, Switzer and Klewchuk owed a fiduciary duty to each other. Justice Moldaver of the Ontario Court of Justice General Division held in ***Hemlo Gold Mines Inc.* v. *Royal Oak Mines Inc.*** (1993), 52 C.P.R. (3d) 458 at 469 that parties engaged as partners in a joint venture mineral exploration agreement owed fiduciary or quasi-fiduciary obligations to each other. Accordingly, each party was obliged to act toward the other in utmost good faith.

[93] Switzer breached his fiduciary duty to Klewchuk. This is a separate head of damages, and I could discuss breach of fiduciary duty at length. However, all the various heads of damage (conversion, breach of fiduciary duty, breach of duty to contract in good faith, etc.), come together in one event — Switzer took Klewchuk's assets. The damages, under the various heads of damage, combine in one amount.

c) Duty of Good Faith

[94] I have ruled on what Switzer is **not** entitled to do — he is not entitled to grab. For the purpose of this judgment, it is therefore necessary to discuss good faith and fair dealing only briefly.

[95] In Alberta, one contracting party owes a duty of good faith to another in accordance with reasonable expectations of each party under the contract. Feehan, J. reviewed the development of the doctrine in ***Opron Construction Co.* v. *Alberta*** (1994), 14 C.L.R. (2d) 97 (Q.B.) at 221-26.

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[96] I also note ***Canada Deposit Insurance Corp.* v. *Canadian Commercial Bank (Liquidation)*** (1998), 236 A.R. 14 (Q.B.), where one party attempted to circumvent an agreement by relying on statutory obligations. Specifically, the Bank held preferred shares in Western Securities entitling it to dividends and redemptions. Western refused to redeem the preferred shares or pay dividends to the Bank's liquidator, claiming that the same would breach the solvency tests under the *Business Corporations Act*. Wachowich, A.C.J. (as he then was) held that Western breached its duty of good faith to ensure that best efforts would be made to fulfill the terms of the agreement in accordance with the reasonable expectations of the parties.

[97] In ***Mesa Operating Ltd. Partnership* v. *Amoco Canada Resources Ltd.*** (1994), 19 Alta. L.R. (3d) 38 (C.A.) at 45, Kerans, J.A. adopted the following statement of the trial judge:

> . . . [A] party cannot exercise a power granted in a contract in a way that 'substantially nullifies the contractual objectives or causes significant harm to the other contrary to the original purposes or expectations of the parties.'

Justice Kerans again agreed with the words of the trial judge at 43:

> In Canada the test . . . does not include the need for the plaintiff to show that the defendant intentionally acted in bad faith . . .
>
> . . . the common law duty to perform in good faith is breached when a party acts in bad faith, that is, when a party acts in a manner that substantially nullifies the contractual objectives or causes significant harm to the other, contrary to the original purposes or expectations of the parties.

[98] The July 1st 1996 gaming regulations may have required a new arrangement between Switzer and Klewchuk (for example a new corporation or a new partnership to allocate revenue between them). There was no bona fide reason for Switzer to pretend that the 14 year old existing relationship was frustrated. Switzer owed a duty of good faith to Klewchuk, and he breached that duty of good faith.

d) Conclusion on Nature of Relationship

[99] This relationship is difficult to pigeonhole. However, the precise nature is not important. What is important is that Switzer violated the relationship.

2. Should Klewchuk be compensated?

[100] In light of Switzer's actions, Klewchuk should be compensated.

3. Damages

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[101] Klewchuk is seeking damages for breach of fiduciary duty, breach of duty of good faith and for conversion of his business. Klewchuk concedes that his damage claims significantly overlap and that to compensate him for a breach of fiduciary duty and conversion would be double compensation. In addition, Klewchuk also seeks punitive damages for what he says was the high-handed manner in which Switzer conducted himself. Klewchuk says that Switzer needed his business, including his gaming equipment, trained staff and goodwill to obtain a facility licence and to carry on the casino business himself. Rather than purchase Klewchuk's business, Klewchuk states that Switzer made a deliberate choice to take it wrongfully and illegally.

[102] I have found both a wrongful seizure and conversion of the Plaintiffs' business, and a breach of fiduciary duty based on the joint venture between the parties. However, the essence of the wrong committed here is the expropriation of Klewchuk's business by Switzer. I am therefore assessing damages on the basis of conversion.

[103] In calculating damages, Klewchuk's business must be viewed as more than the sum of its parts. While Klewchuk provided the gaming tables and other equipment, his business was also comprised of his expertise in the gaming industry and his reputation. As I have stated previously, what Switzer contributed to the business was a room. Klewchuk was the essential element in the success of the joint venture.

a) Legal Principles

[104] The wrongful seizure of Klewchuk's equipment and the expropriation of his business gives rise to damages in conversion (***Bank of Nova Scotia* v. *Dunphy Leasing Enterprises Ltd.*** (1991), 120 A.R. 241 (C.A.); ***Royal Bank of Canada* v. *W. Got & Associates Electric Ltd.***, (1994), 150 A.R. 93 (Q.B.); aff'd, (1997), 196 A.R. 241 (C.A.); [1999] 3 S.C.R. 408). According to Klar, et. al. in ***Remedies in Tort***, vol. 1 (Toronto: Carswell, 2001) at p. 4-30:

> In an action for conversion, the normal measure of damages is the value of the chattel at the date of conversion, together with any consequential damage flowing from the conversion, provided that it is not too remote to be recovered in law.

Damages for conversion can also include damages for loss of profit: ***Blue Cove Packing Co. Ltd.* v. *Theodore Landry et al.*** (1981), 35 N.B.R. (2d) 527 (Q.B.), aff'd (1982) 42 N.B.R. (2d) 337 (C.A.).

[105] A recent and comprehensive treatment of the issue of damages for conversion can be found in a judgment of this Court in ***Royal Bank* v. *Got***, *supra*. In that case, the trial judge found that the bank intentionally failed to give notice and make a demand for payment on a debenture. At the same time, the bank brought a motion in Master's Chambers to appoint a receiver. The trial judge found that the bank intentionally filed a misleading affidavit in the Chamber's motion to procure the receiver. As a result, the Court found that the bank was liable to Got for trespass and conversion for the premature seizure and sale of Got's assets.

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[106] Justice McDonald held at p. 111 that damages for conversion represent "the full value of the property converted . . . as well as any additional damage which it may have suffered by reason of the conversion which is not too remote". Justice McDonald found that the business at issue would have continued as a going concern. He awarded damages for, *inter alia*, the goodwill of the business as well as for loss of profits. The Court rejected the argument that recovery for value of the business plus damages for loss of profit would be double recovery, stating at p. 129:

> In the context of the remedies for conversion, it is clear that damages for loss of profits consequential upon the wrongful taking are recoverable in addition to the value of the property will be allowed, and will not be regarded as double recovery.

[107] A majority of the Alberta Court of Appeal affirmed McDonald, J.'s conclusions on this issue. The Supreme Court of Canada also endorsed McDonald, J.'s assessment of damages.

[108] Damages for conversion are of course subject to mitigation, and, as discussed in greater detail *infra*, the case law is clear that the onus is on the defendant to show that the plaintiff has failed to mitigate his or her losses. Simply put, damages in conversion equal the value of the chattels plus any special damages subject to mitigation.

b) Application of Legal Principles

[109] With respect to the value of the seized chattels, Switzer grabbed everything, so I will allow him to keep everything. I order that Switzer does not have to return any chattel (or other thing) to Klewchuk. Switzer can now be the owner of everything. There was only one major event — the Switzer grab. This portion of the claim for damages can be amalgamated into Klewchuk's general claim for damages.

[110] There is no magic formula to easily assess damages in conversion. I will try to use some known guideposts to make a reasonable assessment.

[111] For assessment of damages for lost profits, should I use five years of future income? Should I use three years of future income? The November 1st 1989 contract states that the joint venture terminates on November 1st 1999. The parties could extend the term of the contract, but for a conservative assessment of damages I will use only three years of future income.

[112] The task of assessing damages for lost profits is often difficult, comparable to gazing into the proverbial crystal ball. The result is often imprecise, but is based on some evidence to use as a guideline. The only guidelines this Court has to reference is Exhibit 107 prepared by Switzer

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and the evidence from Gaming on the escalation of gaming profits after the Gaming regulation changes.

[113] In this trial, Switzer made damage assessment evidence most difficult for Klewchuk. Switzer refused to disclose relevant information until I ordered that some information be disclosed. Some information was then disclosed by Switzer on the last day of trial. Obviously, the Gaming information is more credible than the Switzer information.

[114] Switzer's contention is that by October 25th 1996, Klewchuk had virtually lost everything and had nothing left to lose. While the evidence shows that Klewchuk was undergoing financial pressure, I have found that his situation was beginning to improve. It would be too speculative to conclude that he would not have been able to keep his head above water long enough to begin reaping the benefits of the regulation changes. Moreover, such a conclusion is not supported on the evidence. Klewchuk did not end up in an insolvency situation despite Switzer's actions.

[115] The evidence is that Klewchuk's financial situation was improving. By September 24, 1996, Klewchuk had, with the assistance of the $20,000 loan, paid up wage arrears of $125,000, and he moved to paying his staff every four days, instead of every two days. He was out of the summer doldrums and the financial performance of the casino events was improving. Moreover, the seizure occurred on the eve of Gaming opening up the casino industry by extending hours and radically increasing the number of slot machines.

[116] Klewchuk's average remuneration from the casino business (in the years just prior to the conversion) was $400,000 per annum and Switzer's average remuneration from the casino business was also $400,000. The historic combined joint venture remuneration was $800,000 per annum.

[117] Rather than disclose evidence of remuneration, Switzer tried to suppress evidence of remuneration. However, the evidence from Gaming is that after October 25th 1996, the total revenue to the four Calgary casinos **boomed**. Exhibit 32 shows the average revenue for each two-day casino; and it is Schedule "Y" attached to this judgment.

[118] The 1998/1999 average total revenue to the operator (per casino event) is significantly greater than the 1996/1997 average total revenue, that is $38,474.13 compared to $22,520.25. The number of casino events increased from 558 to 902. The Elbow Casino has always performed better than competitors, so the Elbow Casino enjoyed a huge increase in revenue.

[119] Casino operating expenses do not increase in lock-step with increased casino revenue. The profit margin just gets better.

[120] During the trial, I ordered that some financial disclosure be made, and on the last day of the trial Switzer filed Exhibit 107. Switzer suppressed evidence. Switzer did not disclose personal income tax returns or corporate income tax returns for 1996, 1997, 1998, or 1999.

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[121] I granted a motion that Exhibit 107 shall be placed in a sealed envelope, and the envelope may only be opened by any judge. Therefore, I will not discuss Exhibit 107 in great detail.

[122] Exhibit 107 shows that in 1999, the Elbow Casino revenue increased from 1998 revenue by a further $1 million, from $6.3 million to $7.3 million. After October 25th 1996, times were good.

[123] Exhibit 107 also shows that Switzer is paying money from himself to himself (from him to one or more related corporations). There is nothing legally wrong with this type of "operating expense" — but at first glance it makes the profit look smaller. If you add back in that type of "expense" the profit is big.

[124] According to Klewchuk, and based on the figures in Exhibits 79, which is an Income Statement for the Elbow Casino for the years 1996 and 1997, and 107, during the three years after Switzer expropriated Klewchuk's casino business, Switzer's total profit was $5,345,000. If Klewchuk is entitled to one-half of that profit, the sum is $2,672,000.

[125] Because of the lack of concrete evidence and Switzer's failure to disclose the pertinent financial records until the last day of trial, I am left with a most unfortunate evidentiary record from which I must try to draw conclusions with respect to the profit generated by the Elbow Casino. For this reason, I am prepared to accept Klewchuk's figure as an approximate amount of the profit generated by Switzer in the period from 1997 to 1999. This figure is also consistent with the evidence of Gaming that the profits from Casino gambling in Calgary increased significantly following the Regulation changes in 1996.

[126] However, because the evidence was so unsatisfactory, I will be conservative and I will reduce the total profit for the three years by $945,000, from $5,345,000 to $4,400,000. One-half of $4,400,000 is $2,200,000, and that is the award of general damages. This is an amount that reflects the value of the entirety of Klewchuk's casino business as a going concern

c) Mitigation

[127] Switzer also alleges that Klewchuk should have mitigated his loss, and that Klewchuk has failed to adduce any evidence with respect to mitigation. The only evidence, according to Switzer, is that Kathy Klewchuk opened a restaurant. No evidence was adduced as to the revenues of this new business. It is well established that the burden of proof of damages lies with the plaintiff but that the onus shifts once it is alleged that the loss should have been mitigated: see ***Red Deer College* v. *Michaels***, [1976] 2 S.C.R. 324 at 330-331; ***Asamera Oil Corp.* v. *Sea Oil and General Corp***., [1979] 1 S.C.R. 633; ***Janiak* v. *Ippolito***, [1985] 1 S.C.R. 146; and ***Costello* v. *Calgary (City)*** (1995), 53 Alta. L.R. (3d) 15 (C.A.) leave to appeal refused (1998), 212 A.R. 398n. (S.C.C.). Thus it is the defendant who carries the burden of proving mitigation.

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[128] The defendant also urges this Court to draw an adverse inference from the plaintiff's failure to call Kathy Klewchuk to give evidence as to the revenues of the new business venture. The defendant cites Sopinka & Lederman and ***Vector Energy Inc.* v. *Pacific Gas and Electric Co.***, [2000] A.J. No. 326 (Q.B. *per* Hart J.) as authority for the principle that an adverse inference should be drawn against the plaintiff who does not call a material witness over whom he or she has exclusive control and does not explain why. They state that such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[129] While the adverse inference principle remains true relating to material issues of a trial in proving liability, Kathy Klewchuk's evidence was not necessary to prove that Switzer wrongfully seized the casino business. Counsel for the defendant has not provided any support for the proposition that an adverse inference can be made in circumstances where the defendant carries the burden of proof. Moreover, to draw an adverse inference in relation to Klewchuk's damages would in effect reverse the widely accepted principle that it is the defendant who carries the burden of proving mitigation. Counsel for the defendant did not explain why the defendant was not entitled to conduct examinations for discovery of Kathy Klewchuk or to call Kathy Klewchuk as a witness.

[130] It is open for a trial judge to make findings in regard to mitigation from the facts presented. In ***Red Deer College* v. *Michaels,*** *supra,* Laskin C.J. stated at 331:

> If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.

[131] I am not satisfied that Kathy Klewchuk's restaurant business is relevant to the issue of mitigation in this case as there is no evidence that it involves the assets or goodwill of the casino business that was converted. I note that it would have been difficult for Klewchuk to have tried his hand at the casino business again after Switzer's conversion. There are a limited number of casino licenses granted in Calgary.

[132] Even if I were persuaded that the evidence with respect to the restaurant business was relevant, the evidence adduced is not sufficient for me to draw any conclusions with respect to mitigation. Further, I am satisfied that the three year period for which I have chosen to compensate Klewchuk for the conversion of his business, adequately takes into account any duty to mitigate.

d) Counterclaim/Setoff

[133] Two of the three items on Switzer's counterclaim were: the $20,000 promissory note and the wage payments to casino staff of $17,407.82. Switzer has already paid himself these two

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amounts from the Klewchuk cash that Switzer grabbed in the casino. The cash was "washed" through Gaming, and then given back to Switzer.

[134] I have permitted Switzer to keep all of the Klewchuk casino assets, including the cash. The two Klewchuk liabilities of the promissory note and the wage payments are set off against Switzer's expropriation of the Klewchuk cash. Those two counterclaim items are not granted.

[135] The third item on Switzer's counterclaim was for payment of Switzer's invoices to Klewchuk. By agreement, Klewchuk paid Switzer $2,500. plus GST for each two-day casino. This payment was current, except perhaps for the two-day casino prior to October 25th. But Switzer created that non-payment (by expropriation). The other items on Switzer's invoices have not been proven as valid claims.

[136] Switzer not only grabbed Robert Klewchuk's computer and Kathy Klewchuk's computer. He seized and kept all the accounting records, business records, business plans, and information regarding the charities - *i.e.*, all of the goodwill and all of Klewchuk's business. When Switzer seized the total business, he got **both** the assets and the liabilities (including any liabilities owed to himself). No counterclaim is granted.

e) Punitive Damages

[137] The Plaintiff seeks punitive damages for the wrongful seizure and conversion of his business. "Punitive damages may be awarded in conversion where the conversion is carried out in a high-handed and arrogant manner or where the court seeks to deter others from similar acts": (Klar et al., ***Remedies in Tort***, *supra,* at p. 4-32.2). In making my assessment with respect to punitive damages, I am mindful of the decisions of the Alberta Court of Appeal in ***Sylvan Lake Golf & Tennis Club Ltd.*** **v.** ***Performance Industries Ltd.*** (2000), 185 D.L.R. (4th) 269 (Alta. C.A.); leave to appeal granted, [2000] S.C.C.A. No. 260 (Q.L.) and ***Colborne Capital Corp.*** **v.** ***542775 Alberta Ltd.*** (1999), 69 Alta. L.R. (3d) 265 (C.A.); leave to appeal granted; notice of discontinuance of appeal filed May 17, 2000, [1999] S.C.C.A. No. 128 (Q.L.). As stated by the Court in ***Sylvan Lake***, *supra,* at 277:

> We agree with the trial judge that the misconduct of the defendants was so outrageous that punishment and deterrence was required. However, as was held by the Ontario Court of Appeal in ***Walker v. CFTO Ltd.*** and by this Court in ***Colborne Capital Corp. v. 542775 Alberta Ltd.***: punitive damages, over and above full compensation, should be awarded only if they achieve some rational purpose. In light of a full compensatory award, the court must determine whether any further need remains. If the compensatory damages themselves adequately satisfy the goals of punishment and deterrence, there is no valid reason for punitive damages. [citations omitted.]

[138] In this case I have found that Switzer carried out a secret plot to expropriate Klewchuk's business and to reap the profits for himself. Switzer attempted to deal with Gaming unilaterally

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and stated in his August 29th 1996 letter that Switzer's Investment Ltd. would operate the facility under its own name. However, Switzer learned from Gaming that SIL was not a licenced facility operator and that he still required Klewchuk. If Switzer wanted to run the facility on his own, he had to purchase Klewchuk's operation or expropriate it. He chose the latter.

[139] In these circumstances, punitive damages are appropriate. Regarding the amount of punitive damages, I am bound by the findings of the Alberta Court of Appeal in ***Colborne Capital Corp***., *supra.* In that case, the trial judge awarded $1,000,000 in punitive damages. On appeal, the Court stated at 336:

> 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 ***BMW of North America Inc.* v. *Gore*** and others. [citations omitted.]

[140] In ***Royal Bank* v. *Got***, *supra*, the trial judge awarded Got punitive damages in the amount of $100,000. He characterized this as a "substantial award" which was designed to underscore the Court's disapprobation of the failure to give reasonable notice on the debenture prior to seizing the debtor's assets, and the Court's refusal to condone its abuse for commercial advantage. This award was ultimately upheld, albeit with some reservations, by the Supreme Court of Canada.

[141] I award Klewchuk $100,000 in punitive damages. Switzer was motivated by greed: rather than purchasing Klewchuk's business, he chose to take it wrongfully through an illegal seizure and conversion. This is the type of reprehensible behaviour that warrants punitive damages. Switzer gained significantly from his wrongdoing. For example, Switzer has profited to such an extent by expropriating Klewchuk's casino business that Switzer is now willing to bulldoze the Elbow Casino and build a new casino. The amount that I awarded in general damages may not sufficiently deter Switzer's reprehensible conduct or similar reprehensible conduct of other people.

[142] The damages awarded to Klewchuk represent what Klewchuk would have been entitled to if there were no wrongdoing by Switzer. As a result, Switzer is in approximately the same position he would have been in if he had not taken such drastic action. Absent punitive damages, these actions were worth the gamble: Switzer could double his money or keep his half. Switzer took little or no risk. One need not be a professional gambler to know this is a hand clearly worth playing.

INTEREST AND COSTS

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[143] In addition to Switzer's egregious expropriation on October 25th 1996, in this action Switzer refused to make proper disclosure. The action grew more difficult and more expensive for Klewchuk. This should be reflected in the award of interest and costs.

[144] Klewchuk is entitled to pre-judgment interest on the general damages under the ***Judgment Interest Act***, S.A. 1984, c. J-0.5. Pursuant to s. 2(3), I have a discretion to vary the amount of interest provided for in the ***Act***. That section states:

> 2(3) If it considers it just to do so having regard to changes in market interest rates, the circumstances of the case or the conduct of the action, the court may
> (b) award interest under this Part at a rate higher or lower than the rate set out in this Part.

[145] The circumstances of this case warrant the award of pre-judgment interest at a higher rate than that set out in the ***Judgment Interest Regulations***, Alta. Reg. 364/84, (as amended). Switzer simply took what he wanted from Klewchuk. If he had acted in accordance with accepted commercial practice, he would have had to purchase Klewchuk's business. Had Switzer gone to a financial institution to borrow the money, he would have had to pay a higher interest rate than that set out in the ***Regulations***.

[146] There is no pre-judgment interest on exemplary or punitive damages. On the damages for conversion, I award pre-judgment interest computed from October 25th 1996 at the interest rate (from time to time) set out in the ***Regulations***, plus 4% per annum.

[147] Regarding costs, I do not know if either party has used Part 12 of the *Alberta Rules of Court*. Any portion of the costs to which Part 12 does not apply, I award such costs to Klewchuk based on column 5 of Schedule C, times 1.5.

[148] All of the awards in this judgment are payable by all of the Defendants (jointly and severally) to all of the Plaintiffs (jointly and severally). If a party wishes to propose a different payment procedure, that party must make an application to me within 30 days.

[149] If the pleadings require any amendments to reflect the award of general damages and the award of interest, I now make the necessary amendments.

[150] Some cases and authorities are referred to in this Judgment. Other relevant cases and authorities presented to me by both counsel are on Schedule "X" attached.

HEARD on the 14th day of September, 2000.

DATED at Calgary, Alberta this 19th day of April, 2001.

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J.C.Q.B.A.

This Is **Schedule "X"** to The Reasons For Judgment of The Honourable Mr. Justice J.S. Moore in Action No. 9601-17433, dated the 19th day of April, 2001.

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1. G.H. Fridman, *The Law of Contract* (4d)(Toronto: Carswell, 1999), p. 690-692.
2. *Peter Kiewit and Sons' Co.* v. *Eakins Construction Ltd.,* [1960] S.C.R. 361.
3. *Davis Contractors Ltd.* v. *Fareham Urban District Council,* [1956] A.C. 696 (H.L.).
4. *Petrogas Processing Ltd.* v. *Westcoast Transmission Co.* (1988), 59 Alta. L.R. (2d)118(Q.B.).
5. *Petrogas Processing Ltd.* v. *Westcoast Transmission Co.* [1989] 4 W.W.R. 272 (CA).
6. *Capital Quality Homes Ltd.* v. *Colwyn Construction Ltd.* (1975), 61 D.L.R. (3d) 385 (Ont. CA).
7. *111 Niakwa Road Ltd.* v. *Duraps Corp.* (1985), 37 Man. R. (2d) 250 (Q.B.).
8. *Mr. Convenience Ltd.* v. *040502 N.B. Ltd.* (1993), 137 N.B.R. (2d) 305 (CA).
9. *R.G.O. Office Products Ltd.* v. *Knoll North America Corp.* (1996), 37 Alta. L.R. (3d) 113 (Q.B.).
10. *Central Mortgage and Housing Corp.* v. *Omega Investments Ltd.* (1981), 34 N.B.R. (2d) 291 (CA).
11. *Ramrakha* v. *Zinner* (1994), 24 Alta.L.R. (3d) 240 (Alta.CA).
12. *Wonsch Construction Co.* v. *National Bank of Canada* (1990), 75 D.L.R. (4th) 732 (Ont. CA).
13. *Luscar Ltd.* v. *Pembina Resources Ltd.*, [1995] 2W.W.R. 153 (Alta. CA).
14. *Poulos* v. *Caravelle Homes Ltd.* (1995), 32 Alta. L.R. (3d) 76 (Q.B.).
15. *Poulos* v. *Caravelle Homes Ltd.* (1997), 49 Alta. L.R. (3d) 385 (CA).
16. *Partnership Act,* R.S.A. 1980, c.P-2.
17. Ellis, *Fiduciary Duties in Canada* (June 1999 Rel.) at 12(1-3).
18. *Cameron* v. *Willis* (1908), 9 W.L.R. 224.
19. *Civil Enforcement Act,* R.S.A. 1986, c.10-5, s 1(1), 9(1), 9(3), 104 and 45(5).
20. Bennett, "Creditors' and Debtors' Rights, 1987-1988" in *The Law Society of Upper Canada Bar Admission Course Materials* (Calgary:Carswell, 1988) c.5, p59-61.
21. *Clarkson Co. Ltd.* v. *Consortium Group Ltd.* (1983), 40 O.R. (2d) 771 (H.C.).
22. *Fawell* v. *Andrew*, [1917] 2 W.W.R. 400 (Sask.CA).
23. *Hoyes* v. *Creery*, [1918] 1 W.W.R. 873 (B.C.C.A).
24. Williams and Rhodes, *Canadian Law of Landlord and Tenant* (6th) (Calgary: Carswell 1988 Volume 1) p8-85, 8-91, 8-92.
25. *Financial Collection Agencies Ltd.* v. *Elgarably*, (1996) 38 Alta.L.R. (3d) 276.
26. *Canadian Imperial Bank of Commerce* v. *Delta Masonry & Concrete Ltd. and Pfaff,* (1985) 41 Alta L.R. (2d) 48.
27. *Personal Property Security Act,* S.A. 1988 c. P-4.05, s58.

28. *Creditor-Debtor Law in Canada,* Dunlop, C.R.B., (Carswell, 1995) (2d) p.286-288.
29. *Stewart* v. *Industrial Acceptance Corporation Limited* [1949], 1 W.W.R. 1154 (B.C.S.C.).
30. *McGregor on Damages*, 14th ed. (London: Sweet & Maxwell Ltd., 1980) c.11, p.226-242.
31. *Phillips* v. *707739 Alberta Ltd.* [2000], 6 W.W.R. 280.
32. *Broom's Legal Maxims,* 10th ed. (London: Sweet & Maxwell Ltd., 1939) p.637-640.
33. W.A. Stevenson and J.E. Cote, *Civil Procedure Guide* (Edmonton: Juriliber Ltd. 1996) p.1152.
34. *Halsbury's Laws of England*, Evidence: Special Modes of Proof (Vol 17) 4th ed. para 119, 120 and 121 .
35. *The Digest: Annotated British, Commonwealth and European Cases,* Evidence (Vol.22(1))(London:Butterworth & Co. Ltd., 1988) p. 267-269.
36. *Gilham* v. *Ulm* [1923], 3 W.W.R. 853.
37. *Saint John River Steamship Co.* v. *Star Line Steamship Co.* (1911) 40 NBR 405 (CA).
38. *Spasic Estate* v. *Imperial Tobacco Ltd.* [2000], O.J. No. 2690 (QL)(CA).
39. *Donison* v. *Donison and Uncle Bill Foundation Inc.* (1984), 35 Sask.R. 183 (CA).
40. *Wewayakum Indian Band* v. *Canada and Wawayakai Indian Bank* (1995), 99 FTR 1.
41. *Bank of Nova Scotia* v. *Lockhart,* [1986] AJ No. 1363 (QL).
42. *Heriteau* v. *W.D. Morris Realty Ltd. (Capital Storage Co.),*[1943] OR 724 (Ont. HC).
43. *Woodfall Landlord & Tenant* (London: Sweet & Maxwell, Release 29), para. 9.135 to 9.142, and 9.169.
44. *A Practical Treatise on the Law of Distress for Rent and of Things Damage-feasant* (London: Butterworth & Co., 1899) p. 180, 181, 219 and 220.
45. Volume 18, *The Digest: Annotated British Commonwealth and European Cases,* 2nd Reissue (London: Butterworth & Co. 1989) p.481 and 482.
46. Dunlop, *Creditor-Debtor Law in Canada* (Toronto: Carswell, 1981), p. 24-26. *Cross* v. *Albertson* (1923), 25 OWN 421 (HC); *aff'd* (1924), 26 OWN 3 (CA).
47. Cumming and Wood, *Alberta Personal Property Security Act Handbook,* 4th ed. (Toronto: Carswell, 1998) p. 169 and 173.
48. *Grenn* v. *Brampton Poultry Co. Ltd.* (1958) 13 D.L.R. (2d) 279 (Ont. H.C.).
49. *Whiten* v. *Pilot Insurance Co.* (1999) 42 O.R. (3d) 641 (CA).
50. *Capital Quality Homes Ltd.* v. *Colwyn Construction Ltd.* (1975) 61 D.L.R. (3d) 385 (Ont. CA).
51. *Chitty On Contracts,* (28th ed) (1999) v.1, p. 1205.
52. *Buckley* v. *Russell* (1884) Trinity Term, XLVII Victoria 205.
53. *Pegg et ux* v. *Supreme Court of the Independent Order of Foresters* (1901) O.L.R. 97.
54. *C.W. Financial Corp.* v. *Westworld Computers Ltd.* (1986) A.J. No. 1648 (Q.B.).
55. *Waisman* v. *Crown Trust Co.* (1970) 9 D.L.R. (3d) 733 (S.C.C.).

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56. *Civil Enforcement Act,* R.S.A. 1986 c.10.5, s104, 14, 1(1)(g) and 2(a).
57. *Purschke* v. *CRD Industries Inc.* [1993] A.J. No. 151 (Q.B.).
58. *Khoury Real Estate Services Ltd.* v. *Maritimes & Northeast Pipeline Management Ltd.* (1999) 218 N.B.R. (2d) 58.
59. *Richmond Spadina Investments Inc.* v. *Incorporated Sixth Video* (1996) 6 R.P.R. (3d) 236.
60. *Personal Property Security Act,* R.S.A. c.P-4.05, s.58(7).

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This Is **Schedule "Y"** to The Reasons For Judgment of The Honourable Mr. Justice J.S. Moore in Action No. 9601-17433, dated the 19th day of April, 2001.

Calgary Casino Results[1]

Fiscal Year[2]	# of licences	Drop	Win	Hold[3]	Average	50% to Operator	Slot Revenue to Operator[4]	Total Revenue to Operator
96/97	558	138,655,000	115,664,000	22,991,000	41,202.51	20,601.25	1,919	22,520.25
97/98	817	226,399,000	188,215,000	38,184,000	46,736.84	23,368.42	7,371	30,739.42
98/99	902	262,834,000	220,784,000	42,050,000	46,618.63	23,309.31	15,165	38,474.31

[1] Prepared from "Charitable Gaming in Alberta, 1998-99 in Review", Alberta Gaming

[2] April 1 to March 31

[3] Drop minus Win

[4] 1.5 times Slot Revenues to Charities

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